1   IN THE UNITED STATES DISTRICT COURT

2   FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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6   SCO GROUP, INC.,   )
)
7   Plaintiff/Counterclaim-Defendant,)
)
8   -vs-   )   2:03-CV-294 DAK
)
9   INTERNATIONAL BUSINESS MACHINES,   )
    CORPORATION,   )
10   )
        Defendant/Counterclaim-Plaintiff.)
11   )

12

13

14

15   BEFORE THE HONORABLE BROOKE C. WELLS

16   DATE: APRIL 14, 2006

17   REPORTER'S TRANSCRIPT OF PROCEEDINGS

18   ARGUMENT ON MOTION

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25   Reporter: REBECCA JANKE, CSR, RMR

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1 APRIL 14, 2006   SALT LAKE CITY, UTAH

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

 3   * * *

 4   THE COURT: Good morning, ladies and gentlemen.

 5   MR. HATCH: Good morning, Your Honor.

 6   MR. SINGER: Good morning, Your Honor.

 7   THE COURT: We are here in SCO vs. IBM And I

 8 have reviewed your submissions. We're here on IBM's

 9 motion.

10   And, counsel, I see some new faces, so perhaps I

11 could ask counsel to make their appearances.

12   MR. SINGER: Good morning, Your Honor. Stewart

13 Singer from Boies, Schiller & Flexner on behalf of SCO

14 Group. With me Brent Hatch and Dan Filor.

15   MR. MARRIOTT: Good morning, Your Honor. David

16 Marriott for IBM. With me, Mike Burke and my associate Amy

17 Sorenson.

18   THE COURT: Okay. Mr. Shaughnessy is not going

19 to be here?

20   MR. MARRIOTT: Mr. Shaughnessy couldn't be talked

21 out of going to Costa Rica, Your Honor.

22   THE COURT: Well, Mr. Marriott, do you want to

23 proceed?

24   MR. MARRIOTT: I do, Your Honor. Thank you.

25 There is at least, I think, one preliminary question, Your

                                                        3

1 Honor, which is whether the Court will be considering or

2 not considering the proposed declaration of plaintiffs,

3 what I consider a surrebuttal declaration. And the Court's

4 direction on that perhaps might be helpful at the outset.

5   THE COURT: Well, there obviously is some concern

6 about it because it was not raised until this point in

7 time. I understand that SCO may have a response and be

8 arguing that IBM should have included its experts at,

9 maybe, in its original motion. I'd like to hear it. I

10 would like to hear some argument on that.

11   MR. MARRIOTT: Would you like to hear argument

12 with respect to whether it should be permitted, Your Honor,

13 or on the merits?

14   THE COURT: Of the motion?

15   MR. MARRIOTT: Yes.

16   THE COURT: I think that we need to hear it --

17   MR. MARRIOTT: Well, let me start with --

18   THE COURT: -- on both.

19   MR. MARRIOTT: The motion is actually SCO's

20 motion, then, Your Honor, so I think I should yield the

21 podium to SCO with respect to the motion to receive the

22 declaration of their proposed expert.

23   THE COURT: All right. If you want to start

24 there, that's fine.

25   MR. SINGER: Good morning, Your Honor.

1   THE COURT: Good morning.

2   MR. SINGER: I will be very brief. IBM elected

3 not to file an expert declaration with their initial

4 motion. It could have done so, which then would have

5 obligated us to file a response in our responsive phase.

6 Instead they elected to wait until their reply brief, and

7 the only opportunity, then, to respond to what that expert

8 says is in doing exactly what we did, very quickly filing a

9 motion for leave to file a rebuttal declaration, which we

10 have submitted, at the same time, which clearly, in

11 fairness, should be considered. IBM argues that we should

12 IBM argues that we should have anticipated that they would

13 file an expert declaration.

14   On what basis can they say that we should

15 anticipate that they would file that in reply, when they

16 did not file it in their initial papers?

17   THE COURT: Let me ask this question, though:

18 Were they required to initially?

19   MR. SINGER: I wouldn't think they were required

20 to anymore than we would have been required to. I think we

21 can make this argument with or without the aid of

22 supporting declarations. They apparently decided that they

23 needed to do so in their reply papers, and, at that time,

24 they filed Professor Davis' declaration. My argument is

25 simply that if expert testimony is to be considered, it's

only fair that both sides have an opportunity to present

that testimony. And here they are the moving party. They

had the obligation, as part of being the moving party, to

put forth what they thought was needed in their case.

In fact, a number of Federal Courts, as noted in

our reply papers, have criticized parties that wait until a

reply motion to add an expert's testimony and if that was

the intent, then, to deprive the other side of a chance of

putting on its own expert testimony.

Mr. Rockein's testimony directly relates to what

Mr. Davis said in his declaration, and we submit it is

perfectly proper.

THE COURT: Mr. Marriott?

MR. MARRIOTT: Thank you, Your Honor. We

received the Rockein declaration, Your Honor, less than 24

hours ago, despite what the certificate of service

suggests, and I have no reason why that's the case, except

that that's when we received it. We objected to the

submission of the declaration without even having read the

document because, as I say, we hadn't received it until

less than 24 hours ago.

The only reason that IBM submitted a declaration

from Professor Davis in connection with IBM's reply papers

is that SCO said something in its opposition papers which

we think simply isn't true. In IBM's opening papers, Your

1 Honor, we said that SCO had failed to identify versions,

2 files and lines with respect to certain operating systems.

3 In their opposition papers SCO shot back and sort of, in

4 broad, general language, said they fully complied,

5 suggesting that IBM's assertions in its opening papers were

6 wrong.

7   Professor Davis does nothing in his declaration

8 except set out a chart, Your Honor, which shows you, based

9 upon review of the documents, where versions, files and

10 lines are identified or not identified. The declaration

11 that's proposed from Mr. Rockein is a declaration that

12 doesn't even meet directly the assertions of Professor

13 Davis. They pass in the night. Mr. Rockein is addressing

14 a different set of questions.

15   On the highest level, he says, of course, SCO has

16 provided specificity with respect to the final disclosures,

17 but with respect to the specific questions that Professor

18 Davis answered, which were responses to what was said in

19 the opposition brief of the SCO Group, those two

20 declarations simply don't meet. And I would submit that

21 the declaration is little more than an effort to get the

22 last word in an untimely way, and it not ought not to be

23 allowed.

24   If SCO thought that it needed a declaration to

25 refute the assertions made in our opening brief, for which

1 I think no declaration is required, Mr. Davis -- Dr. Davis

2 says little other, Judge, than: "There is not a version

3 there. There is not a file there. There is not a line

4 there."

5   Your Honor, if Your Honor wished to take the time

6 to plow through the SCO final disclosures, could reach the

7 very same conclusion. So, the idea that they weren't on

8 notice at the time of their opposition as to IBM's

9 assertion, and if they wanted to submit a declaration of

10 support thereof at that time, they full well could have

11 done that. To give us 24 hours' notice to respond to a

12 declaration that is, itself, improper in any case, is, I

13 think, simply not necessary.

14   Mr. Singer suggests, Judge, that the cases he

15 cites in his papers somehow stand for the proposition that

16 what IBM has done here is incorrect, and I respectfully

17 don't think that's right. I think what those cases say is

18 that it is not proper to raise a new issue in a reply

19 brief. IBM's reply brief doesn't raise any new issues. It

20 simply responds to the issue raised by SCO in its

21 opposition papers, that they in fact provided the requisite

22 specifications.

23   THE COURT: Then how does it hurt you,

24 Mr. Marriott, the existence of it, the acceptance of it, if

25 you say that it really doesn't address your expert's

8

1 declaration anyway?

2 MR. MARRIOTT: That's an excellent question, Your

3 Honor. I don't think it hurts us in any way. I would ask

4 only that, if Your Honor is to allow the submission of

5 Mr. Rockein's report, that we be given an opportunity to

6 respond to it by way of a declaration from Professor Davis.

7 Other than that, it doesn't hurt us in the slightest way,

8 Judge.

9 It is, however, an attempt to change the issues

10 and to raise new issues, really a justification of a

11 failure to comply in a surrebuttal declaration that I think

12 is inappropriate. So, as long as we have an opportunity to

13 respond, Your Honor, I don't think it hurts us in any way.

14 THE COURT: All right.

15 Mr. Silver, let me ask you this question: Why --

16 well, I guess the question goes to Mr. Marriott first.

17 Mr. Marriott, why did you not submit an expert

18 report in your initial submission?

19 MR. MARRIOTT: Sure, Your Honor. The answer is

20 very simple. The SCO -- the premise of this motion is that

21 SCO has failed to provide the specificity required by Your

22 Honor's orders, which were very particular as to what was

23 to be provided. We asserted, because I think it's just

24 simply true, in our opening papers that the specificity

25 wasn't there, and references made to the documents

1 themselves, which, as I say, of course the Court can look

2 at and divine for itself whether or not there is a version,

3 file and line of code there.

4   We didn't submit an expert report in the opening

5 papers because it wasn't required. It was only when we had

6 a denial of what we had asserted that we didn't want the

7 Court left with a situation of: Gee, he says this and she

8 says that. What are we supposed to make of this?

9   It was only for that reason, Your Honor, that we

10 submitted it. It was purely as a response to what was said

11 in the opposition papers of SCO.

12   THE COURT: And, Mr. Silver, the next question,

13 and to you, is: Why did you not respond with this in your

14 reply?

15   MR. SINGER: First of all, Your Honor, I'm Stuart

16 Singer. We have a lawyer on our case, Bob Silver.

17   THE COURT: I'm sorry. Excuse me. I do get

18 those confused. I'm sorry.

19   MR. SINGER: Your Honor, the issue which is

20 framed in the initial papers is, is our description of

21 technology, the misuse of the material, made with

22 specificity? If they were going use expert testimony on

23 that, we would have responded in our opposition paper.

24 They did not. Our response to that was that we have

25 provided specificity, as I'm sure the Court will hear about

1 when we turn to the merits of that motion.

2   For them -- for IBM to say they didn't expect an

3 issue on whether or not we complied with the order, I mean,

4 I don't know what they would have anticipated. That we

5 would not dispute their motion? Clearly we dispute their

6 motion. The issue is not whether or not we cite line,

7 version, file for the methods and concepts, and nor is

8 Professor Davis' declaration limited to observing that

9 fact.

10   The question is whether or not the parties have

11 complied with the order of providing specificity, and

12 Mr. Rockein's declaration goes directly to that. It

13 contradicts Mr. Davis -- or Professor Davis. Professor

14 Davis says it's not specific enough for us, and Mr. Rockein

15 explains that, for methods and concepts, this is plenty

16 specific and quotes examples, deals with the example they

17 raised. So, it was only when we saw the Davis declaration,

18 that they were going to rely on expert testimony at the

19 reply stage, that, at that time, we apprehended the need to

20 file a responsive declaration.

21   THE COURT: Upon what rule or case did you rely

22 that allows you to raise this in a surrebuttal fashion?

23   MR. SINGER: Well, we don't believe it's a

24 surrebuttal. We haven't made an argument. We think that

25 the Court had -- if a reply declaration is being raised,

1 then that is something you do in reply and that the Court

2 has discretion, just like in accepting any papers, to grant

3 leave to accept the declaration from our side in response

4 to that. It would be fundamentally unfair, we would

5 submit, for the Court to consider only one side's expert

6 testimony and not consider the other's when the first side

7 raises it in reply.

8   It would be one thing if they had raised it in

9 their initial brief and we didn't say anything, and then,

10 later, after all the briefing was done, we said: "Judge,

11 we want you to consider this."

12   But that's not what's happened here.

13   THE COURT: Thank you, Mr. Singer.

14   Anything in response, Mr. Marriott?

15   MR. MARRIOTT: Well, Your Honor, they don't cite

16 any cases or any rules in support of the application, and I

17 think it is certainly not one contemplated by the rules.

18 What I would say, again, Your Honor, is that I'm not

19 concerned in the least about the content of the

20 declaration. However, we are the movant, and I think, in

21 fairness, if it's to be considered, we ought to have an

22 opportunity to respond, which we can do promptly after the

23 hearing.

24   If it's not to be considered, then I don't think

25 you need to consider much of what Professor Davis has to

1 say either, Your Honor. I think either -- they aren't

2 required, either of them, because they said what they said,

3 and the orders say what they say at the end of the day. If

4 you're going to consider it, we just ask that you be --

5 that Professor Davis be given an opportunity to briefly

6 respond.

7   THE COURT: All right. What I am going to allow

8 to be submitted -- and, Mr. Marriott, I will allow you to

9 submit a supplemental or a responsive declaration on behalf

10 of Dr. Davis. How long will it take to do that?

11   MR. MARRIOTT: I'll need to check with him, Your

12 Honor. Is ten days agreeable to the Court?

13   THE COURT: Ten days would be fine. Now, what

14 effect does that have on the remainder of today's motion?

15   MR. MARRIOTT: In my mind, it has none, Your

16 Honor, because, as I say, I don't think the declaration,

17 taken as true, has any bearing on this motion.

18   THE COURT: All right.

19   MR. MARRIOTT: And I'll explain why.

20   THE COURT: And, Mr. Singer, I'm going to allow

21 them to respond to that, but that's where it's going to be

22 cut off.

23   MR. SINGER: I understand the Court's ruling,

24 Your Honor. And the only thing I would ask is -- we

25 haven't seen what's going to be said, and if there's new

1   issues raised, we would hope the Court would entertain, at

2   that time --

3   THE COURT: Well, I'm assuming that they will

4   limit it, in proper surrebuttal fashion, to those issues

5   raised or addressed in your submission. I don't anticipate

6   that that will be an issue, and so, therefore, I'm going to

7   leave it as stated. They will respond, and that will be

8   it.

9   MR. SINGER: We understand, Your Honor. Thank

10 you.

11   MR. MARRIOTT: Thank you.

12   THE COURT: All right. Now let's address IBM's

13 motion at this time.

14   MR. MARRIOTT: Your Honor, at issue on this

15 motion is whether SCO complied with the Court's -- with the

16 Court's orders and IBM's requests specifically to identify

17 the allegedly misused material. And while we don't believe

18 that SCO has provided what it was required to provide with

19 respect to any of the 294 items at issue, it's disclosures

20 are, respectfully, especially egregious with respect to 198

21 of them. And those are the items of the disclosures that

22 are at issue on this motion and the ones I would like to

23 address today, the ones as to which we do not believe, in

24 fairness, that SCO should and can be allowed to proceed.

25   With Your Honor's permission, I would like to

1 make, if I may, four points in support of IBM's motion.

2 The first, Your Honor, is that the Court repeatedly ordered

3 SCO to provide specificity with respect to SCO's final

4 disclosures; version, file and line information.

5   Point 2. Your Honor, SCO's disclosures lack the

6 required specificity. Point 3. The shortcomings in these

7 198 disclosures make it impossible, as a practical matter,

8 for IBM fully and fairly to defend itself. And then,

9 fourth, Your Honor, and finally, the only appropriate

10 remedy, I respectfully submit, is for SCO not to be allowed

11 to proceed with respect to these 198 items. It ought not

12 to be allowed to adduce evidence in support of them.

13   Now, for Your Honor's convenience and with your

14 permission, I would like to hand up, if I may, a book which

15 will have some documents and exhibits which I hope will

16 help with my presentation.

17   THE COURT: You may.

18   MR. MARRIOTT: The chronology of events, Judge,

19 relating to this motion is long. Since it is set out in

20 IBM's papers and including Addendum A to IBM's reply

21 papers, which is in this book at tab 1, I don't intend to

22 repeat it here except I would like to say this just briefly

23 by way of background. And I would refer you, please, Your

24 Honor, to tab 2 of the book. SCO contends, as I think you

25 know, Your Honor, that IBM dumped UNIX, System V, AIX and

1   Dynix source code into Linux.

2   That's the material that IBM is alleged to have,

3   in one fashion or another, misused. And those are

4   represented at tab 2 of our book. Those are the materials,

5   Your Honor, as to which IBM has been requesting version,

6   file and line information for just about three years. And,

7   as you can see in the chart, Your Honor, we've been

8   requesting that information because each of these products

9   consists of a number of different versions, a number of

10 different -- many, many files and many more lines of code.

11   So, for example, UNIX System V consists of at

12 least 11 versions which SCO is believed to have produced.

13 Those versions are comprised of 112 thousand files, at

14 least, and 23-plus million lines of code. The same is true

15 with respect to AIX. IBM has produced at least nine

16 versions. They represent more than a million files of code

17 and 1.2 billion lines of code. Dynix, Your Honor, consists

18 of at least 37 versions of a base operating system, more

19 than 470 thousand files and more than 156 million lines of

20 code. Linux, in one form or another, has 500-and-some

21 versions. It consists of 3-plus million files, and lines

22 in excess of 1 billion.

23   We're talking about a lot of code, Your Honor.

24 More than 2 billion lines of code is implicated by SCO's

25 claims in this case. IBM has repeatedly asked that SCO

1 provide version, file and line information with respect to

2 the materials that IBM is alleged to have misused, these

3 operating systems: System V, AIX, Dynix and Linux. A

4 selection, Your Honor, of IBM's requests appears at tab 3

5 of the binder, going back to the second month the case

6 started, April, 2003, when IBM began asking SCO to tell us,

7 with specificity, what it is this case was about. And,

8 Your Honor, if you wish, of course, to look for yourself,

9 the backup is provided.

10   That brings me, Your Honor, to the first of my

11 points, which is that Your Honor has repeatedly ordered SCO

12 to disclose the allegedly misused material with

13 specificity. In response to IBM's discovery requests, Your

14 Honor has entered no less than two orders, and Judge

15 Kimball a third, that matter to today's motion. And, by

16 those orders, Your Honor and Judge Kimball clearly and, I

17 would submit, consistently required SCO to identify what I

18 call the coordinates of the allegedly misused material, the

19 versions, the files and the lines.

20   The Court's orders, Your Honor, generally speak

21 in terms of files and lines, as opposed to versions, but

22 it's impossible to talk about lines and files with also not

23 having a sense of versions. It would be like referring to

24 a line of a book without mentioning what the book is that's

25 being referred to. Never, Your Honor, in the course of

1 this case, has SCO made a request for relief from any of

2 the orders that I'd like to review with Your Honor. Never

3 has it sought clarification.

4 And that is, I would submit, because those orders

5 are crystal clear. It made arguments in opposition to the

6 orders, what they required, and it did not prevail in those

7 arguments. And Your Honor entered the orders that you

8 entered. And I would like to refer you, if I may, now, to

9 tab 4 of the book. Here, Your Honor, we've set out the

10 relevant text of the three orders that mattered, and you

11 will see that indicated along the left column: The

12 12/12/03 order, the 3/3/04 order, and the 7/1/05 order of

13 Judge Kimball. Along the top we've indicated the four

14 operating systems that are at issue.

15 I'd like to direct you, if I may, Your Honor, to

16 the 12/12/03 order. Not long after this case was filed,

17 following IBM's requests for particularity, Your Honor

18 entered an order in the case requiring SCO, quote, "to

19 identify and state with specificity with the source codes

20 that SCO is claiming formed the basis of their action

21 against IBM."

22 Those source codes, Judge, are System V, AIX,

23 Dynix and Linux. And they were ordered to disclose, with

24 specificity, that which they contend was misused. In the

25 same order Your Honor said, quote, "To respond --" "SCO is

1 required to," quote, "respond fully and in detail to

2 interrogatory numbers 1 through 9 as stated in IBM's first

3 set of interrogatories."

4   What do IBM's first set of interrogatories say?

5 I've included just three of them here, Your Honor, for

6 purposes of illustration. Interrogatory number 1 said, and

7 I quote, with appropriate ellipses in the text here:

8 "Please identify, with specificity, by product, file and

9 line of code, where appropriate, all of the alleged trade

10 secrets and confidential or proprietary information that

11 plaintiff alleges or contends IBM misappropriated or

12 misused."

13   They were ordered, Your Honor, to respond as

14 stated in IBM's request. Interrogatory 3: "Please

15 describe in detail all places or locations,"

16 parenthetically, "including the operating systems, where

17 the alleged trade secret or confidential or proprietary

18 information may be found or accessed."

19   Interrogatory 4: "Please describe in detail,

20 with respect to any code or method plaintiff alleges or

21 contends that IBM misappropriated or misused, the location

22 of each portion of such code or method in any product, such

23 as AIX, in Linux in Open Source or in the public domain."

24   The only way, Your Honor, to tell us where in the

25 products the material lies we are alleged to have misused,

1 whether it be code or concepts, is to tell us the file and

2 the lines of code. Your Honor went on in the same order to

3 say SCO was required, quote, "to fully respond in detail to

4 interrogatory numbers 12 and 13 --" again -- "as stated in

5 IBM's second set of interrogatories."

6   Interrogatory 12 says. "Please identify with

7 specificity, by file and line of code, all source code and

8 other materials in Linux to which plaintiff has rights and

9 how the code or other material derives from UNIX."

10   And then, in interrogatory 13: "Please describe

11 in detail how IBM is alleged to have infringed plaintiff's

12 rights."

13   It could not be more clear. Four and five times

14 the same thing, Your Honor, has been requested and four and

15 five times ordered. Following that order, SCO, Your Honor,

16 nevertheless it did not provide the requested information.

17 And we set that out in the motions that were made that

18 preceded the next order that the Court entered. And Your

19 Honor entered an order on 3/3/04 wherein you ordered SCO to

20 do as you ordered it to do previously.

21   And if you look at the blue text, Your Honor, in

22 the middle, you say in paragraph 2 of the order: "As

23 previously ordered, SCO is required to --" and then you go

24 on to explain what SCO is required to do. We had pointed

25 out, Your Honor, that SCO had not provided version, file

1 and line information with respect to each of the operating

2 systems. Again, the allegation is we took code from AIX

3 and Dynix and we dumped it into Linux. And that's a

4 problem, they contend, because AIX and the Dynix code is a

5 derivative or modification of System V.

6   So we said, "All right. Where are the versions

7 and files and lines here? Where are they here? And where

8 they here? We didn't get it. We came back to Your Honor,

9 and your Honor entered the following order. We start in

10 the middle with respect to the AIX and Dynix, which really,

11 I think, is the crux of their case: "As previously

12 ordered, SCO is to provide and identify all specific lines

13 of code that IBM is alleged to have contributed to Linux

14 from either AIX or Dynix."

15   As to System V, Your Honor, it says: "SCO is to

16 provide and identify all specific lines of code from UNIX

17 System V from which IBM's contributions, whether they be

18 code or methods or anything else from AIX or Dynix are

19 alleged to be derived."

20   And, finally, paragraph 4 on the far right: "SCO

21 is to provide and identify, with specificity, all lines of

22 code in Linux that it claims rights to."

23   Again, Your Honor, it could not be more clear

24 they were required to provide version, file and line with

25 respect to that which we are said to have misused. Judge

1 Kimball, in his order of 7/1/05, simply reiterates that SCO

2 is required to specify by certain deadlines, once and for

3 all, the allegedly misused material.

4   I would submit, Your Honor, that the orders of

5 this Court could not be more clear as to what SCO was

6 required to do. And that brings me, if I may, Your Honor,

7 to my second point, which is that the final disclosures

8 lack the requisite specificity. The indisputable fact,

9 Your Honor -- and I submit it is indisputable -- is that

10 SCO has not provided version, file and line information

11 with respect to 189 -- 198 items at issue here as to each

12 of these operating systems.

13   It is not there. Mr. Rockein doesn't tell you

14 it's there. SCO's papers don't tell you it's there. It

15 absolutely is not there. That's what they were required to

16 do. They didn't do it. And, as a result, Your Honor, they

17 have not complied with this Court's orders. It's as simple

18 as that.

19   By way, Your Honor, of -- and let me refer you,

20 if I may, to tab 5. Tab 5 is Exhibit -- or Addendum B,

21 rather, to IBM's reply papers and an addendum to Dr. Davis'

22 report. What we have done here, Your Honor, is, along the

23 left column, indicate the items that are challenged on this

24 motion. There are 198 of them. We have then taken each of

25 the operating systems and displayed them, System V, AIX,

1 Dynix and Linux. And we have a "V," "F" or "L." "V" for

2 version. "F" for file, and "L" for line. And we have put,

3 Your Honor, an "X" in that box where SCO has provided, with

4 respect to that disclosure, a version of System V, a file

5 of System V or a line of System V.

6   As this chart demonstrates, Your Honor, with

7 respect to System V, SCO identifies a single version of

8 System V with respect to the entirety of these 198 items.

9 One of the items has a version of System V. With respect

10 to files of System V, one, Your Honor. One of the items

11 identifies a file of System V. Not a single one of the 198

12 items identifies lines of code of System V with respect to

13 it, not one of them.

14   The same, Your Honor, is essentially true with

15 respect to AIX and Dynix. A single one of these items

16 references a version of AIX. None of them references a

17 version of AIX. None of them references lines of AIX.

18 With respect to Dynix, roughly two of them, by my count,

19 identify versions of Dynix. Roughly three of them identify

20 files of Dynix. Not a single one of them, Your Honor,

21 identifies lines of Dynix.

22   Compare that, Judge, to your orders, your orders,

23 plural, which could not have been more clear about what was

24 required with respect to each of these operating systems

25 and the allegedly misused material.

1   Finally, Your Honor with respect to Linux. There

2   are more versions of Linux identified here. Roughly 27 of

3   the items offer a version. There are many more files

4   identified in this category from Linux. However, only

5   three of the items, Your Honor, offer lines of Linux code

6   as described in this chart. So, Judge, respectfully, each

7   one of these three categories: System V, AIX or Dynix and

8   Linux required all three coordinates for IBM to be able, as

9   we thought was required, as your orders made clear, to

10 assess SCO's claims. As to these 198 items, as opposed to

11 the ones we haven't moved on, that information simply isn't

12 here as it was required to be.

13   And for that reason, Your Honor, we submit that

14 SCO has not complied, plainly, with the Court's orders.

15 Now, in its opposition papers, Your Honor, to be sure, SCO

16 says in broad strokes that it has complied, that it has

17 provided specificity. What it doesn't say is that it has

18 provided this information. What it does is redefine

19 specificity in a way to its liking. It lists the things

20 that it's provided, and it says that lots of stuff has been

21 provided here, and we have certainly met our obligations.

22 We have gone above and beyond.

23   Respectfully, Your Honor, the prerogative wasn't

24 SCO's to redefine what it meant to provide the specificity

25 that the Court's orders required. They submitted a

1 declaration from Mr. Rockein who, apparently, according to

2 the declaration, played what he described is the largest

3 role in compiling SCO's final disclosures. As I said at

4 the outset, we have had this for less -- now probably

5 slightly more than 24, but we have had this for about 24

6 hours, Your Honor, and we will respond in due course,

7 within the scope given by way of a declaration from

8 Professor Davis we opposed in principle, when we hadn't

9 seen it.

10   Having read this declaration, Your Honor, as I

11 said at the outset, it is absolutely no impediment to the

12 entry of the motion we seek here, a disposition that the

13 specificity required wasn't provided and SCO therefore

14 shouldn't be allowed to proceed with respect to these

15 claims. Mr. Rockein says in his declaration that he

16 strongly disagrees with Professor Davis, that in fact a lot

17 of specificity has been provided. And he reaches

18 conclusions to that effect.

19   The only reason, Your Honor, when you look

20 carefully at Mr. -- when you look carefully at

21 Mr. Rockein's declaration, the only reason that he reaches

22 a different conclusion from Professor Davis is because he

23 answered different questions. Mr. Rockein's declaration

24 does not say, "Oh, in fact IBM has missed it. Here are all

25 the versions. Here are all the files. Here are all the

1 lines of System V." He doesn't say, "Here are all the

2 versions. Here are all the files and here are the lines

3 for UNIX or for AIX or for Dynix."

4   What Mr. Rockein basically says, Judge, is that a

5 lot of work has gone into this and a lot of information has

6 been provided. We have summarized, he says, the alleged

7 disclosure. We've pointed IBM to a bunch of documents,

8 which they call disclosures -- e-mails, essentially. We

9 have given a list of the names of people we say were

10 involved in this, and we have pointed IBM to some source

11 code.

12   Well, Your Honor, Professor Davis doesn't say,

13 and IBM hasn't argued, that SCO didn't provide some

14 e-mails, point to some source code, list some people and

15 generally describe what it is they contend is at issue.

16 That isn't, however, the issue, Your Honor. The issue is

17 whether they have met the standard of specificity that was

18 set out in this Court's orders, that was requested for

19 almost three years now in IBM's discovery requests. That

20 information hasn't been provided, and it's in that respect,

21 respectfully, that Mr. Rockein's declaration supports the

22 relief that IBM seeks here, by silence.

23   It does not dispute because it can't dispute that

24 the information that we have requested was not provided.

25 And for that reason, Your Honor, I respectfully submit that

1 SCO simply hasn't complied. And lest Your Honor think that

2 we're seeking here to apply some different standard to SCO

3 than has ever been applied to IBM, I remind you that early

4 in the case IBM moved for summary judgment on one of its

5 counterclaims for copyright infringement. In support of

6 that motion, with no order from the Court, we submitted

7 line-for-line comparisons of 783 thousand lines of code,

8 showing exactly what they copied and exactly where they

9 copied it from.

10   We've been asking from the beginning for nothing

11 other, Your Honor, from them, than we gave them voluntarily

12 without any order of the Court. That's what we don't have,

13 and it's for that reason that SCO, respectfully, has not

14 complied with the Court's request.

15   That brings me, if I may, Your Honor, to the

16 third point, which is, Your Honor, that the shortcomings

17 here in SCO disclosures make it, as a practical matter,

18 impossible for IBM properly to defend itself. This is not

19 a question of a technical, harmless foul. This is a

20 fundamental difficulty in our ability to properly defend

21 ourselves and, without that information, it is not

22 possible, as a practical matter, fairly to be able to do

23 that.

24   The problem, Your Honor, is that we have, as

25 Professor Davis describes, essentially been pointed to an

1 enormous haystack of code, to some billion lines of code,

2 and told to go find 198 needles which, I respectfully

3 submit, as Professor Davis has said in his declaration,

4 are, in their appearance, because of the description that

5 has been given, without versions, files and line

6 information, literally, in their appearance, different from

7 all of the other hay. We've got an enormous haystack in

8 which we haven't been shown, with any particularity, what

9 it is we are supposed to have done.

10   I want to illustrate for Your Honor the prejudice

11 that flows out of the approach SCO has taken here, and for

12 that purpose it's useful to revisit their allegations.

13 Remember the allegation. We took AIX and Dynix code. We

14 dumped it into Linux. We took System V code, and we

15 improperly put it there, infringing the System V code by

16 using it.

17   SCO has basically two claims, Your Honor, that

18 represent the thrust of their case, breach of contract

19 claims and copyright claims. We supposedly breached

20 contracts by dumping this code, they say, into Linux, and

21 we supposedly infringed their alleged copyrights by using

22 Linux which contains, apparently, they say, the allegedly

23 misused information. Each of those causes of action, Your

24 Honor, requires an extensive inquiry into the particulars

25 of what SCO alleges. And I want to refer you, if I may,

1 Your Honor, to tab 10 in the book.

2   Here what we have done is simply set out the

3 basic copyright principles which concern principles that

4 really govern the prosecution of a copyright case and a

5 contract case, and, you know, they are: Does IBM have a

6 license? Who wrote this code? Is the stuff that's

7 supposedly infringed in Linux, is it even protectable by

8 copyright laws? Is it merely an idea or a method or a

9 process? Is it dictated by externalities, as the Tenth

10 Circuit says in the Gates Rubber case, like programming

11 practices? Is it in the public domain? Does IBM have a

12 license to it? When did they get the license to it?

13 Is it even in Linux? Did it get accepted in the patch by

14 which, perhaps, it was offered? Did it get accepted in the

15 patch in which it was offered? If it's there, is it even

16 important?

17   I mean, the basic allegation, Your Honor, is that

18 IBM dumped so much material into Linux that we made it a

19 super operating system that killed SCO's UNIX business and

20 that, therefore, they are entitled to billions of dollars

21 of damages. Surely they don't contend that we are not

22 entitled to understand exactly what it was that was

23 supposed to be put in there and determine and evaluate

24 whether that even matters to Linux, whether anyone is even

25 using Linux because of that and whether, even if they are

1 using it because of that, it has any bearing whatever on

2 the competition between Linux, if any, and their UNIX

3 products.

4   Those are the kinds of questions, Your Honor,

5 that we need to be able to answer. Those are the kinds of

6 questions that are practically impossible to answer without

7 having the coordinates that are missing here. And I want

8 to refer you, if I may, to tab 11 of this book. All

9 right. This, Your Honor, is one of the code comparisons

10 which SCO provided with its final disclosures. We have not

11 challenged this code comparison, Your Honor. It doesn't --

12 SCO has not provided, with respect to this, all the

13 information they were required to provide, and we can deal

14 with that at summary judgment. But they have provided the

15 coordinates.

16   We know that they are contending that there is a

17 substantial similarity between a certain version and a

18 certain file and a certain line in System V, which is on

19 the left, and a certain version and a certain file and a

20 certain line in Linux. You can see the red highlighted

21 language down there, Your Honor. There appear to be 14 or

22 so lines of codes which they have identified. With that in

23 hand, Your Honor, we can undertake to do the investigation

24 contemplated by the cases that you have to do in a case of

25 this kind.

1   Did IBM actually contribute that? When did we do

2   it? How did we do it? Is it actually even in -- is it

3   actually something that even, in any way, helps or hurts

4   Linux? Was it publicly -- was it publicly disclosed before

5   IBM supposedly did it in some standard? Did some third

6   party disclose it, for which IBM couldn't possibly be

7   responsible? There are a whole series of questions which

8   are laid out at tab 10, Your Honor, that we would want to

9   ask based on having this information.

10   Now, as to this particular item, it has been

11 provided with the detail, here, that we've asked, and we

12 have undertaken our inquiry with respect to it. Again, it

13 isn't in the motion. If you look at the blue sheet, Your

14 Honor, behind that information there is an excerpt from

15 Intel's 386 family binary compatibility specification.

16 It's a public specification with a copyright date of 1990

17 -- 1989, I believe. If you look at the second page, you

18 will see exactly that code, exactly that code which

19 supposedly IBM has improperly put into Linux, in an Intel

20 specification since 1989, long before any allegations of

21 misuse by IBM here.

22   When we are told exactly what it is we did, Your

23 Honor, we can ask all the right questions. We can do all

24 the right investigation, and we can properly defend

25 ourselves. When we are told, nebulously, that we did bad

things with respect to some generally defined technology,

we are in no position to undertake that kind of

investigation. That's the only kind of investigation --

that's the kind of investigation we believe we have a right

to do. That's why we asked for version, file and line

information from the beginning of the case.

And without that information, as SCO well knows,

it is an entirely different matter -- how are we even to

begin the exercise of answering all the questions that we

are seeking to answer without knowing particularly what it

is we are said, Your Honor, to have done?

Mr. Rockein suggests in his declaration that the

specificity provided to IBM is more than adequate. It

sounds like he's almost done with his expert report. He's

ready to submit it by, presumably, May 9th when I believe

it's SCO's obligation to submit, and therefore IBM should

have no problem figuring out precisely what it is SCO

contends.

Your Honor, first of all, Mr. Rockein is not

qualified to speak to what IBM needs to do to defend

itself. The cases make quite clear the inquiry that is

required. Moreover, Your Honor, Mr. Rockein is the author

it sounds like, of a very significant part of these final

disclosures. He assembled them. He says he played the

largest role in it, so he has a different perspective. His

1 agenda, Your Honor, and SCO's agenda is very different from

2 IBM's agenda.

3   It isn't -- it isn't their concern to demonstrate

4 that SCO doesn't own the code. It isn't their concern to

5 demonstrate that they don't have a license to the code. It

6 isn't their concern to demonstrate it's not copyrightable

7 as a matter of law. It isn't their concern to demonstrate

8 that it has been in the public domain for decades. Those

9 are the kinds of questions we have to answer. Those are

10 the kinds of questions we can't answer in view of what lack

11 of specificity we have. That's my third point, Your Honor.

12   Fourth, and finally, the only appropriate remedy,

13 here, Judge, I respectfully submit, is to limit these

14 claims, by which I mean an order precluding them from

15 offering evidence in support of them.

16   THE COURT: Why is it more appropriate to ask for

17 this remedy than to address this in a partial summary

18 judgment?

19   MR. MARRIOTT: That's an excellent question, Your

20 Honor. It's more appropriate because there are many

21 arguments that we would make at summary judgment

22 potentially. We are in no position to even begin to

23 prepare all of the arguments that we'd like to make at

24 summary judgment because we don't have the information

25 sufficient to do that. I mean, without knowing exactly

1 what we're moving against, we're going to have an awful lot

2 of difficulty, Judge, showing where something that hasn't

3 been defined is found in a standard.

4　　　　The reason that SCO urges Your Honor deferral of

5 this question to summary judgment is because dealing with

6 this question on summary judgment is going to be awfully

7 messy, and it's ordinarily the plaintiff's perspective that

8 things ought to look awfully messy in summary judgment

9 because it tends to make it hard to get questions resolved

10 in summary judgment. It makes it much easier to get to

11 trial.

12　　　　Your Honor said at a hearing in this case on the

13 24th of February, quote: "Obviously I don't want -- what I

14 don't want is either side to use information that has been

15 withheld in support of a summary judgment motion, in

16 support of their case at trial. All evidence needs to be

17 on the table for the other party to analyze and to take a

18 look at."

19　　　　Your Honor, it's not on the table. We aren't in

20 a position to take a look at it in the way that we believe

21 Your Honor has repeatedly directed SCO to put us in a

22 position to do. And we're not because we don't have the

23 versions and the files and the line information. Contrary

24 to the suggestion made by SCO, there is ample authority,

25 ample authority for Courts entering orders of this kind,

1 limiting the evidence that can be submitted in support of

2 claims that have not been particularized in a way as

3 required by the Court.

4   In summary, Your Honor. We simply don't have

5 that which SCO has been ordered repeatedly to provide. As

6 a result, we are at an extreme disadvantage in preparing

7 our case as to these 198 items. We will deal with the

8 other ones at summary Judgement. Thank you, Your Honor.

9   THE COURT: Thank you, Mr. Marriott.

10   Mr. Singer.

11   MR. SINGER: Your Honor, we also have a book of

12 material. May it please the Court. Your Honor, there are

13 three arguments that I am essentially going to present

14 which -- in the course of which will respond to what

15 Mr. Marriott has had to say. And it's really three

16 independent reasons why IBM's motion should be denied.

17   First, we will show that SCO has complied with

18 the Court's order requiring that, quote, "misused

19 material," close quote, be identified with, quote,

20 "specificity." That specificity differs, whether you're

21 dealing with method and concept or whether you're dealing

22 with a donation of code. And I'll explain that when we get

23 to argument number 1.

24   Argument number 2. There is no evidence, none,

25 that SCO has willfully withheld any identifying information

1   in its December submission. This is a discovery sanction

2   which is sought. That requires proof that we are holding

3   back something that we have that we are not making

4   available, and there is zero proof of that.

5   And, third, even if one were to get past the

6   first two issues, a decision on 198 disclosures as to

7   whether or not those technologies are properly in the case

8   cannot be made without an individualized determination as

9   to the adequacy of the disclosure with respect to those.

10 It cannot be done on simply a blanket basis. And, as the

11 Court's question indicates, this is really a merits issue

12 which goes to the question of: As described, without using

13 more material than the voluminous material we have

14 provided, have we properly stated a cause of action with

15 respect to these disclosures, that they are protected under

16 our contracts? Have they been disclosed improperly? And

17 has that, in turn, caused damage?

18   Now, turning to that first issue -- and I'm now

19 at tab 2 in the book -- I'd like to talk a little bit about

20 what the December report, in compliance with the Court's

21 order, provided. And I can start by saying that we decided

22 to go above and beyond that order, not just to describe and

23 identify, with specificity, those disclosures, but, in a

24 large part, add in and tab materials, the evidence that

25 relates to them, to show the actual disclosures when they

1 are made in writing, and to provide an enormous amount of

2 information that even goes beyond the order which simply

3 says identify with specificity.

4   Now, there are 293 instances where technologies

5 were misused by IBM that are identified in the submission

6 provided to the Court and to opposing parties. Those

7 identify, in almost all cases, the persons making the

8 disclosure. It says what the improperly disclosed code,

9 method or concept is. Where there is code that is

10 specifically --

11   THE COURT: Where are you reading from?

12   MR. SINGER: I'm not reading. I'm describing

13 what is in the summary of the 293 methods.

14   THE COURT: All right. The reason I asked that

15 is because -- and perhaps this is just ignorance on my

16 part, and I will gladly, please, and urge you to educate

17 me, but it seems to me that the orders emphasize lines of

18 code, etc., and now we're switching to technologies, method

19 and concept, as opposed to what was included within the

20 order and which I thought was specific.

21   MR. SINGER: Your Honor, I'm very happy to

22 address that because that is really the heart of this

23 issue. IBM's position is that if it isn't a line of code,

24 with specificity as to version, file and line, it doesn't

25 count. Well, that is not this case. If you go back to the

1 Second Amended Complaint, where we talk about code being

2 dumped in, we also talk about disclosure of methods related

3 thereto. We talk about the use of other information, and

4 that's in paragraphs 111, 113. It's throughout the entire

5 Complaint.

6   THE COURT: But it has never been raised in terms

7 of argument or response until now.

8   MR. SINGER: Well, Your Honor, the issues which

9 were raised in your earlier orders was: You have an

10 interrogatory. It says, "Identify all the source code that

11 you're going to be making claims about." Now, I agree

12 that, to the extent there's an issue about source code that

13 we are making claims about, the Court's orders say identify

14 that. And then, to the extent we've gotten a lot of that

15 source code in the last year, we have made very substantial

16 identifications of the disclosures that relate to source

17 code disclosures.

18   Those are the ones that they are not challenging.

19 Those are the ones such as where charts are shown drawing

20 that specifically. The others are method and concept

21 disclosures. Now, there is no order of this Court which

22 has ever held that the method and concept disclosures are

23 not part of this case. There is no order that says that

24 method and concept has to be disclosed by line, version,

25 file, source code, and that isn't the mode of disclosure.

1   THE COURT: No. But it has never been mentioned

2 before, to my recollection, although I'm more than willing

3 to be proved wrong, that we have ever talked about methods

4 and concepts. We have always been talking about source

5 code, line, file, version; isn't that correct?

6   MR. SINGER: Well, because those discovery

7 requests were asking about that. So, to that extent, where

8 you're talking about discovery requests which were asking

9 for it, then that makes sense. For example, if you look at

10 their own chart, Your Honor, with interrogatory, for

11 example, number 1, it talks about identify with

12 specificity, by product line, file, line of code where

13 appropriate, where appropriate.

14   There are two separate interrogatories that talk

15 about identifying, with specificity, by file and line of

16 code, source code, and then there's one describing, in

17 detail, how IBM is alleged to have infringed plaintiff's

18 rights. They have chosen to move on source code

19 interrogatories.

20   THE COURT: But I'm looking at my orders as well.

21   MR. SINGER: Yes. Your orders are to order us to

22 comply with their interrogatories.

23   THE COURT: But looking at the specific wording

24 on those orders. And nowhere does it talk about method and

25 concept.

1   MR. SINGER: But, Your Honor, the -- we have

2   complied with those orders by identifying, to the extent

3   there are lines of code which are being relied upon, and

4   saying that, in these cases we are talking about lines of

5   code either from System V or from a derivative product such

6   as AIX or Dynix, here they are.

7   But, until this last disclosure obligation, which

8   says to identify all the misused materials, there has not

9   been an obligation on SCO to identify methods and concepts

10 that are not related to the lines of code. Moreover, a lot

11 those have come out of work on the materials, depositions

12 and other discovery that's occurred over the last six to

13 nine months.

14   So, we have, in response to the Court's order,

15 which is the one which deals with these disclosures, which

16 says, "Define, with specificity, the misused materials,"

17 where those misused materials have involved code, we have

18 provided specificity. And those are largely the ones which

19 they are not moving on. And, to the extent these deal with

20 methods and concepts, our position is that they are

21 provided with the specificity the material allows.

22   Code was not disclosed in those cases, in many of

23 those cases, so code cannot be identified, but that doesn't

24 mean that nothing valuable, nothing that isn't protected

25 under our contracts, wasn't disclosed. It was provided,

1 and we provided abundant detail there. We provided over 10

2 thousand pages of supporting material that constitutes

3 those disclosures in these binders, and that's in addition

4 to the 450 thousand lines of source code that was misused.

5   Now, if we turn to tab 3, we break that down. We

6 indicate that approximately one-third of the disclosures

7 are source-code based, which are largely not challenged,

8 and IBM's motion concerns the other two-thirds, which are

9 largely method and concept disclosures.

10   Now, Mr. Marriott, at the beginning of his

11 presentation, says really all of them are deficient. And I

12 would point the Court to what Mr. Marriott said before the

13 Court on February 6, 2004, at page 6 of the transcript,

14 where SCO, at that time, had identified 17 files which it

15 says were improperly contributed.

16   And Mr. Marriott says, quote: "Now,

17 specifically, SCO identifies 17 files, parts of 17 files,

18 which it says were improperly contributed. With respect to

19 many of the lines of code in those 17 files, they properly

20 identified which line it is they say we took from AIX or

21 Dynix and where it is they say we put it in the Linux

22 operating system. With respect to many, the disclosure is,

23 I think, sufficient."

24   And then he wanted to argue about the ones where

25 he didn't think they were sufficient. So I don't quite

1 understand how IBM can take the position that none of the

2 294 today, which provide even more information, are not

3 adequate when, in February of 2004, the ones available

4 then, were adequate. But be it as it may, those are part

5 of the ones not challenged. Those are within the 100. And

6 we are focusing on the ones which are method and concept

7 disclosures which, by their nature, do not relate to source

8 code.

9   Now, if we turn to tab 4, first of all, Your

10 Honor, the contracts between SCO and IBM required IBM to

11 keep confidential methods and concepts from UNIX System V

12 as well as derivative products. It was part of our

13 pleading. It's always been part of the case. IBM has

14 asked about all sorts of technology issues at depositions.

15 This case is not simply a copyright case that deals with a

16 code comparison. I think the Court has, itself, recognized

17 that this case involves contract protections that can be

18 broader than the copyright law provides.

19   Now, as Mr. Rockein explains, the identification

20 of a method or concept differs from identification of

21 source code disclosure. In many cases no source code is

22 discussed at all. In some cases sample source code is

23 disclosed. In certain cases, where there is a patch, that

24 is referenced in the disclosure item, and that is in the

25 disclosure itself.

1   Now, it would be a merits argument for IBM to

2   argue that, unless you have source code in a methods and

3   concept disclosure, that isn't actionable, and that is

4   really the premise of what they are asking this Court to

5   rule. They make a merits argument that if it isn't source

6   code, it is not actionable. Well, they will have an

7   opportunity to make that argument for summary judgment or

8   otherwise.

9   We don't think that is correct. We don't see any

10   law that supports that proposition, but that certainly is

11   not a proposition that's previously been established, but

12   it is the assumption under which their motion rests, that

13   if it's not source code; line, file, version, it doesn't

14   count. Now, we would submit that if these disclosures

15   convey sufficient information to tell the Linux developers,

16   who are doing the coding, how to implement the method and

17   concept, then, by definition, it should be sufficiently

18   specific to put IBM on notice of those claims, as it is IBM

19   that has the operating system and which made those

20   disclosures.

21   And I think, when we talk about a few examples,

22   we'll see that. I'd like to turn, Your Honor, to tab 7 in

23   the binder, if I might. Tab 7 is a summary of what

24   Mr. Rockein points out in the detailed charts which are at

25   tab 10 and in his declaration. And they talk about the 198

1 challenged disclosures. For 130 of those 198, you have the

2 actual disclosure item, if it was an e-mail, if it was an

3 article. That item, the disclosure, itself, is provided.

4 So IBM knows exactly what we're talking about.

5   For 181 of the 198 challenged items, there is an

6 express reference to Dynix or ptx in the disclosure, which

7 we submit is a prima facie case that this comes from Dynix.

8 The people making these disclosures were at Sequent

9 Developers, who had worked on Dynix. For 168 of the

10 challenged items, file locations in Linux were specifically

11 provided.

12   Now, I'd like to, if I might, turn to one example

13 that Professor Davis discussed in his declaration because I

14 think that, in itself, an example hand-picked by IBM's

15 expert, that example, itself, shows that there is

16 sufficient specificity here to allow IBM to understand what

17 we are talking about and proceed and prepare a defense. We

18 have included that at tab 11 in the book, Your Honor.

19   Now, I'm going to be fairly general in describing

20 the contents of these and a couple other examples because

21 of the confidentiality order concerning these matters, but

22 the matters are before the Court and can be read. And the

23 first page here indicates what's in item 146, which is a

24 method and concept that is -- also references another tab,

25 a paper written by an IBM employee named McKeny, and a

1 website with code which, interestingly enough, we can't

2 access because we don't have access to that, but which says

3 that these are scripts related to this method and concept

4 that IBM would be able to access but which we were unable

5 to access.

6   If one goes to the third page, this is a copy of

7 what we have in our disclosure statement with respect to

8 item 146. And it indicates the three IBM employees, all

9 former Sequent employees, who had worked on Dynix, who are

10 involved in the disclosure. It quotes from the e-mail in

11 which the disclosure was made. And the general area here

12 is a method and concept called differential profiling. It

13 discusses how -- where this is described, and that is a

14 reference to this article, which Mr. McKeny wrote, with

15 respect to differential profiling. And there is a

16 reference to some scripts that can help with differential

17 profiling found at a website where we don't have access,

18 but he says these scripts are set up for ptx, which is the

19 reference at Dynix and ptx.

20   It has the source to tab 156 in these books,

21 which then has the following pages, which is the entire

22 e-mail chain, which has proposed code submission to Linux

23 and the discussion by e-mail among these IBM'ers, one of

24 whom is putting together the Linux contribution and the

25 other who is familiar with this method and concept in

1 Dynix.

2   And, finally, you have the Linux files which, we

3 submit, relate to this improperly disclosed code, method

4 and concept. So, here, in the very example that Professor

5 Davis points to, you don't have just a nebulous description

6 of what we're talking about or a general description of the

7 method and concepts, we have the actual disclosure. You

8 have the precise method and concept which is at issue. You

9 have references to code, although we don't know what that

10 code says. You have the Linux files. You have the

11 individuals who they can talk to. They are IBM employees,

12 who assisted in preparing a defense.

13   And we submit that that shows that that is a

14 sufficient amount of information for us to proceed with

15 this item. Now, if we turn -- and I think that that is

16 generally the case. This is the one example they have

17 picked, but the point is, is that there is specific

18 information here about methods and concepts which have been

19 part of the case since the Complaint and which are, until a

20 court orders otherwise on the merits, a sufficient basis

21 for us to say they have violated contracts that say that

22 methods and concepts are to be maintained as confidential.

23   Now, Your Honor, the second argument that I'd

24 like to turn to is that there is no proof of willfulness,

25 that would be a requisite finding for a discovery sanction

1 of the type this Court is being asked to make. We are here

2 under Rule 37(b)(2), and that provides that if a party

3 fails to obey an order to permit discovery or provide

4 discovery then a certain number of sanctions may be

5 entered. All the cases cited both by us and by IBM are

6 consistent in indicating that you have to have a willful

7 failure to make discovery. In other words, we have to have

8 something in our possession that we are not turning over to

9 them. And there is no proof of that whatsoever, that we

10 are holding back source code relating to these methods and

11 concepts and not telling them about it.

12   Where is the proof of any of that with any of

13 these 198 disclosures? What there is, is an argument

14 saying that they would like there to be a source code

15 identification for these methods and concepts. Well, there

16 isn't. If they think that means these legally aren't

17 actionable, that is a motion to make on summary judgment to

18 the Court.

19   If they think we are holding back some

20 information, then tell us what that is because we aren't,

21 and Mr. Rockein expressly indicates that in his

22 declaration. And his instructions were to be as

23 forthcoming as possible, and we have sought to do that.

24   And if we were to, at a later time, present

25 disclosures that are not in these 293 or to be shown to

1 have had in our hands information that was disclosed at

2 this time, IBM is certainly able to object. If we were to

3 oppose a motion for summary judgment by using material that

4 should have been disclosed here but wasn't, they know how

5 to object. And that's what these cases deal with.

6 　　　　　If you look at tab 12, the cases cited by IBM

7 deal with situations where here a creditor failed to appear

8 for a deposition at all, and the Court dismissed the case.

9 Obviously the creditor had the ability to appear for the

10 deposition. You had the Nike case, where the defendants,

11 quote, "totally failed to provide the relevant data that

12 they had."

13 　　　　　If you go to tab 13, we talk about the other

14 cases; the Standard Metals case, which is a Tenth Circuit

15 case, the defendant failed to appear for deposition. The

16 Kern River case, the property owner failed to produce

17 documents, documents which it had within its possession.

18 That is where discovery sanctions come into play, but there

19 is no basis, in any of the cases cited, on which you can

20 sanction SCO for not turning over information it does not

21 have with respect to version, file, line references to

22 methods and concepts where those were not used. They

23 weren't used by the IBM employee in making the disclosure,

24 and they weren't otherwise known to us.

25 　　　　　Now, there are a couple of cases where Court's,

1 on summary judgment motions, like the Imax versus Cinema

2 Technology case and the Kang case have precluded a party

3 from using evidence at summary judgment that they haven't

4 produced in discovery. And that isn't, of course, what we

5 are talking about here. We are not at summary judgment.

6 We certainly haven't sought to use any evidence that hasn't

7 been produced in discovery. If we did try to do that, IBM

8 knows what to do.

9   So, Your Honor, with respect to the legal

10 requirement to enter a sanction order that IBM has asked

11 for here, there is simply no legal basis on which a finding

12 can be made that we have things in our possession that we

13 have willfully failed to provide. Now, I would note

14 further that this is especially an inappropriate motion

15 coming from IBM, given what has come to light as their own

16 actions which have made identification of source code more

17 difficult, if not impossible, in many cases.

18   If you turn to tab 16, Your Honor, I would like

19 to briefly discuss two aspects of that. Your Honor, one

20 aspect is the AIX source code, which this Court ordered to

21 be produced, to provide all versions and formats. And IBM

22 has said that many of these can't be located.

23   If we turn to tab 17, one of the things that has

24 come to light during the deposition process is that

25 directions were given, after these lawsuits were filed,

1 that led to the destruction of probative information.

2 After this lawsuit was filed, you would expect an order to

3 go out to everyone saying: "Don't destroy anything. Keep

4 everything in tact. You are required to preserve

5 evidence."

6   The record from Dan Frei, who is the head of the

7 Linux technology center, indicated that there was a

8 direction to the people there to cleanse their sand

9 boxes -- What are sand boxes? That's where you're working

10 on code. That's a colloquial term used on your desk tops,

11 on your computer screens that are on file to work on

12 code -- to cleanse their sand boxes of AIX and Dynix/ptx

13 source code. And one IBM Linux developer, Mr. McKeny, a

14 senior developer, has admitted to destroying pre-litigation

15 drafts of source code written for Linux while, at the same

16 time, he was referring to the Dynix/ptx source code. And

17 that's Exhibit 7 to SCO's memorandum.

18   So it is -- and in their response, IBM said, "We

19 don't think this is true, and we are not going to respond."

20 That's all they said about this. Here you have a party

21 saying we should be sanctioned and, yet, they have, in

22 fact, taken affirmative steps that led to the destruction

23 of probative information that has come to light in the

24 discovery of this case.

25   THE COURT: That may or may not be true, but that

1 isn't before me today.

2   MR. SINGER: Well, Your Honor, we think it

3 relates --

4   THE COURT: That issue is not before me. The

5 question is whether SCO is in compliance with the Court

6 orders and whether or not it was a willful withholding,

7 etc. So, I would prefer not to go into issues that are not

8 before the Court.

9   MR. SINGER: Your Honor, we will respect that and

10 move on to a subsequent issue. We think that it relates to

11 the overall environment in which the motion is made.

12   Your Honor, the third point of the three

13 arguments is that, even if you were to find, which we don't

14 think you can, we haven't complied with the Court order

15 saying, "Disclose material with specificity," which is the

16 Judge's order leading to these disclosures, and even if you

17 were to find that we were willfully withholding

18 information, you can't make a blanket judgment saying, "All

19 198 items should be excluded. You fail on all of them."

20   Expert testimony would be needed, and we would

21 need, we would submit, a lengthy hearing where you go

22 one-by-one and see whether or not it's specific and see

23 whether or not there's any information that has been

24 withheld on that particular item, which should have been

25 produced, which we have not produced, which we have not

1 provided. There is no evidence at this point, with respect

2 to any of the 198, that we were withholding such

3 information.

4   But, if we were to go down that process, what you

5 would need is a hearing where, on an item-by-item basis,

6 IBM comes forward and says, "Here. They could have

7 disclosed this," or "They had this information available.

8 They didn't do it."

9   You hear from us. You hear to the extent it

10 would assist the Court from expert witnesses, and you make

11 a decision on that item. Instead, they have tried to make

12 a blanket judgement with respect to the 198 disclosures.

13   Moreover, I would submit that the expert reports

14 that are coming up and the discovery of those expert

15 reports in depositions will be a good test as to whether,

16 in fact, IBM doesn't have sufficient specificity to defend

17 against these items. We will see whether or not IBM's

18 experts say: "Well, we really don't have anything to say

19 about these because we can't figure out what these defenses

20 are," or that, even though this was a specific enough

21 e-mail to tell the Linux community about the method and

22 concept, we can't use that to prepare a defense as to

23 whether that's already publicly known in some textbook or

24 some publication. That process should be allowed to run

25 its course and to see what that expert discovery turns up

1 with.

2   Now, Your Honor, I'm going to just briefly

3 mention, because they have only picked one example, 146,

4 the need for this type of individualized determination is

5 clearly seen when you just turn to a few of the other

6 examples that they are challenging but which they haven't

7 said anything specific about. They said something specific

8 about item number 2, which was RCU, and when we responded

9 in our opposition brief, they dropped it.

10   Item number 53 is at tab 20, and, again, I'm

11 going to be general because of the confidentiality. But

12 this is a method and concept which deals with improving

13 locking, and if you turn to the first page after our header

14 slide, you see the actual disclosure. It identifies who

15 made the disclosure, an IBM employee, Mr. Wright; the

16 nature of that disclosure, which is not amorphous. It's

17 very specific. It refers to the e-mails and quotes them,

18 where those were actually made to a Daniel Phillips, who

19 was a Linux developer, and it makes specific references

20 that they are getting this from Dynix/ptx.

21   You have references that this method, this

22 particular method, quote, "is not currently used in Linux."

23 You have another reference at the bottom of that page

24 saying the classic quoting style in Dynix/ptx is then and

25 goes on and provides source code in the context of the

1 e-mail saying that this is the right way to go about it.

2 You then have sources referenced on the next page in our

3 disclosure and you have Linux files relating to that method

4 and concept. And then, following that, you also have the

5 entire e-mail -- this was put in at tab 156 -- and

6 deposition testimony where, if you turn to page 154 of

7 Mr. Wright's deposition, you have an admission that this

8 particular method and concept was cut from source files in

9 ptx source code. That's page 154 of his deposition between

10 lines 1 and 8 at the top of the page.

11   So, it is, in our view, a completely specific

12 identification of a method and concept. In this case it

13 relates to source code. It's related to the source code

14 that they have drafted here. There's an admission by the

15 person who wrote it that it came out of Dynix/ptx. There

16 is no reason IBM can't sufficiently defend against that.

17   If you look at tab 21, we talk about item number

18 38. This is a disclosure of a method and concept that

19 actually goes back to UNIX System V. It relates to an

20 automatic method of checking for updates in memory. And if

21 you turn to the next page, you have an identification of

22 the IBM employee, Mr. Irwin, who made the disclosure. You

23 have a summary of that and a reference to a tab in the

24 Linux files. If you turn to the tab items, it shows the

25 actual e-mail of how this should be handled, an express

1 reference to SVR4, which is System V release four, which

2 prove that there are, and then it goes on to get into the

3 merits of the method and concept.

4 This is specific identification. If you go to

5 tab 22, this is another method and concept dealing with

6 multi processing from Dynix into AIX and from Dynix into

7 AIX for use in Linux. And, again, you have a specific

8 individual, Mr. McKeny. You have specific e-mails, which

9 are referenced and provided at tabbed items, which embrace

10 the disclosure. You have deposition testimony where, at

11 page 255, there is admission and there were disclosures

12 from ptx and AIX. And turning to near the end of this

13 tabbed item at pages 194 and 199, you have admissions that

14 certain Sequent technology, subject to contractual

15 protection, was contributed to the AIX kernel and used to

16 enhance AIX.

17 Item 23, which is also tab 23, is a disclosure of

18 negative knowhow, where they are discussing how not to do

19 something, to avoid a blind alley, which is part, we would

20 submit, of the confidential information protected by our

21 agreements. And you have an express discussion in e-mail

22 by another identified IBM employee; in this case, Martin

23 Bligh. It relates to the way Dynix and ptx used this

24 system. He states, quote, "We are trying to get for Linux

25 the benefits of blank --" you have that -- "without the

1 associated pain." And then you have references to

2 particular tabbed items that go into more details of the

3 nature of that discussion.

4   I could go on and on and on, and we don't think

5 it's necessary, but if this Court were going to pursue the

6 issue of whether or not there is sufficient specificity in

7 our December report, that is what would be necessary

8 because we have a right to defend ourself with these

9 disclosures and say that this is specific information.

10 This is all we have. This is adequate to mount a defense.

11   Your Honor, the motion should be denied.

12   THE COURT: Thank you, Mr. Singer.

13   Mr. Marriott -- and I'm certain you will, but I

14 would like you to address what IBM uses to support the

15 willfulness requirement.

16   MR. MARRIOTT: Excuse me, Your Honor, what?

17   THE COURT: The willfulness requirement, to

18 address that.

19   MR. MARRIOTT: Your Honor, what I heard is a

20 presentation that bears little relationship to the

21 provisions of the Court's orders that are at issue on this

22 motion. And let me briefly -- in fact, let me make a

23 series of points in that connection. Just as at the

24 outset, let me say this with respect to Mr. Singer's query

25 as to how IBM could possibly say that all 294 items were

1 insufficient:

2   What I said, Your Honor, is that SCO was not

3 providing all the information he was required to provide,

4 with resepct to this, pursuant to many of the orders, not

5 that we don't have as to all of them the coordinates that

6 at least allow us to figure out our defense. They are

7 deficient, all of them, for reasons entirely unrelated to

8 the present motion, and we won't deal with those here. But

9 it is not the case, Your Honor, that we contend that they

10 are deficient because of the particular reasons at issue on

11 this motion. They are deficient for other reasons.

12   Now, Your Honor, the first point I made, I

13 believe, when I stood last was that the Court had

14 repeatedly ordered SCO to provide version, file and line

15 information. What I heard Mr. Singer say is, "That may be

16 true with respect to code, but it's not true with respect

17 to methods and concepts. A different standard applied

18 there. We could kind of be as specific as we felt was

19 appropriate." That absolutely -- that, Your Honor, bears

20 no relationship to the Court's orders, and it is, I would

21 submit, wrong.

22   Lit me direct you, if I may, to tab 4 of our

23 book. I agree with Mr. Singer that SCO has made

24 allegations relating to methods and concepts, whatever

25 precisely that means, from the beginning of the case, and

57

1 it is for precisely that reason that we propounded

2 interrogatories that address that exact issue. And I would

3 refer Your Honor now to some of the language in here which

4 I think speaks expressly to the question which Mr. Singer

5 ignores, which is that the orders of the Court applied as

6 equally to methods and concepts as they applied to

7 allegations of misuse of code.

8   To begin, Your Honor, in the first line, Your

9 Honor asks for -- requires, even, that SCO identify and

10 state, with specificity, the source codes that SCO is

11 claiming form the basis of their action. Your Honor,

12 contrary to what Mr. Singer suggests, methods and concepts,

13 whatever they are, do not exist, as they relate to

14 operating systems, independent of the code that implements

15 them. They don't exist somewhere in the ether. They exist

16 as they are implemented in operating systems by source

17 code, which source code is organized in files and appears

18 in versions of products.

19   Take a look, if you would, at interrogatory

20 number 3. There Your Honor ordered SCO to respond, as

21 requested, by IBM. What did IBM request? That SCO

22 describe in detail all places or locations where the

23 alleged trade secret or confidential or proprietary

24 information may be found. We are talking there, Your

25 Honor, not about just code, but information. That

1 includes, however you define it, methods and concepts. And

2 the order is for them to describe, in detail, where those

3 methods and concepts are found.

4   That means, when you are talking about operating

5 systems, not saying "Dynix," which is essentially what

6 their argument is. Mr. Singer points to a bunch of e-mails

7 and says, "See. There's a mention of the word 'Dynix.'"

8 Well, okay. But, so what? That doesn't tell us, with any

9 particularity, what method and concept we are talking

10 about. The Court's orders contemplated the provision of

11 specifics. That's what IBM asked for. That's what Your

12 Honor indicated should be provided.

13   Look, if you would, please, at interrogatory

14 number 4. "Please describe in detail, with respect to any

15 code or method plaintiff alleges or contends that IBM

16 misappropriated or misused, the location of each portion of

17 such code or method in any product."

18   The order was to disclose the location of the

19 method in the product with -- in detail. The only way to

20 do that, Judge, is not to say it's in Dynix, which is

21 essentially what they are saying, but to tell us where it

22 is in Dynix. We produced, as Your Honor knows, enormous

23 amounts of information from IBM concerning version and

24 control. CMVC Your Honor will remember well, and though

25 their expert has claimed to have referenced CMVC in

1 preparing the final disclosures, which CMVC was produced at

2 enormous expense, which information would allow SCO to tell

3 us where in AIX the versions, files and lines are that were

4 supposedly misused, we don't have that information.

5   The Court's orders contemplated for methods, as

6 well as code, a location. A location, to be done with any

7 particularity, means files and lines.

8   The next item, Your Honor, interrogatory number

9 12: "Please identify, with specificity, by file and line

10 of code, all source code and other material, methods, in

11 Linux to which plaintiff has rights."

12   Don't tell us it's in Linux, which is essentially

13 what they have done, or there is a bunch of files in which

14 you can probably find it. The order was to tell us, in

15 detail, where it's found. And as you made clear in other

16 of the orders below, Your Honor, by way of lines and code,

17 just look at one more, if you would. Look at the red text

18 with respect to System V, Judge. SCO was to provide and

19 identify all specific lines of code from UNIX System V from

20 which IBM's contributions from AIX or Dynix are alleged to

21 be derived.

22   Contributions isn't limited to code. It's about

23 code and methods and concepts and whatever else you want to

24 throw in under it. From the beginning, Judge, we have

25 been seeking simply to understand what the allegations are.

1 What SCO has come back and said is: "We have given you a

2 bunch of disclosures, and that tells you enough."

3   That doesn't tell us what their allegations are. And

4 when I come to your willfulness question, Your Honor, I

5 will explain why that's easily satisfied here. So, with

6 respect to what the Court's orders say, Your Honor, I have

7 heard nothing from Mr. Singer about this language. The

8 Court's orders couldn't be more clear. They are not just

9 limited, as has been suggested, to code. They are about

10 whatever SCO contends is misused.

11   Now, it is true that one of them says, where

12 appropriate, by file, version, line and code. That's not

13 where we're talking about methods and concepts. That's for

14 something like the use of a patent, to which there is no

15 file with respect to a patent. That's: Tell us what lines

16 of the patent are at issue.

17   So, there is no file to be talked about when you

18 are talking about a disclosure from a patent, as they do.

19   The orders are clear, Your Honor, and I've heard

20 nothing to suggest that this language means anything other

21 than what it says on its face. And, frankly, if you were

22 to look at the history, Judge, behind these, as we have set

23 out in tab 3, we aren't singing a different tune. I have

24 been saying, from the beginning of this case that, for all

25 four of these operating systems, we want version, files and

1 lines of code with respect to whatever they say we did

2 wrong.

3   And what we are hearing today is that, well, all

4 that didn't really count if you were talking about methods

5 and concepts, and, by the way, we are talking almost all,

6 they say, about methods and concepts. I would submit that

7 that's not true either, Your Honor. A number of the items

8 that are challenged in this motion are not just about

9 methods and concepts, they are about code.

10   And under the standard that Mr. Singer would

11 apply, they plainly fail because, as you see in Addendum B

12 to our reply brief and Dr. Davis' report, there is no

13 versions, files and lines with respect to each of those

14 operating systems for the code they say has been misused.

15 And there is not that order for the methods and concepts

16 and, as a result, Your Honor, the Court's orders have not

17 been complied with.

18   Now, with respect to the second point I made when

19 I stood before you, Judge, which is that they haven't

20 complied, Mr. Singer didn't refer -- SCO nowhere refers to

21 this table wherein -- and I submit, again, as I said, it is

22 indisputable that information is not provided; version,

23 files and lines of code. So, what do we hear instead? We

24 hear a different story. Instead of hearing about where the

25 versions and files and lines are, we hear: Well, gee, we

1 can't tell you about those because the e-mail didn't

2 mention it.

3   We are not asking to be told, Your Honor, what

4 it says in an e-mail that we produced to them and then that

5 they threw back at us. What we are asking is: What is it

6 that they contend? What is it in Linux that you say we did

7 wrong? Where's the version and the file and the line of

8 code of the method which is somehow supposedly there and

9 supposedly entitles you to billions of dollars?

10   We are asking them for their allegations. No one

11 knows their allegations but them. No one. I could read

12 the e-mails for myself and see that they say Dynix. That

13 isn't what we've been asking for since the beginning of the

14 case, Your Honor, and, respectfully, that is not what the

15 Court required. Now, what Mr. Singer says is: "Judge, we

16 provided 10 thousand pages of paper. Come on. Give us a

17 break. This is really specific stuff."

18   I haven't counted the pages. I take him at his

19 word that there are 10 thousand there. But, Your Honor, as

20 I said in the opening, what we've been given is our own

21 documents back. We produced a bunch of e-mails, and they

22 hand them back and say: "See, there? You know what you

23 did. Figure it out for yourselves. There is a reference

24 in there that says Dynix. You know what you did. Go talk

25 to the developer, McKeny. He worked for you, you know, go

1 find out for yourself."

2   Well, Your Honor, that argument was made two plus

3 years ago, and it lost when SCO endeavored not to provide

4 this information in the first place and when Your Honor

5 said they were to provide it, and it was their burden, as

6 the plaintiff, to tell us what is in dispute. And what we

7 have been done -- what has happened is, we've been pointed

8 to a bunch of documents which, sure, if I were to stand

9 here and read to you from an e-mail, it sounds kind of --

10 it sounds kind of particular. It may well be particular,

11 but it doesn't answer the questions and provide the

12 particularity that we asked for and that the Court ordered

13 to be provided.

14   IBM has produced millions of pages of paper, and

15 I could stand here for days and read to you from the

16 documents, and it would sound a lot -- it would probably be

17 pretty boring, but that isn't what we asked for. That

18 isn't what was required. Now, Mr. Singer points to a

19 couple of examples, and I want to come to a few of those,

20 but the suggestion, Your Honor, that the examples that he

21 pointed to is somehow representative of what is in these

22 final disclosures is, I think, mistaken.

23   And I would refer you, if you would, please, to

24 tab 17 of the book -- I'm sorry, of the IBM book. And

25 there are four of SCO's disclosures here at 17, Judge.

1 This first one, I don't think I'm revealing anything of any

2 consequence here because there is nothing of any

3 consequence here. This says that IBM used ptx -- you

4 should read it there Dynix -- used Dynix. It says

5 absolutely nothing about what we did or about what part of

6 Dynix we supposedly used. We are told that we used our own

7 operating system.

8   There is no Linux files, no Linux versions, no

9 Linux lines. There's no System V versions, files and

10 lines. There is no versions, files and lines of Dynix.

11 Look at the next page, Judge, on the back. That's the

12 e-mail. That's what appears at tab 30. So, what we're

13 told is that, look, this shows that you guys were doing

14 funny stuff with Dynix or with ptx.

15   That doesn't answer the questions that we asked,

16 which is: What is it you say we did? You have had three

17 years. You have deposed this guy Martin Bleigh. What is

18 it we did? Where, particularly, is it you say we took the

19 code from Dynix, and what exactly did we do with it? Where

20 is it, so we can answer the questions that I took Your

21 Honor through before? It's not there.

22   If you look at 92, Your Honor, you see the same

23 thing right after the blue sheet. They say basically the

24 same thing: "You've misused Dynix/ptx."

25   Okay. In other words, you've misused an entire

1 operating system. If you look back at tab 3 -- I'm sorry,

2 tab 2, Dynix has 37 base versions, 472 thousand files, 156

3 million lines of code. So, what is it we did? When are we

4 going to find this out, Judge? In response to their

5 summary judgment papers at trial when we have no ability to

6 prepare a defense to answer all the kinds of questions that

7 we want answered because they won't tell us what they

8 claim?

9   This isn't about telling us what's in documents

10 we gave them and saying that it's not there, so how can we

11 tell the Judge? We've been asking from the beginning for

12 their allegations. These interrogatories are, in a sense,

13 contention linked. What is it you are saying that we did?

14 Only you know that. Only you can provide that. That we

15 don't have.

16   The same can be said, Your Honor, with respect to

17 number 93, with respect to 112. I won't bore Your Honor

18 with it, but, as you can see, and if you look at Professor

19 Davis' report, the detail that we have requested just isn't

20 there. There's no versions. There's no files, and there's

21 no lines of the operating systems that were required to be

22 provided. It says IBM made NUMA contributions. NUMA, Your

23 Honor, is a type of -- specialized type of hardware. So,

24 saying IBM made NUMA contributions is like saying IBM

25 made contributions that relate to a super computer.

1   They told us, in one of the Complaints, that we

2   used NUMA. We've been asking what exactly that means. So,

3   the idea that telling us that we used NUMA is telling us

4   something we didn't already know, tells us nothing. We are

5   asking for their allegations, in substantial part here,

6   that we don't have.

7   Now, again, reference is made -- not directly to

8   the affidavit but in the book that SCO provided Your Honor,

9   reference is made to the Rockein declaration and to the

10 questions that he answers and some of which are submitted

11 at one of SCO's tabs. And what I would say to you about

12 that, Your Honor, is, again, the Rockein declaration

13 supports the relief that we seek in this case. And I would

14 refer you to Mr. Rockein's Exhibit B. This is in his

15 report where he tells us why SCO has been specific.

16   All you have to do is compare the questions that

17 he answered to the questions in the Court's order to see

18 there is little to no relationship. One of the questions

19 here is: Did IBM provide an actual -- has SCO provided an

20 actual disclosure of code? Translated, that means: Did

21 SCO give IBM back some of the e-mails IBM produced to SCO?

22 Probably, in a bunch of those categories.

23   We didn't ask for that, Your Honor. We asked to

24 know exactly what we done. And what the Court's orders

25 said were: Not just identify, but provide.

1   So take a look at the next item over, column B in

2   the Rockein declaration. This is entitled Source Code

3   Identified in Disclosure. Reference Document, URL or

4   Related Item. And what you will see is, when talking about

5   source code identified here, Mr. Rockein, for the 198

6   items, says that source code was identified with respect to

7   16 of them. What he doesn't tell you is that his

8   definition up here, even to get to 16, means that he's

9   borrowing source code from other disclosures.

10   He says source code identified in these items or

11 in related items, so he's not just looking at the items

12 that are challenged. He's pulling source code from related

13 items. Whatever precisely that means isn't said. The

14 point, in any event, is: Even in his own document, there's

15 only 16 of them for the 198 items. The Court's orders said

16 identify and provide with respect to these three

17 categories: System V, AIX, Dynix and Linux. And it isn't

18 there, and he has illustrated that it isn't there.

19   And if you look at his next column, Column C, A

20 Link To Protected Materials. And there's a check or an "X"

21 in most of these boxes. What that means is that they've

22 got an e-mail, an e-mail that makes reference to somehow

23 IBM using AIX and Dynix, it's operating system. Maybe the

24 check is appropriate, but it isn't the right question. The

25 question is: Is there some link? Does IBM acknowledge

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1 that it used Dynix in some way?

2   We know we used Dynix. There's not any question

3 about that. The question is: Did they tell us

4 particularly which portions of Dynix we supposedly misused,

5 and, if so, what relationship does it bear to System V,

6 where Your Honor said they had to provide version, files

7 and lines of code, and where in Linux is it? Where is the

8 version, file and line of code, so we can figure out:

9 Could this possibly have hurt these guys?

10   What if it came into Linux, Your Honor, in 2005,

11 and their UNIX business is shown to have -- to have

12 essentially died in 2001? How can IBM be held to be

13 responsible for that? We have a right, Your Honor, and it

14 only makes sense that we know what it is, particularly, is

15 being alleged here.

16   Now, I won't address, Your Honor, the suggestion

17 that IBM has improperly put up road blocks except to say

18 that I don't think that's right, and it's not properly used

19 in this motion.

20   Finally, Mr. Singer says, with respect to SCO's

21 compliance here, Judge, that -- that what you've got to do

22 is hold a hearing, and we've got to get experts on the

23 stand, and we've got to funnel these documents up to them

24 and let them read the documents and tell us how much

25 specificity is there. There is no dispute. The question

1 -- the simple question is: Did you require them to give

2 version, files and lines of code?

3   If the answer is yes, they lose because there is

4 no question they didn't do it. And I would submit, you

5 need nothing more than to look at this chart -- this is

6 actually their chart -- look at our chart, that looks like

7 this, Professor Davis' chart, look at what's not said here,

8 not submitted, and look at the orders. What was required

9 to be provided isn't provided. And that, Your Honor, ought

10 to be the end of the inquiry.

11   Now, does this -- does this injure IBM?

12 Absolutely it injures IBM. Your Honor, the suggestion is

13 made that this will all sort itself out, that it will be

14 really interesting to see what IBM, as Mr. Singer says,

15 puts in its expert reports when we get those expert

16 reports.

17   The difficulty is, Your Honor, how are we

18 supposed to prepare the kind of expert reports that we

19 ought to be able to prepare without knowing precisely what

20 it is that they are even alleging? How are we supposed to

21 send an expert down the road to show that a certain set of

22 concepts is in the public domain when all we know is it has

23 something to do with Dynix? One of the disclosures here,

24 Judge, is that IBM misused the internals of System V

25 Release 4. The internals. There are books some place, and

1 my colleague probably has it -- there are books written on

2 the subject of internals of System V Release 4. This has

3 been public for a very long time, Judge.

4   According to the copyright, which is not

5 immediately leaping out at me, it has been available for

6 probably a decade, Your Honor. 1994. So, when we're told

7 that we misused the internals of System V, that's not

8 telling us anything of any consequence. We are in no

9 position, Your Honor, on the schedules set, to be providing

10 the kind of expert reports that we need to provide to

11 defend ourselves with respect to these items because we

12 don't know, with any particularity, what is being talked

13 about.

14   Now, finally, Your Honor, is this the appropriate

15 remedy? It is the appropriate remedy. Your Honor entered

16 orders. We have been asking for a very long time to get

17 this information. The orders are repeated, and they are

18 consistent, in their tone and in their message, that this

19 information was to be provided so that IBM could prepare

20 itself for trial.

21   The issue isn't: Do we have some general idea of

22 what the technology is? The issue is: What are we all

23 really talking about here so we can go out and answer the

24 kind of questions that we need to answer? Deferring this

25 to summary judgment is not an adequate solution to the

1 problem because it puts us in no position to properly

2 prepare for summary Judgement.

3   Your Honor asked about willfulness. Willfulness

4 isn't bad faith. Willfulness means: Did they

5 inadvertently provide these disclosures or did they

6 knowingly provide what they provided? There is not any

7 question they acted with willfulness. They know what they

8 did. Mr. Rockein said he spent a substantial amount of

9 time working on this. I don't have any reason to think

10 that he didn't. What they provided is not -- is not done

11 inadvertently, Your Honor.

12   They had those Court's orders. Your Honor

13 admonished the parties in December -- December of 2003, I

14 think, Your Honor, when we first argued that SCO hadn't

15 complied, in chambers, that if anybody had any problem with

16 any one of SCO's orders, that they should make the Court --

17 any of your orders, that they should make the Court aware.

18 This is when IBM complained that SCO hadn't complied with

19 the order the first time around. That never happened.

20   And, in fact, Your Honor, what happened here is

21 that when we received SCO's interim disclosures, we brought

22 to SCO's attention that we believed that it had not

23 properly complied. Mr. Shaughnessy sent a letter to SCO,

24 and I believe, Your Honor, it's at tab 17 -- that's not

25 right. It's at tab 14, Judge. And what we said here is

1   that we've done a preliminary analysis of your interim

2   disclosures, and, in effect, these come nowhere close, so

3   please fix this problem or you're going to leave us no

4   choice but to seek the very remedy that we are seeking

5   here.

6   We got no response, Judge. What we got is the

7   final disclosures on the 20-something of December with 198

8   items that aren't properly disclosed. There is ample

9   authority for this Court entering an order indicating that

10 SCO failed to do what the orders plainly required it to do,

11 ample authority. The Tenth Circuit's decision in Kern

12 River; the decision from the Southern District of New York

13 in the Nike case; the Ninth Circuit's decision in Imax.

14   There is not any question that what happened here

15 was intentional in the sense that they didn't provide the

16 information they were requested. This motion doesn't turn,

17 as has been suggested, on the idea that SCO is sitting on

18 an e-mail some place that tells IBM -- that has all the

19 information that IBM wants and just failing to provide it.

20   The disclosure -- the interrogatories, Your

21 Honor, and the Court's orders require the disclosure of

22 that which they contend was misused. The issue isn't

23 whether there is something in a document some place that

24 they have withheld. The issue is: What are they really

25 saying? What are we really going to present to a jury in

1 this case? What is it really about? What should the

2 experts be talking about so that we don't have a situation

3 like we have here, where Professor Davis is saying, "Gee,

4 there's no versions, files and lines there."

5   And Mr. Rockein is saying, "Gee, it seems pretty

6 specific to me, and I worked pretty hard on this and gave

7 them an awful lot of documents. They should know what's

8 going on."

9   Well, what's required, Your Honor, hasn't been

10 provided, and, respectfully, the Court ought to enter an

11 order indicating that the Court's orders haven't been

12 complied with and SCO ought not be allowed to produce -- to

13 proceed with respect to these 198 items. It can proceed

14 with its 90-some other items. That is not an extraordinary

15 remedy, and we are not asking for a dismissal of the claim

16 in its entirety. We are asking it to be limited to those

17 items that have been properly disclosed.

18   The Court's orders were clear. They sought no

19 clarification. We are severely prejudiced in even

20 preparing for summary judgment, let alone expert reports,

21 without that information. We ask that Your Honor enter an

22 appropriate order. Thank you.

23   THE COURT: Thank you, Mr. Marriott.

24   Go ahead, Mr. Singer.

25   MR. SINGER: I will be brief, since we are in

1 rebuttal. First of all, we have provided, compliant with

2 the December order that says specifically identify the

3 misused material. That is the order that led to these

4 submissions.

5   The assumption IBM continues to make is that for

6 a method and concept there is always a source code to be

7 identified. And where does that assumption come from? It

8 is not a prior order of this Court. It's not a

9 determination of fact or law that the District Court has

10 made. It's an assumption because they would like to get

11 rid of these 198 items without having to defend against

12 them. These 198 items, to the extent they didn't have

13 source code, were, never the less, disclosures where the

14 IBM people, without the use of a source code, were able to

15 communicate protected information to Linux that we contend

16 was valuable and in violation of our rights.

17   And if they didn't need to include source code

18 in the disclosure, Mr. Marriott cannot explain how we can

19 be expected to provide or be obligated to provide source

20 code beyond what the disclosure itself contained.

21   THE COURT: Let me ask you this: Is SCO in

22 possession of -- can SCO provide additional specificity

23 with regard to any of these items?

24   MR. SINGER: We have had a couple months of

25 additional work since December 22. It may be that on a

1 handful of these items something has come up during that

2 time period which would allow a more specific reference in

3 one place or another. But, in general, with what we're

4 talking about here on methods and concepts, no.

5   THE COURT: Well, I guess what I'm asking you,

6 basically: Is this all you've got?

7   MR. SINGER: Well, what we -- we have continued

8 to have our experts work, but if the issue is: Do we have

9 today, version, file and line, which Mr. Marriott expects,

10 on methods and concept, where IBM did not used those in its

11 disclosure, the answer is no. We don't have that because

12 it's not part of the method and concept. It is a

13 disclosure of something which might be implemented in

14 source code when the method and concept is implemented.

15 But if that implementation was not disclosed then we don't

16 have, in our possession, where that specific code is coming

17 from.

18   It could be implemented a number of different

19 ways in different source code. That is the very difference

20 between a method and concept and a source code disclosure,

21 so the very premise of IBM's argument, that methods and

22 concepts inherently must be identified with associated

23 source code, is without support. They would like that to

24 be the case, but that has not been so held. They can make

25 an argument to that effect in front of the District Court,

1 that they should be granted a summary judgement because the

2 method and concept that we haven't disclosed source code is

3 not actionable.

4 THE COURT: But you are talking more conceptually

5 here, again. Is there source code that relates to these

6 method and concept items?

7 MR. SINGER: On 16 of them, we have, and those

8 are 16 of the 198, there is source code ether imbedded in

9 the item or in a related URL file where you go to a

10 website. It is possible that a few more may come up, you

11 know, with additional work, but we have given, at the time

12 of this submission, everything we have. And we are happy

13 to continue providing everything we -- if there is anything

14 new we get.

15 THE COURT: But you are referring to a website;

16 is that correct? You are not providing it yourself.

17 You're saying it's imbedded somewhere else?

18 MR. SINGER: Well, for instance, the one example

19 that they choose, 146, the source code that's referenced

20 there in search of scripts is on a website we don't have

21 access to, so we provide the reference to that website that

22 is an IBM password-protected website. Now, with regard to

23 the methods and concepts, generally, there will be some

24 sample code that's in the e-mail disclosure saying, "Here

25 is one way you can implement it."

1   That goes beyond those 16. Some of the examples

2   I have mentioned to you have that. But the more general

3   point is, these are not just saying: "Here's the general

4   method and concept," or "We want you to defend everything

5   in Dynix." These are very specific items, culled from

6   thousands and thousands, coupled with thousands and

7   thousands of hours of work from millions of pages from the

8   much broader universe. Now, some of them relate to one

9   another, like there's 40 related to NUMA. You can't just

10 pick out one related to NUMA in isolation and say that this

11 is not specific enough.

12   The point is, is that we cannot be expected to

13 provide a greater level of specificity on method and

14 concept disclosures than IBM's engineers used when they

15 were making the disclosure. We are not going to present

16 more in terms of at trial. We are talking about

17 disclosures that are not in these 293, where they need to

18 be concerned that something new is coming up, and, if we

19 did that, they could raise that issue.

20   If they move, either here or at trial, on the

21 grounds that we should have disclosed something that we had

22 now, and we didn't disclose it, they are able to make that

23 motion. That's what most of these cases deal with.

24   THE COURT: But that's not really the issue. The

25 issue is not: Will you be allowed to present at trial,

1 but, do you have it and should you have presented it so

2 that they can determine how to deal with it in terms of

3 their motions for summary judgment or at trial?

4   MR. SINGER: We gave them everything we had, so

5 we don't have anything more. I mean, we think we have

6 complied fully with the Court's order, but, in any event,

7 we certainly have not withheld information. And I listened

8 very closely to what Mr. Marriott said about willfulness

9 and that we willfully filed these. He did not say anything

10 that indicated that we have any information that we have

11 not provided, that somehow we are sitting on top of source

12 code, line, file and versions relating to where -- let's

13 say any particular one of these 198 items relates to a file

14 in Dynix, and we just haven't returned it over or that we

15 have or it or that we should have it and haven't provided

16 it.

17   We have given them everything we have related to

18 these, and their argument is that they would rather not

19 have to defend against these disclosures, but they are --

20 we submit, they fall into one of two categories; either the

21 disclosure, as made by IBM, with the information here, is

22 specific enough to defend against. It tells you it isn't

23 just Dynix, generally. You can see these are talking about

24 very specific items, with the individuals who are involved

25 in making them, what they do, where they went to Linux.

1 They know what we are talking about.

2 They can mount a defense on any number of

3 grounds. They can say it's not really a method and

4 concept. They can say it came from somewhere else, that

5 Mr. McKeny came up with 146. It wasn't from Dynix. It

6 came from some other source. They can say it is out in the

7 public domain because we have exactly what was disclosed.

8 It is specious to suggest that they cannot defend against

9 these items.

10 These are items that were sufficient to

11 communicate this knowledge to Linux, and if they weren't

12 sufficient to communicate that method and concept to Linux,

13 either because there wasn't enough information in them or

14 the information was too general to really be protectable,

15 well, then, that's their summary judgment motion on that

16 item, and they are fully able to make it from what they

17 have been given, and we will oppose it with what we've been

18 provided with.

19 And that's a merits issue, to be considered with

20 respect to whether or not this truly was a disclosure of

21 protected methods and concepts. But, whatever it is, it's

22 not a discovery sanction issue. We have given them what we

23 have. And where is the evidence that we are holding back

24 anything? Where is the evidence that we should have been

25 able to provide source, line and code on disclosures where

1   the disclosures themselves do not relate back to source,

2   line, code and file -- excuse me -- version, file and line

3   of source code with respect to that particular method and

4   concept?

5   We have supported our position with an expert's

6   declaration explaining that methods and concepts, even if

7   many textbooks, Mr. Rockein says, are not discussed with

8   respect to actual source code. They may be discussed with

9   some sample source code. They are often not discussed with

10 actual source code. That is in the nature of a method and

11 concept.

12   Now, I fully understand that Mr. Marriott might

13 be -- would rather not have to deal with these 198

14 disclosures because you have a lot of evidence. IBM

15 disclosed things, from what we contend are protected

16 systems against disclosure, to the Linux community. But he

17 has to deal with these. And the fact they come from IBM's

18 own files means it should be easier -- not more difficult,

19 but easier for Mr. Marriott and the IBM team to defend

20 against.

21   So, we have supplied specificity here. There is

22 absolutely no showing of any willful failure to make

23 discovery. And with respect to the third issue, of having

24 to go example-by-example, we hear in this rebuttal argument

25 three or four new examples that aren't mentioned in any of

1 their briefs. They didn't say anything about example 146,

2 which was the one example that was mentioned by Mr. Davis.

3   And all I think that highlights is that if the

4 Court was going to go down this path, we would have to go

5 item-by-item and look at those and deal with the issue of

6 whether or not it is sufficiently specific so that IBM can

7 defend, to deal with the issue of: Do we have more

8 information, for some reason that we are not turning over,

9 that we would willfully be withholding something?

10   To be sanctioned for discovery, you have to be --

11 have within your capacity the ability to comply. You have

12 to have something you are not turning over. You have to

13 produce a witness for deposition. You have to turn over a

14 set of documents that you're withholding. They have made

15 no showing of that -- of that, whatsoever. But, if they

16 were going to go down that road, that would have to be done

17 item-by-item with respect to these disclosures.

18   Your Honor, the motion should be denied.

19   MR. MARRIOTT: May I just briefly respond, Your

20 Honor?

21   MR. SINGER: Your Honor, there was one point I

22 omitted to make before Mr. Marriott responds. May I just

23 go to that?

24   THE COURT: You may.

25   MR. SINGER: With respect to your earlier orders,

1 the Court is aware March 3, 2004, it indicated, in light of

2 what the Court considered SCO's good faith efforts to

3 comply with the Court's prior orders, the Court lifts the

4 discovery stay previously imposed. In February of '05,

5 there was an order which provided us a lot of information,

6 and we have been digesting that information and working

7 with that information, and the depositions, some of which

8 we had as a matter of course, some of the which came out as

9 a result of one of the hearings we had before Your Honor

10 with more developers.

11   And it is that information which leads to this

12 material. Some of it comes from IBM. Some of it comes

13 from discovery. Some comes from third sources. But there

14 has never been a finding by this Court that we have not

15 acted in good faith, that we have withheld any information

16 or anything that Mr. Marriott suggests, other than the fact

17 that we've been trying to produce as much information as

18 possible on a complex matter.

19   MR. MARRIOTT: Your Honor, Mr. Singer suggests

20 that what was required in the December submission was just

21 disclosures of the allegedly misused information, as if

22 somehow that had no meaning independent of all the Court's

23 prior orders, that it meant disclose, and it meant disclose

24 with specificity, so they could basically do what they

25 wanted in disclosing in the orders. What he doesn't --

1 what he overlooks, however, is the language of Judge

2 Kimball's order and his own statement to this Court in a

3 subsequent hearing.

4   Judge Kimball's order says, "The interim deadline

5 for parties to disclose, with specificity, all allegedly

6 misused material identified to date and to update

7 interrogatory responses accordingly, to provide the

8 information ordered by the Court previously and requested

9 by IBM."

10   There is -- in any event, even if that language

11 didn't exist there, there is an obligation under the

12 Federal Rules to seasonably update your disclosures. IBM's

13 discovery requests didn't go away. Neither did the Court's

14 orders, and if SCO acquired additional information, and

15 certainly by that final deadline it had an obligation to

16 provide it. Now, Mr. Singer, at a hearing, Your Honor, the

17 date of which I don't recall, but on one of SCO's motions,

18 was asked by you about interrogatory number 13 and

19 indicated that that particular interrogatory would be

20 updated as of the date of the final disclosures.

21   So, the Court's order expressly makes reference

22 to it as to the interim. It was plainly contemplated by --

23 by both -- both dates, and Mr. Singer acknowledged that at

24 that earlier hearing. Now the question is: Do the e-mails

25 make reference to a line or file in the concept? They may

1 or they may not.

2   The issue, Your Honor, is whether the methods and

3 concepts, that they contend we mis -- we misused in some

4 respect, are implemented in code, whether they have an

5 address in Dynix, in System V, in Linux and AIX. And the

6 answer which I think he gave is yes. You implement methods

7 and concepts in code. They don't exist somehow ephemerally

8 above the code. They are in the code. They do not exist,

9 as a practical matter, in an operating system independent

10 of the code. And that's why we asked for that information.

11   Mr. Singer makes reference to item 146 and

12 suggests I failed to make reference to -- to how that item

13 is somehow not adequate. Your Honor, Mr. Rockein --

14 Mr. Singer suggested 146 is somehow an example of why SCO

15 has properly complied. Reference is made to a patch. The

16 patch referenced in item 146 bears seemingly no

17 relationship to the paper which is provided. The

18 connection -- there is no connection between the paper

19 given and the method that is mentioned.

20   The indication of Linux files that they have

21 referenced don't seem to have anything to do with the

22 method. What we've been given is a bunch of dots and said,

23 as I think Mr. Singer essentially just conceded, asked to

24 figure it out for ourselves. We are in the best position,

25 he says, to figure out what's going on.

1   Now, the question is: Did we sit on -- did they

2 sit on something? Is there something they have held back

3 that they haven't provided? The answer to that question

4 is: Absolutely they have.

5   Is it a document from IBM's files which

6 references a disclosure? Perhaps not. What it is, is

7 their allegations. And I refer you back to tab 4 in our

8 book where you will find the Court's orders. The Court

9 ordered them to provide information relating to what they

10 allege and what they contend. This is in interrogatory

11 number 1. That's what we asked for, their allegations and

12 their contentions. How do they contend some code was

13 misused by IBM? Where, in Linux, is it that it supposedly

14 is such that it's killing their UNIX business? Where, from

15 AIX, does it come from?

16   The theory of their case is that we can't

17 contribute our own code. They admit we own AIX. They

18 admit we own Dynix. They assert that they, nevertheless,

19 have a right, pursuant to contract, to control what we do

20 with our own code. What is the basis of this argument?

21 They say, "Well, AIX and Dynix are, in some sense,

22 derivatives or modifications of System V and, so, again,

23 the contributions you have made are modifications and --

24 and derivative works of System V."

25   So we say, "All right. Tell us where the

86

1   connection is between System V, between AIX and Dynix."

2   There is nothing, Your Honor, in these final

3   disclosure that make that connection, nothing. There is no

4   version, file or line of System V provided with respect to

5   all of those 180 -- 198 items. What SCO is essentially

6   seeking to do here, Your Honor, is to deny IBM the right to

7   pursue its defenses. They say we can raise all these

8   issues at summary judgment, but they know, full well, that

9   without knowingly particularly what's being said to be

10 misused, we are limited significantly in the number of

11 defenses we can raise.

12   There are probably defenses that could be made.

13 In fact, I have no doubt there are defenses that could --

14 that could be asserted. But we have -- we have -- we are

15 entitled, Your Honor, to pursue all of the legal defenses

16 available to us. That's why we asked the questions. The

17 answer -- the question here isn't just: What isn't being

18 provided in disclosure? It's: What, exactly, are you guys

19 alleging?

20   And that's what our interrogatory number 1 asks

21 for, allegations, and that's, if you look carefully at,

22 what the other items ask for as well. So, what are they

23 sitting on? They are sitting on their allegations,

24 allegations which, if they are not provided to us now --

25 frankly, now is too late. If they -- if the -- because

1 they weren't provided to us, Your Honor, we are now -- we

2 are now not capable of doing the kind of work that we would

3 provide -- that we would have done if the allegations had

4 been provided to us. So, they are sitting on their

5 allegations.

6   That they have. That they are willfully doing.

7 And they are completely free to say at summary judgment,

8 when we say, "Gee, we didn't contribute that to Linux,"

9 they'll say, "Oh, yeah, it's over here. It's in that file

10 there. We didn't point those lines out to you before, but

11 it's right there."

12   We show a certain method is in the public domain.

13 Oh, we're not talking about that part of the System V

14 internals. We are not talking about that portion of NUMA.

15 We are talking about something else.

16   They are the master of their allegations, Your

17 Honor. We asked them for what their allegations were.

18 They sat on the allegations because they contend the

19 information is in Linux, but they won't tell us precisely

20 where. They contend that it derives from System V, but

21 they won't show us exactly where. They are effectively

22 throwing back to IBM the burden to figure out what it is

23 exactly they contend.

24   That, Your Honor, is improper. There is ample

25 authority, again, for the Court to enter the order we have

1 requested, to indicate that the Court's orders required the

2 disclosure of this information and that it hasn't been

3 provided. No hearing is required. It is undisputed that

4 they haven't provided the information we say is required.

5   Thank you, Your Honor.

6   THE COURT: Mr. Singer, let me just ask you --

7 and then we are going to cut this off at 1:00 o'clock --

8 but how do you address Mr. Marriott's argument that without

9 this information that you maintain custody of, the

10 allegation, that they are forced to figure it out, in

11 contravention of the Court's orders?

12   MR. SINGER: I strongly disagree with it, Your

13 Honor. If we were to introduce a new technology not

14 embraced by the 293, 198 they challenge, they object. It's

15 out of the case. If we try do come up with specific source

16 code that we should have produced now to buttress a

17 connection that we didn't disclose that we should have,

18 they could object to it at that time saying we should have

19 put it in the December submission. If there is something

20 which is so general in the 293, and they say this one is

21 too general, that we should get a summary judgment on it

22 because it is so general, it really doesn't describe a

23 method and concept, it isn't anything that isn't widely

24 known in the industry or that our people have communicated,

25 that's a summary judgment merits argument.

1   They haven't shown at all, other than repeatedly

2   asserting we can't defend, we can't defend, why, when you

3   look at these materials, they cannot defend. It describes

4   a method and concept specifically. It provides, usually,

5   an actual disclosure, the way in which the IBM employee

6   took that and gave it to the world, which we contend

7   violated our rights.

8   THE COURT: But doesn't that go directly to his

9   point, that you haven't identified that it was taken and

10   implemented?

11   MR. SINGER: No, but we have, Your Honor. That

12   goes to -- one of the lines in the chart that we presented

13   is where there has been an express reference, express, in a

14   written document in the disclosure item, that this comes

15   from Dynix or another system where we have protected rights

16   because they are derivatives of System V. And in 161 of

17   those 198, there is an express reference. In some of the

18   examples I mentioned to you, which they are objecting to,

19   you have a witness, an IBM employee, who says, "Yes. I

20   copied this out of ptx Dynix."

21   That's an admission. It came right out of that

22   system. Our argument is that that operating system is a

23   derivative work and, as such, they could not take

24   technologies from Dynix and ptx and disclose them to Linux.

25   And we prove that with this information. They are

1 entitled, and they have enough here, clearly, to say:

2 "Here's this technology. It came from some somewhere other

3 than Dynix."

4   They can prove that. They know specifically what

5 we're talking about, and if there is one that's so general

6 where they don't know, then the issue isn't that we don't

7 describe it with source code, line, file, version; the

8 issue is that the method and concept, as a method and

9 concept, is too general to be protected or was describing

10 something generally known. And those are merits arguments.

11 Those are summary judgment arguments. Those are arguments

12 for experts. They are ultimately the arguments for trial.

13   We have provided this tremendous specificity.

14 There is no basis to conclude they can't defend on that

15 basis. There is no order of this Court or anywhere that

16 says methods and concepts have to be identified with source

17 code when there is no source code that accompanies a lot of

18 these methods and concepts. There is no showing that there

19 is anything in our possession or capability of doing it

20 that we have not done to comply with this order. And a

21 determination as to which of these are specific enough has

22 to be made on an itemized basis.

23   Thank you, Your Honor.

24   THE COURT: Thank you. The matter will be taken

25 under advisement. Counsel, thank you for your arguments

1 today.

    2   MR. SINGER: Thank you.

    3   MR. MARRIOTT: Thank you, Your Honor.

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   25   (Whereupon the proceedings were concluded.)

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2   REPORTER'S CERTIFICATE

3 STATE OF UTAH   )

4   ) ss.

5 COUNTY OF SALT LAKE)

6

7   I, REBECCA JANKE, do hereby certify that I

8 am a Certified Court Reporter for the State of Utah;

9   That as such Reporter I attended the hearing

10 of the foregoing matter on April 14, 2006, and

11 thereat reported in Stenotype all of the testimony

12 and proceedings had, and caused said notes to be

13 transcribed into typewriting, and the foregoing pages

14 numbered 1 through 92 constitute a full, true and

15 correct record of the proceedings transcribed.

16   That I am not of kin to any of the parties

17 and have no interest in the outcome of the matter;

18   And hereby set my hand and seal this 5th

19 day of May, 2006.

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25   REBECCA JANKE, CSR, RMR