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COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:)
)
SCO GROUP,)
)
)
Plaintiff,)
)
v.) Case No. 2:03-cv-294
)
INTERNATIONAL BUSINESS MACHINES,)
)
)
Defendant.)

BEFORE THE HONORABLE BROOKE C. WELLS

December 5, 2003

Transcript of Motion to Compel

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120503DB

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1 Salt Lake City, Utah, Friday, December 5, 2003, 10:00 a.m.

2 (Proceedings)

3 THE COURT: Good morning, ladies and gentlemen.

4 MR. MARRIOTT: Good morning, Your Honor.

5 THE COURT: Let's go forward in the matter of the
6 SCO Group versus International Business Machines
7 Corporation. The record should reflect that plaintiff SCO
8 is represented today by Mr. Brent Hatch and Mr. Kevin
9 McBride. Defendant IBM is represented at counsel table by
10 Mr. David Marriott and Mr. Todd Shaughnessy.

11 Gentlemen, let me indicate, as we begin, that I
12 have reviewed your submissions, I have reviewed what I
13 believe to be the pertinent case law in this matter and I
14 have reviewed the affidavit that was submitted by Mr.
15 Shaughnessy. And I've also taken note of the statements
16 that are included in the submissions which indicate that
17 certain representations have been made by SCO to the media.

18 Based upon my review of those items, I would tell
19 you what my intention is today so that we can then focus the
20 argument towards that particular end. As I've stated, and
21 based upon my review of those items mentioned, it would be
22 my intention to grant defendant IBM's motion to compel
23 answers as to both sets of interrogatories, and to require
24 plaintiff SCO to file responses to these interrogatories or
25 affidavits indicating that they are unable to do so and why

1 within 30 days of the entry of this order. I would further
2 intend on directing that IBM's responses should correct
3 those deficiencies that are set forth in the defendant's
4 addendum which was filed on 11-4 of this year, and that is
5 to include answers to Interrogatories No. 12 and 13. Now,
6 in the interim, it would also be my intention to otherwise
7 postpone all other discovery until such filings have been
8 and compliance has been achieved.

9 Let me ask counsel first, is there a protective
10 order in place?

11 MR. MARRIOTT: There is a protective order.

12 MR. MCBRIDE: Yes, Your Honor.

13 THE COURT: All right, that answers that question
14 then. All right, given that as my intended plan today, then
15 I would ask counsel to focus your arguments as to why or why
16 not I should not implement that plan.

17 MR. MCBRIDE: Would you prefer that I go first,
18 Your Honor?

19 THE COURT: Well, we --

20 MR. MCBRIDE: Mr. Marriott's pretty much got the
21 day so far, it would appear.

22 THE COURT: It's up to you, counsel. You both
23 have matters. Maybe, Mr. McBride, it does make some sense
24 for you to go forward.

25 MR. MARRIOTT: That's acceptable, Your Honor.

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THE COURT: All right.

MR. MCBRIDE: Thank you, Your Honor.

Frankly, we can appreciate the intention of the Court based on the submissions and understand the basis for it. We think, Your Honor, however, that in a few minutes this morning we can convince you that the more appropriate path is to follow a rule or an outline of the rule in Rule 33 that basically says that because the issues involved in this discovery involve a complex interplay between facts and law, that instead of granting the motion, what the Court should simply do is put the motion on hold until very specific discovery has been identified and produced and then make a ruling. And before I address this -- yes, Your Honor?

THE COURT: No. What I was going to say, Mr. McBride, is that in reviewing all the submissions and reviewing the pertinent case law, it appears to me that what is happening is somewhat circular in that defendant indicates that it cannot answer plaintiff's interrogatories until plaintiff has identified the source codes, et cetera, but the manner in which those have been submitted make it, I believe, unduly burdensome on the defendants and so we go 'round and 'round. And I find also that it appears to me that if there's any argument to be made on the failure to confer under Rule 37 that -- that there has been a good

1 faith effort to comply, but that because we can't get off
2 the ground because of this circular problem, that I would
3 not find that a sufficient basis for, you know, further
4 postponing.

5 MR. MCBRIDE: May I have a few minutes to try to
6 convince you otherwise, Your Honor?

7 THE COURT: Absolutely.

8 MR. MCBRIDE: All right. And I simply set this
9 out at the beginning because this is what I think we can
10 convince you of in a few minutes this morning. And what I
11 think we can convince you of is that rather than entering an
12 order, what really should happen is specified discovery
13 should be identified, we should have time to take that
14 discovery, then we should revisit this and respond more
15 fully to the interrogatories submitted by IBM. Now, I would
16 like to explain why.

17 This case, Your Honor, at a very fundamental
18 level, involves infringement. Infringement is a very
19 broadly defined category in the law. It can include
20 copyright infringement, trade secrets infringement or plain
21 old confidential information that's taken without
22 permission. Those are all very differently defined areas of
23 the law that all have very differently defined rules of
24 proof. The -- what we need to get our arms around
25 collectively, on our side and on IBM's side, is a clear

1 definition of what source code is at issue, what source code
2 is potentially an infringement. Before we discuss whether
3 it's a trade secret or a copyright or anything else, the
4 most important thing is for both of us to come to grips with
5 the universe of source code, the documentation and methods
6 and concepts that we believe are at issue so we can argue
7 about them. And once we have an understanding of what that
8 universe is, the very complex rules -- this is a complex
9 case, Your Honor. There's going to be some of this code and
10 some of these methods that are trade secrets, and some are
11 going to be copyright and some are going to be contract
12 violations and some are going to be nothing. I submit, Your
13 Honor, that's the very first step that needs to take place
14 before we start worrying about whether there is trade secret
15 burdens met or not met.

16 Certainly, Your Honor, the cases cited by the
17 defendant in this case with respect to trade secrets and the
18 need to make some affirmative representation of what those
19 are, that makes complete sense. We have no argument with
20 that general proposition of law. What we are simply saying
21 is this case involves deeper level complexities than the
22 cases cited by the defendant. This is not the Muna case.
23 This is not a case where we're talking about identity of
24 employee records or customer records that you would normally
25 see in a trade secrets case. This involves an

1 interrelationship between, as I said, copyright, trademark
2 and contract law.

3 Now, Your Honor, I would like to proffer a case
4 for the Court's review that is a pretty well known case but
5 it's not in our briefs. It is Sun against Microsoft, a
6 Ninth Circuit case decided in 1999, and the reason -- would
7 it be appropriate to. . .

8 THE COURT: Certainly.

9 MR. MCBRIDE: The reason --

10 THE COURT: Excuse me, Mr. McBride.

11 MR. MCBRIDE: Yes.

12 THE COURT: Do you have an extra copy of that?

13 MR. MCBRIDE: Oh, sorry, Your Honor.

14 THE COURT: Hand it to Mr. Willey. He's the
15 brains behind this operation.

16 MR. MCBRIDE: The reason this is an interesting
17 case is because it underscores the point that I just made to
18 the Court. The -- there are some paragraphs here worth
19 reading, but the -- and I'll get to those in just a moment.
20 The case in Sun against Microsoft involved claims of
21 misappropriation of derivative works. A derivative work is
22 a work that was licensed from one party to another party,
23 and then the other party made some improvements to it. In
24 copyright law that's a derivative work. And in the Sun
25 against Microsoft case, Sun licensed Microsoft its Java

1 technology, Microsoft made a bunch of changes to it, which
2 is derivative work, and then there was an argument about how
3 that should be used.

4 The reason this is an important case and an
5 interesting case is the Court goes right to the issue of --
6 that we are -- this particular case is in the intersection
7 between contract law and copyright law that is a frontier,
8 literally, of judicial interpretation. Even for the Ninth
9 Circuit in 1999, this was deemed a case of first impression
10 insofar as identifying the interrelationship between
11 contracts and copyrights. That -- and the language in this
12 case, for example, if I could turn the Court's attention to
13 page 5. It's not 5 in the case. It's five on the printed
14 page up in the upper right-hand corner. I simply would like
15 to read a little language to underscore the points just
16 made. In the bottom left-hand corner, the Ninth Circuit,
17 upon review of the issues, says, in affect, five lines up
18 from the bottom of the page, We agree with Microsoft that
19 the issue turns upon whether the terms Microsoft allegedly
20 breached were limitations on scope of the license, which
21 would mean there is copyright infringement by acting outside
22 the scope, or whether the terms were merely separate
23 contract covenants, which would make this a contract
24 dispute.

25 Now, the Court -- the Ninth Circuit goes on, and

1 I'll ask the Court to kindly turn to page 6, the following
2 page, for additional highlighting. The bottom right-hand
3 corner at the very -- at the top of the sentence, the Ninth
4 Circuit continues to explain, Whether this is a copyright or
5 a contract case turns on whether the compatibility
6 provisions help define the scope of the license.

7 And one last reference I would like the Court to
8 consider, and then I'll leave this case, is further on page
9 7, bottom left-hand corner, picking up in headnote no. 8,
10 The enforcement of a copyright license raises issues that
11 lie at the intersection of copyright and contract law, an
12 area of law that is not yet well developed. We must decide
13 an issue of first impression, whether -- and the Court goes
14 on to explain what the issue of first impression is.
15 Essentially, it has to do with licensing a derivative work,
16 whether it's a copyright or contract case and what are the
17 issues that flow therefrom.

18 Now, Your Honor, we would submit that if this was
19 a case of first impression for the Ninth Circuit, it
20 underscores -- this is an undeveloped area of law that turns
21 on issues of law and fact and they're intertwined. That's
22 getting us back to the Rule 33 question that we were making.

23 I would like to give the Court a little bit of the
24 background of the licensing relationship between our parties
25 that relates to the Sun against Microsoft case.

1 May I move to that or does the Court have any
2 particular questions?

3 THE COURT: Certainly. Go ahead.

4 MR. MCBRIDE: Thank you. May I put up a chart
5 here?

6 THE COURT: If you can find a place to put that
7 chart up, go for it.

8 MR. MCBRIDE: I'll tell you what I have.

9 MR. WILLEY: We have an easel right here if you
10 want, sir.

11 MR. MCBRIDE: Would you mind. . .

12 THE COURT: We are spacially challenged. We just
13 do the best we can. .

14 MR. MCBRIDE: Well, that's all right.

15 THE COURT: And, counsel, if you wish to move
16 around --

17 MR. MCBRIDE: Your Honor, I have a smaller,
18 obviously --

19 THE COURT: Nonetheless, feel free and you need
20 not ask permission to move, even up behind the bench area if
21 you wish to in order to be able to see.

22 MR. MCBRIDE: May I, Your Honor?

23 THE COURT: Yes. Certainly.

24 MR. MARRIOTT: Thank you, Your Honor.

25 MR. MCBRIDE: This case is an interesting and

1 important case because it involves, really, the genesis of
2 computer software for large corporations. You can judge
3 somewhat by the fact that we have a variety of people in the
4 audience here, none of whom, I believe, are affiliated with
5 either party, but are people who have general interest in
6 the area. And that really speaks to this issue, Your Honor.

7 In the beginning of the corporate software world,
8 there was AT&T. AT&T created Unix. Unix is the corporate
9 operating system of choice that all corporations use at the
10 Fortune 1000 level and significantly below that. It just
11 works better than Microsoft Windows when you have a large
12 distributed environment. So companies have used Unix for 20
13 years or more. AT&T made all this stuff.

14 Then AT&T wanted to create larger markets for it
15 and licensed Mr. Marriott's client, IBM, and a number of
16 other companies, Hewlett Packard and all those large
17 software vendors, allowing each company to create its own
18 derivative work based on top of Unix. And so, thus, we have
19 in the chart, Your Honor, in the upper left-hand side just a
20 really description that points out that IBM software product
21 that we're trying to get produced in this case and that is
22 at issue in this case is part stuff that came from AT&T and
23 part stuff that it made by itself. The derivative work is
24 stuff it made by itself.

25 Now, under the contract with IBM, and now SCO --

1 actually, we have two roles in this relationship, but in the
2 particular law I'm talking about now SCO's in the shoes of
3 AT&T. We have acquired all of AT&T's rights of license and
4 copyrights relating to Unix. And so we now have a situation
5 where the contract we have with International Business
6 Machines provides the following, in the scope clause, the
7 clause that the Court in Sun against Microsoft addresses,
8 the scope clause was really the clause that identifies what
9 you can use the software for. It is the heart of the
10 intended and allowed use for the software. The scope clause
11 of our license, that is to say AT&T -- SCO's license to IBM
12 says the following: You may use this software product. You
13 may modify it. You may create derivative works based
14 thereon provided that your derivative works are treated as
15 part of the original software product.

16 Now, Your Honor, that becomes a very interesting
17 question. Is that a contract interpretation that this Court
18 will ultimately have to make? Is it a copyright issue? But
19 the bottom line is this, IBM is obligated to maintain some
20 confidentiality under some law, copyright, contract and
21 trade secrets, with respect to not just the Unix that
22 licensed -- was licensed from AT&T but also the derivative
23 work that IBM created on top of that. IBM owns the
24 derivative work. We don't contend anything to the contrary.
25 But what we do contend is that we have a license agreement

1 that says even though you own your derivative work, you
2 don't own Unix, you don't own the stuff we licensed to you
3 and you can't use your stuff in ways that violate our
4 license scope. And our license scope says the following:
5 You have to use it for internal business purposes only. You
6 cannot use it for the benefit of others. You can't let
7 others use it for their benefit. You can use it for
8 yourself. You can make money on it. You can license it.
9 And that's what its intended use is, but the second you step
10 outside that license scope and you use this for other
11 people, you've violated the scope of this license. That's
12 what this case is rooted in, fundamentally. That's the
13 beginning point of this case, Your Honor.

14 Now, that leads us to a very interesting point.
15 Do we have again -- and I'll only do this once more and I
16 won't repeat it after that -- do we then have a contract
17 case? Do we have trade secrets? Do we have confidential
18 information which is neither a trade secret or a copyright?
19 And if so, what proportion do those fall out or shake out in
20 and how is the Court going to deal with that? Your Honor,
21 that is precisely the interrelated issue of law and fact
22 that ought to be addressed appropriately under Rule 33 and
23 should not -- should not be allowed -- this discovery needs
24 to be framed -- in the Court's wisdom and appropriate
25 oversight, this discovery needs to be framed in a way that

1 allows us to identify just first what is all this stuff that
2 IBM put into Linux? And I'll explain this in just a
3 minute. We will need to identify all the -- everything
4 that's at issue before we start giving it a legal label.
5 That's why this Rule 33 ruling that we are requesting is
6 appropriate in this case.

7 Now, we go to the question of, okay, IBM licensed
8 a software. What's this -- and agreed, you know, that they
9 would keep it confidential and they wouldn't use it for
10 other people and would only use it internally. What those
11 words mean, Mr. Marriott and I or other lawyers are going to
12 be arguing about ad nauseam. That should not be the inquiry
13 today. We know -- and the reason this case got launched in
14 the first place, we know IBM gave a lot of source code,
15 development methods and sequences of source code usage into
16 Linux. Linux is a free operating system that's distributed
17 free of charge and is literally undermining, totally, the
18 entire operating system environment for Unix users in the
19 corporate world of Fortune 1000 and thereabouts. And Linux,
20 as I'm sure the Court knows from general knowledge, is
21 developed under an open source model where many people
22 contribute, many people make wonderful improvements. And,
23 again, I'm willing to guess that a number of the people in
24 the audience are probably software developers who have a
25 very intense interest in this case being decided rightly,

1 because there are many people who like the Linux model, like
2 participating in a community and -- a development community,
3 and that's kind of a big issue that's underlying this case.

4 We don't have issue with the non-infringement part
5 of it. This particular case has to do with IBM's
6 infringement. IBM, by its own admission -- and what I would
7 like to do, if I may, Your Honor, just so you know I'm not
8 making this stuff up, or at least I am not making it up new,
9 because there are numerous references in the complaint that
10 I think are appropriate to just generally address.

11 I'm sorry. This is my copy. If you don't mind
12 I'll trade you.

13 THE COURT: Have you got two? Give them to me,
14 please.

15 MR. MCBRIDE: Yes, Your Honor.

16 Now, where we are so far, in at least my line of
17 reasoning, is I want to walk the Court through enough of our
18 complaint to help the Court understand that IBM clearly did
19 contribute a lot of the Unix-related information into
20 Linux. We just don't know what it is. And I would refer
21 the Court, to start with, to paragraph 51 -- no. I'm
22 sorry. We are going to back track to that -- paragraph,
23 please, 95. Actually it's 96. Now, the reason I'm using
24 this complaint is we've included in the complaint news
25 articles published about IBM's contributions into Linux and

1 quotes attributed to IBM about its involvement into Linux.
2 So we're not guessing here. We're not making this story up
3 that IBM has put a lot of Unix information into Linux. IBM
4 had told everybody they've done that.

5 THE COURT: But isn't SCO also saddled with, for
6 lack of a better term, having made public statements itself
7 concerning this case? I mean, it's not just IBM making
8 comments about the contributions to Linux.

9 MR. MCBRIDE: Right.

10 THE COURT: Isn't it also SCO making comments
11 about trade secrets and what it would show in court?

12 MR. MCBRIDE: There is -- yes. Certainly.

13 THE COURT: I guess, Mr. McBride, my only concern
14 about this is I acknowledge that this is here, but I want to
15 focus you back on to the question of whether or not motions
16 to compel should be granted.

17 MR. MCBRIDE: Well, if the Court wouldn't mind,
18 I'll try to hurry up my chain of reasoning here that I think
19 gets me to where I think the appropriate ruling is and I'll
20 try to do it more quickly. If I might, just very briefly,
21 in paragraph 96, there's a quote here attributed to an IBM
22 executive that for the purposes of this hearing certainly is
23 sufficient for discovery to go forward on the issue, that
24 IBM admits -- and I've grown a little older since I was last
25 looking at this and need my glasses.

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THE COURT: I understand.

MR. MCBRIDE: In the bold in paragraph 96, it simply says, While they admit Linux has a long way to go before it can compete with the functions available on many flavors of Unix --

(Whereupon, the reporter asked Mr. McBride to slow down.)

MR. MCBRIDE: I'm sorry. While they admit Unix still has a way to go before it can compete with the functions available on many flavors of Unix, IBM officials said Linux can prove more cost effective.

And the next paragraph says, We are happy and comfortable that Linux can become the successor, not just for AIX but for all Unix operating systems.

Now, there's only one last quote I would like to refer to and that's in paragraph 97, Your Honor. The quote was attributed to a senior executive vice-president, Mr. Steven Mills at IBM, who in the bold stated in January 2003, IBM will exploit its expertise in AIX to bring Linux up to par with Unix.

Then continuing in the bold only, Mills acknowledged Linux lags behind Unix in scalability, SMP support, failover capabilities and reliability but not for long. The pathway to get there is an eight-lane highway, Mills said, noting that IBM's deep experience with AIX and

1 its 250-member open source development team will be applied
2 to make the Linux kernel as strong as that of Unix. The
3 road to get there is well understood.

4 Now, SCO has made public statements about Unix and
5 I'm not suggesting we want a moratorium on all of these
6 interrogatories. And perhaps what I should do is address it
7 in much more specificity right now. The things that we have
8 said, or that our executives have said, or quotes attributed
9 to our executives, we have to live with just the way IBM
10 does, and we're happy and willing to do that. But I
11 believe, Your Honor, those issues are most appropriately
12 included in Interrogatories No. 12 and 13, and if I read
13 them correctly, where in Interrogatory 12 IBM requests all
14 of the contributions made by other people, not IBM, into
15 Linux. And in paragraph 13 -- in Interrogatory 13 IBM
16 requests -- and I'm sorry. I may not be saying it precisely
17 right. But IBM wants the universe of all contributions made
18 to Linux inappropriately that we allege and then wants us to
19 specify which of those are attributed to IBM, and I think
20 that's a fair characterization of Interrogatories 12 and 13.

21 And, Your Honor, if you want us to answer those,
22 Interrogatory No. 12, and that appears to be a fair thing to
23 do, we'll do that. We'll do that. It, to us, appears that
24 it's not part of this case, but if in fairness of putting
25 everything in front of this Court, we'll certainly do that.

1 I'm more focused on Interrogatories No. 1, 2 and 4
2 that IBM has submitted to us, because those go to the heart
3 of my arguments over here. We need, Your Honor, to have Mr.
4 Marriott produce all versions of AIX. We need them to
5 produce all the development notes of their developers from
6 AIX. Then we will have the capability of being able to
7 compare what IBM's contributions are lined up against our
8 codes, and then we'll make a very clear specification of
9 where the violations are, and then we'll end up at that
10 point arguing about what kind of violations they are. This
11 becomes really important because of, we're back to now legal
12 definitions, the Copyright Act allows companies or any
13 copyright holder to copyright expressions that are written
14 down on paper, expressions, including in the computer
15 software world sequences, structure and organization. The
16 Copyright Act does not allow anyone to copy a method or an
17 idea or a concept. That's specifically outside the realm of
18 copyright law.

19 Well, back to the beginning, Your Honor, AT&T
20 recognized this, and in the Unix agreement that was licensed
21 to everybody else, although IBM has its own deal a little
22 different, but Sequent has the standard agreement, IBM made
23 every company hold methods and concepts as confidential
24 information, recognizing that that was not protectable by
25 copyright law, but they wanted to make sure they had it in

1 the contract law. So what I'm saying, Your Honor, is if IBM
2 will produce and answer our discovery, staying the discovery
3 I think will do tremendous injustice. It really gives IBM
4 an advantage to strategically pursue motions that would be
5 dispositive without a full vetting of our ability to be able
6 to then explain to the Court what's what and why.

7 Now, Your Honor, let's take the area of
8 confidential information, and I'll explain to you why I
9 think that is the case.

10 THE COURT: Before we do that, Mr. McBride, you
11 know, tell me why the rulings in the cases of Utah Medical
12 Products, decided, you know, from this District Court and
13 the Leucadia versus Applied Extrusion Technologies case,
14 decided out of the District of Delaware, should not apply to
15 this circumstance which indicates that the burden is on the
16 plaintiff to prove the existence of the trade secrets
17 assuming that that's part of it, all right, and that it is
18 appropriate to postpone discovery in those circumstances
19 until such time as the plaintiffs have acknowledged what the
20 trade secrets may be, and otherwise this Court cannot
21 determine, as the other party cannot determine, what is
22 relevant as to future discovery.

23 MR. MCBRIDE: Thank you. Yes. I will, Your
24 Honor.

25 THE COURT: None of us know.

1 MR. MCBRIDE: Right. And future discovery is up
2 in the air because it's in one of the three categories. The
3 Medical Products case that Your Honor is referring to, in my
4 reference, was a summary judgment case, not at the beginning
5 of the case but at the end of the case. The Leucadia case
6 the Court is referencing, specifically I would call the
7 Court's attention to, says that trade secrets do not embody
8 a Rule 9 kind of specificity requirement. It is, in fact,
9 notice pleading required under trade secrets law. That's
10 what the Leucadia Court said. So I'm saying there's give
11 and take in both of those cases because neither of those
12 cases addresses our specific facts. The facts of our case
13 go deeper than both those cases, number one, and, number
14 two, both of those cases were decided at a different moment
15 in the case than ours. And what I believe is a very correct
16 statement, Your Honor, is we won't know what part is trade
17 secrets, what part is contract, what part is copyright until
18 we've seen all of IBM's contributions. And I can explain
19 why, unless you want to stop on that for a minute.

20 THE COURT: No. Go ahead.

21 MR. MCBRIDE: The reasons why, Your Honor,
22 remember the explanation I gave about IBM's preparation of
23 its derivative works. IBM owns those derivative works. We
24 don't dispute that. Not for a second. What we argue is
25 they can't give them away, the contract -- the terms of the

1 contract, and that's a decision that at some point summary
2 judgment will be brought on to interpret. No question about
3 it. And we are simply saying, Your Honor, because IBM only
4 was involved in preparing that derivative work and we
5 weren't, we don't know what they've prepared. And part of
6 what they've prepared is going to be confidential
7 information, mandated to be kept secret under the license
8 agreement and a breach of the scope clause, according to us,
9 but we don't know what they've done with the derivative work
10 so we can't point out what we don't know.

11 Now, I'll go to the trade secrets, but you can
12 talk if you have anything on that. I'll go to trade secrets
13 specifically because that's a different set of facts.

14 THE COURT: No. Go ahead.

15 MR. MCBRIDE: The cases the Court is referring to,
16 and the cases that IBM cite, aren't trade secret cases.
17 That is the thrust of that case. I'm saying our case is
18 more -- it's an infringement case that may be one of three
19 different. And by the way, Your Honor, I will proffer to
20 the Court that we are filing a second amended complaint that
21 has copyright infringement claims, and will be filed within
22 the coming few days or no less than a week. And we'll put
23 then fully in front of the Court the three buckets we have
24 outlined here, contract, trade secrets and copyright. But I
25 would like to the address trade secrets for a minute and

1 explain to you what is the genesis of our trade secrets
2 claim. And at that point, I think most of my argument is
3 going to come back to some sort of a summary.

4 THE COURT: Let's do that because we need to be
5 finished by --

6 MR. MCBRIDE: All right.

7 THE COURT: -- before 12.

8 MR. MCBRIDE: All right.

9 THE COURT: Giving all parties ample time to
10 argue.

11 MR. MCBRIDE: If -- I'm going to use just as an
12 aid, again, the complaint, because this helps set out the
13 issues. In paragraphs 50 -- starts at 51. Now, what I'm
14 about to refer to here really is only information addressing
15 the trade secret -- well, I guess that's not even true.
16 This addresses all the areas, but it really does go to the
17 heart of trade secrets, and, I believe, explains why the
18 Court should rule according to the way I'm requesting as
19 opposed to entering a motion that Mr. Marriott is
20 requesting. Paragraph 51 through paragraph 57 -- and I will
21 just generally characterize those for the Court. This
22 explains a background information that goes to the heart of
23 our trade secrets claim. And if we have not done a good job
24 of articulating that, then I guess shame on us and we better
25 do it better. But our trade secrets claim really is

1 embodied in and arises out of the joint development
2 agreement between our two companies that started in the 1997
3 time frame.

4 Now, Your Honor, IBM, as I mentioned, prepared its
5 derivative work of Unix that it calls AIX, but SCO also
6 prepared its own derivative work of Unix that it calls
7 Unixware. And so we have two distinct positions in this
8 case, number one, we're in the shoes of AT&T as the original
9 licensor, but, number two, we were a licensee of AT&T. We
10 prepared a version of Unix which was designed to run on
11 Intel-based machines, which is the kind of stuff that is in
12 pretty much all of our offices are Intel-based processors,
13 the cheap processors that make our computers much more
14 inexpensive to run. Intel processors are compared to what
15 are called RISC, R-I-S-C, processors, which are much more
16 expensive and those are the processors used by large
17 corporations and they pay a lot more money for them.

18 SCO, in the early days, carved out a little niche
19 in the Unix world that it would develop a version of Unix
20 only for Intel processors. Nobody else wanted that space
21 because Intel's processing power wasn't very good back
22 then. But Intel's processing power got better and better,
23 and lo and behold, in about 1995, SCO found itself in a
24 really great position. Intel was now being -- Intel chips
25 were now becoming powerful enough that corporations actually

1 wanted to use them for large functions. And here we were at
2 SCO, lo and behold, the only company that had an operating
3 system running on Intel. And so, Your Honor, the SCO
4 Company, as it delineated in paragraph 51, from and after
5 September 1995 spent a lot of money, for us. I've heard the
6 numbers 30 to 50 million, and I can't remember which, so I
7 better not represent too much. But for a small company,
8 this company spent a lot of money in making sure that its
9 version of Unix would run very, very well on Intel-based
10 machines. IBM had none of that information, none
11 whatsoever.

12 The other thing that our little company did was to
13 make our version, SCO's version, of Unix called Unixware,
14 run on 64-bit Intel processors. Now, the stuff we all use
15 right now is a 32-bit Intel processor, and that's really not
16 that complicated a thing. It's just that if you envision a
17 pipe that water flows through, or in the computer world bits
18 flow through, a bit that our computers all use -- or, excuse
19 me, the processor, the Intel processors, that our computers
20 all use, can process 32 bits of data at a time. And so it
21 stands to reason that if you have a 64-bit processor, you
22 just have twice as wide a pipe through which water can flow
23 and you can do stuff a lot faster.

24 Our little company in 1997 and 1998 had spent 18
25 months, as outlined in our allegations in the complaint,

1 developing the technology for 64-bit Unix processing on
2 Intel. IBM had none of that technology. IBM had no ability
3 to convert anything from its operating system onto an
4 Intel-based machine. They had no available technology.
5 They couldn't do it. And yet Intel processors were becoming
6 the thing every company wanted to run their systems on. So
7 IBM was being left out in the cold without an operating
8 system that they could sell.

9 Well, in traditional IBM fashion, they came to us
10 and asked us to partner, because that's what they do with
11 companies, they partner and that makes a lot of sense. But
12 in the process of this partnership, things went awry. We
13 gave IBM all of our knowledge that we had spent 16 months
14 developing about how to run Unix on Intel processors. We
15 had that. That's trade secret stuff. IBM didn't have any
16 of that. We gave it all to them in the joint development
17 project. And at the same time, IBM is developing Linux
18 without telling us. So we sail along. We give them all
19 this trade secret information. This is the core of our
20 trade secrets case, the joint development agreement between
21 the companies that started in the 1997 time frame called
22 Project Monterey. We gave them more knowledge than they had
23 as a company about how to run Unix on Intel processors.
24 They needed that. They took that from us. They then went
25 and said, Thank you very much. We decided not to do the

1 joint development project. Have a nice life. Took all of
2 our technology and gave it to Linux. IBM now is marketing
3 this great new Linux product, that 64-bit Linux, and it's
4 the greatest thing ever. They got that from us. That's a
5 heart -- that's at the heart of our trade secrets
6 violation. That's in the complaint and, again, we're back
7 to the problem that, technically, we've already produced it,
8 Your Honor, because we gave them the source code of Unixwork
9 so it's in there.

10 THE COURT: Didn't you give it to them in hundreds
11 of thousands of pieces of paper, though, without
12 specifically identifying it?

13 MR. MCBRIDE: I'm quite certain we fixed all
14 that. If we haven't, we'll do it in sooner than 30 days.
15 And, Mr. Marriott, do you know? Have we not given that to
16 you in machine readable format?

17 MR. MARRIOTT: I'm not sure that was Your Honor's
18 question. The question, Your Honor, is has the SCO Group
19 identified the specific trade secrets they say we've stolen
20 and dumped into the open source? The answer is absolutely
21 not and I'll address that when I have the opportunity.

22 MR. MCBRIDE: That is correct. We haven't
23 specific -- I admit that. There's no question we haven't
24 done that. And I'll tell you why and then I'll sit down and
25 let Mr. Marriott have his say.

1 We're saying this is sufficient for the Court to
2 assume or view that trade secrets are involved in this case.
3 But the trade secrets are so interrelated with the other
4 code you can't separate out one. You can't do it. You have
5 to have the discovery of the universe, then we can argue
6 about where the code falls in what bucket. That's the way
7 to proceed in this case, we believe, Your Honor, and that's
8 why a ruling under -- and I'll finish this by reading it and
9 then I'll sit down. What we are asking the Court to do is
10 under Rule 33(b) -- I'm sorry. It's at the end of Rule
11 32(c), it simply says, An interrogatory that relates to
12 facts or applications of law or fact, the Court may order
13 that such an interrogatory need not be answered until after
14 designation of discovery has been completed or until
15 pretrial conference. The reason for this ruling is really
16 explained in the -- or this rule is explained in the
17 advisory committee notes on the following page, that since
18 -- it says very practically, Since interrogatories
19 involving mixed questions of law and fact may create
20 disputes between the parties which are best resolved after
21 much or all of the other discovery has been completed, the
22 Court is expressly authorized to defer an answer. We're
23 asking the Court to defer an answer until we have had enough
24 discovery to be able to say what is what in the trade
25 secret, confidential information, copyright arena and then

1 we'll fully answer and live with whatever the answer is.
2 And that relates to, really, Interrogatories 1, 2 and 4.
3 Interrogatories 12 and 13, Your Honor, we'll answer those as
4 best as we can, if that's what the Court wants us to do.

5 THE COURT: Thank you, Mr. McBride.

6 MR. MCBRIDE: Thank you, Your Honor.

7 Excuse me, Dave, you don't need this, do you?

8 MR. MARRIOTT: No. It's all yours.

9 Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. MARRIOTT: We appreciate the direction that
12 Your Honor has given us, and let me, if I may, in the few
13 moments that I have do three things. First, Your Honor, let
14 me say just a little bit, because I think it's helpful to
15 the Court and important to the issues, about operating
16 systems and source codes. Those are sort of fundamental to
17 what we're talking about on these motions. Second, let me
18 tell you what is at issue and that I think what you have
19 tentatively ruled is exactly the right ruling. And, three,
20 let me describe for you just briefly some of the
21 shortcomings of the responses we have received from the SCO
22 Group. I won't take you through all the detail but I would
23 like to describe at least some of them.

24 If I may approach, Your Honor, we have a couple of
25 exhibits, like the SCO Group, that I think may facilitate

1 the discussion.

2 THE COURT: Thank you.

3 MR. MARRIOTT: All right. So, first, Your Honor,
4 by way of a little background, it is important, I think, to
5 understand the issues presented here to understand a little
6 bit about operating systems. And if you'll take a look at
7 page 1 of our book, you'll see a little table which
8 undertakes to describe that. Without its software, Your
9 Honor, a computer is essentially a useless lump of metal.
10 With its software, however, an operating system can do a lot
11 of important things.

12 There are basically two types of programs. There
13 are systems programs and there are application programs.
14 The most important of the systems programs is the operating
15 system. And it's the program which controls the functioning
16 and the operation of the hardware itself. It controls the
17 resources of the machine, and it is the base on which the
18 applications sit. So when Your Honor sits down at her desk
19 and when you write a letter, you communicate with the
20 hardware via the operating system. You might use a program
21 like Microsoft Word or Word Perfect to write the letter.
22 Those are applications which sit on top of the operating
23 system.

24 Computer programs, Your Honor, and operating
25 systems are written in a language called source code.

1 Source code is a set of statements with comments that
2 represent the instructions that are ultimately translated by
3 a device called the compiler into ones and zeroes that the
4 computer executes. And if you take a look at pages 2
5 through 9 in this book, what you'll see, Your Honor, is a
6 sample of source code. In fact, this is source code from a
7 particular file in the 2.5.69 version of the Linux operating
8 system. What you'll see in red are the comments,
9 programmer's notes, and what you'll see in black are the set
10 of programming statements which are actually ultimately
11 translated into ones and zeroes that can be executed by the
12 machine. Essentially, Your Honor, the programmer writes the
13 language and saves it to a file. The file is like the
14 chapter in a much larger book of source code. This is one
15 little chapter in a much larger book of source code.

16 Unix is a family of operating systems. It was
17 developed originally by AT&T. Linux also is an operating
18 system. Linux was pioneered in 1991 by an undergraduate
19 student at the University of Helsinki by the name of Linus
20 Torvalds. He posted a note on the internet saying, I'm
21 writing an operating system, and solicited help. What has
22 followed, Your Honor, is a massive collaborative exercise by
23 which thousands of developers worldwide have written this
24 operating system. And if you take a look at page 10 of the
25 exhibits, Your Honor, you'll see a brief diagram which

1 describes the process by which the Linux operating system is
2 developed. Developers worldwide make contributions. They
3 make the contributions to expert developers known as
4 subsystem maintainers. Those individuals review -- subject
5 the code to a massive process of peer review. Thousands of
6 developers have input, and when the subsystem maintainers
7 are satisfied that the code is in an acceptable form, it's
8 passed up the hierarchy to Mr. Torvalds himself and another
9 developer by the name of Andrew Morton. Those individuals
10 then make judgments about what should be in the production
11 version of Linux and what should be in the development
12 version of Linux and eventually it gets to the market place.

13 What Your Honor needs to understand here is that
14 whereas many operating systems are developed behind closed
15 doors and the source code is secret, with respect to the
16 Linux source code, it has been developed publicly. It is,
17 essentially, Your Honor, developed on the internet. Your
18 Honor can log on to any number of web-sites at which you
19 will see the Linux operating system being written before
20 you. We have included, as the next exhibit in the book,
21 Your Honor, at page 11, an e-mail that was sent from a
22 developer of the SCO Group to the mailing list by which
23 contributions are made to Linux. This is the way the
24 operating system is built. Individuals make -- write
25 codes. They suggest it for inclusion in the Linux operating

1 system. It's passed through a rigorous process of peer
2 review, all public, Your Honor. And as a result of this
3 process, if the contribution is deemed acceptable, it's
4 included into the operating system right before everyone's
5 eyes.

6 What you ought to know here as well, Your Honor,
7 is that the plaintiff here began in 1994 as a Linux
8 distributor and has, over the course of the approximately
9 last 10 years, distributed thousands of Linux products.
10 Now, having said that, let me tell you the second thing I
11 want to make sure you understand, which is what really, I
12 think, is at issue in this case. The crux of SCO's case,
13 Your Honor, is set up at paragraph 101 of their complaint.
14 And we've replicated it here in the book. What they say at
15 paragraph 101 is the following: They say IBM is
16 affirmatively taking steps to destroy all value of Unix by
17 improperly extracting and using the confidential and
18 proprietary information it acquired from Unix and dumping
19 that information into the open source community. That is
20 the case in its essence, Your Honor. They say we took
21 something out of a Unix book over here, a secret Unix book,
22 and we dumped it over here into the Linux public book.

23 And if I may, Your Honor, approach, what I'm
24 handing you is a collection of source code.

25 MR. MCBRIDE: Is this AIX you're finally producing

1 us?

2 MR. MARRIOTT: Let me tell you what you have here,
3 Your Honor. You have two books. The little book, which is
4 highly confidential under the terms of the protective order
5 in the case, is Unix source code. This is the -- this is an
6 example of the secret book that we are alleged to have taken
7 parts of and dumped into the open source community. The
8 other file that you have, the larger book, is a single file,
9 a single file of thousands of Unix source code. What we're
10 said to have done is to have taken something out of this
11 little skinny book and dumped it into this book right here.
12 That's the essence of this case.

13 Now, we asked the SCO Group in discovery, Your
14 Honor, to tell us very simply what it was, specifically,
15 that we took out of this book and that we dumped into this
16 book. We asked them the basics of their case. We asked
17 them for the evidence that they have that we've done what
18 they allege in their complaint that we've done. Now, SCO
19 objected to the requests. They said that we didn't need to
20 know what they took from here and what we put into here
21 because we did it, after all, we should know. That's the
22 first objection. Then they say to us, You don't need to
23 know, IBM, because we are going to produce to you millions
24 of pages of paper and you can figure out for yourself where
25 in those millions of pages of paper what it is you

1 supposedly took from here and supposedly put into here is
2 found. They tell us that we took methods, Your Honor. They
3 tell us that we took trade secrets from here, but they won't
4 tell us precisely where they are. We get that response
5 despite the fact that in order to file its complaint they
6 had to have the evidence they allege to have. We get that
7 response despite the fact that the case law is abundantly
8 clear that the order of things is that a plaintiff first
9 tell the defendant what the trade secret at issue is, and
10 then the defendant provides the discovery.

11 If Your Honor takes a look at page 13 of the book,
12 we summarize here the upshot, essentially, of the case law
13 and the rules, which is that you may not dump on a party
14 undifferentiated documents and expect them to find from
15 those documents the answers. And at paragraph -- at page 14
16 you see some of the cases, Your Honor, which address the
17 question of what the proper order of proceedings is here.
18 In the Porous case, Your Honor, for example, which case
19 concerned canisters, the Court there granted a motion to
20 compel specificity in answers. The Court said that failure
21 to identify trade secrets with sufficient specificity
22 renders the Court -- and that was what the Court was
23 referring to earlier -- powerless to enforce any trade
24 secret claim. The same is true in the Lynchval case, and
25 the same is true in the Xerox case. The Court in the Xerox

1 case, Your Honor, said the defendant is entitled to know the
2 basis for the plaintiff's charges against it. The burden's
3 on the plaintiff to specify the charges. It's not on the
4 defendant to guess what they are.

5 Now, we move to compel, Your Honor, after trying
6 unsuccessfully for four months to get answers to our
7 questions. Following our motion, we received supplemental
8 responses. Those supplemental responses respectfully give
9 the impression of compliance. They are in no way compliant
10 with what it is we requested. I am going to lay that out
11 for Your Honor here momentarily. Basically what SCO says,
12 Your Honor, is that in this giant haystack of code over
13 here, there are some trade secrets which we took and we
14 dumped over here, but they won't tell us where in this
15 haystack it is, and they won't show us where in this
16 haystack that it's found.

17 If you take a look, Your Honor, at page 15 of the
18 book, now, what you need to know is a little bit about the
19 size of the haystack and how small the needles are. And at
20 the risk of mixing my metaphors, let me go back to the book
21 metaphor. In this Unix book, Your Honor, this is actually
22 not the Unix book. This is just a chapter in the book.
23 Unix System 5, which is the set of code which they say is at
24 issue in this case, consists of multiple releases and
25 multiple sub-release. Release 4.2, release 3.2, release

1 4.0, those books of codes are immense. Each of those books,
2 Your Honor, consists of many chapters. It's not just one
3 chapter here we're talking about. Unix 4.0, for example,
4 has 14,548 chapters. This is a chapter. This isn't the
5 book. 14,548 chapters, files in these releases. Within,
6 Your Honor, the files in a given release, there are millions
7 of lines of source code. If you look here, Your Honor, you
8 will see a number on the left margin of the code. In this
9 particular file, there are 11,891 lines of code, in one of
10 the files, in one of the chapters of which there are 14,548
11 in just one release, just one release of Unix.

12 The same, Your Honor, is true with respect to
13 Linux, and, indeed, there are actually many more books of
14 Linux than there are books of Unix. Linux has multiple
15 versions. There is version 2.5, there's version 2.4.
16 Within each of those versions there are multiple releases.
17 Versus 2.5, for example, has 76 different releases, from
18 2.5.0 to 2.5.75. In other words, the book is enormous.
19 Within those books, Your Honor, in Linux, just as in Unix,
20 there are multiple chapters. Each release includes a large
21 number of files. If you look only at 2.5.69, Your Honor,
22 there are 14,086 files. This is one of the files. This is
23 one chapter in this immense Linux book which has been
24 written effectively over the internet into which we're
25 supposed to have dumped code that they won't identify for

1 us. In these files, Your Honor, collectively, there are
2 millions and millions and millions of lines of code. This
3 is one chapter in the book. In this chapter, Your Honor,
4 there are 31,597 lines of code. Where is the secret? Is it
5 line 17,656? What is it about it that's secret? That's
6 what our discovery requests, Your Honor, are all about.

7 Now, what makes SCO's responses here -- let me say
8 this, what do we have from SCO by way of responses? We
9 asked them to tell us where over here, Your Honor, lies the
10 material that we put into Linux. There are many books, all
11 right. They have identified for us not a single Unix book,
12 not a single book. There are thousands of chapters of Unix
13 from which we're supposed to have taken things. They
14 haven't identified for us a single Unix chapter, not a
15 single one. There are millions of lines of code. We've
16 asked for them. They haven't identified a single Unix code
17 -- piece of code that we're supposed to have taken from
18 here and put over here. With respect to Linux, they have
19 not told us in which -- from which -- into which Linux book
20 we are supposed to have taken this Unix material and placed
21 their secrets. We don't know what book it is though there
22 are hundreds of books at issue.

23 As to the chapters, they told us, finally, Your
24 Honor, in their supplemental responses that there are 591
25 Linux files, Linux chapters, into which we can find some

1 secret, which they won't identify, which comes from over
2 here, which secret they've took and they put over here in
3 591 files. Now, 591 files, the 591 they've identified, Your
4 Honor, aren't associated with any book, so we don't know
5 into which of the more than a hundred books or potential at
6 issue those 591 files reside. And even if we did, even if
7 we knew that it was 2.5.69, Your Honor, even if we knew
8 that, there are 335,000 lines of code in the files they've
9 identified. They haven't identified for us a single line of
10 code. Worse still, Your Honor, what they say in their
11 supplemental responses is, We may or may not have trade
12 secrets in those files. Figure it out for yourself. If you
13 read their supplemental responses carefully, they don't say,
14 These are our trade secrets and I swear under oath that
15 those are trade secrets. What they say is, They might be in
16 there. We'll let you know later whether they are or whether
17 they aren't in there. That is not, Your Honor, I submit,
18 what it is the rules here require of a plaintiff in a case
19 of this kind.

20 Now, what makes SCO's approach to discovery here
21 particularly troubling is that from the beginning of the
22 case they have touted far and wide their evidence against
23 IBM, the strength of their case. And I refer the Court,
24 just by way of example, to pages 16 and 17. The additional
25 book I've just given Your Honor is back up for these

1 statements and for more statements. Let me just focus you
2 on the four that are included here in this exhibit. The CEO
3 of the SCO Group, Mr. McBride's brother, who's in the
4 courtroom today, has said, Your Honor, far and wide, there
5 is line by line code in Linux that is matching up to our
6 Unixware code. In other words, We got you. We found the
7 code in here. It matches up to the code in here, but we're
8 not going to tell you what it is. He says, We feel very
9 good about the evidence that's going to show up in court.
10 We'll be happy to show the evidence at the appropriate time.
11 The appropriate time, Your Honor, was four months ago when
12 they received our responses which were submitted to them in
13 June. It's now been five months.

14 If you look at the next bullet point, IBM has
15 donated some of their high-end technologies into open
16 source. We have examples of code being lifted verbatim.
17 Not just a line or two, it's an entire section and in some
18 cases an entire program. Where is the code, Your Honor? We
19 haven't seen it. It's not in their discovery responses.

20 The next bullet, Portions of derivative works of
21 Unix System 5 code are found in Linux. We have begun the
22 process of showing parts of the violating code to
23 appropriate parties under nondisclosure agreements. That's
24 June 6th. That's before we served our discovery responses.
25 We haven't seen that code, Your Honor. We shouldn't have to

1 have a non -- we have a protective order in this case. We
2 ought to be able to have at least access to what it is
3 everybody else is supposedly seeing.

4 If you look at the last bullet point, Your Honor,
5 The month of June is show and tell time. We're not going to
6 show just two lines of code. We're going to show hundreds
7 of lines of code and that's just the tip of the iceberg.

8 Take a look, if you would, please, Your Honor,
9 back at page 14 of our book, alleged misappropriated trade
10 secrets or confidential information must, under the case
11 law, be specified. The Lynchval case concerned computer
12 programs. The Court there affirmed a decision of the
13 magistrate judge to strike an expert report because the
14 plaintiff in the case had failed to adequately disclose the
15 trade secrets. The trade secrets there are disclosed with
16 more particularity than are the trade secrets here. The
17 plaintiff in that case said to the defendant, There are four
18 documents. In those four documents there are 40 functions
19 of the computer. Nineteen of those 40 are ours. Figure it
20 out yourself. The Court in this case said that's
21 unacceptable. By comparison here, Your Honor, we've been
22 given haystacks of millions of lines of code and been told
23 to figure it out for ourselves. We know, after all, they
24 say, we're the bad guy. We supposedly dumped their Unix
25 property into Linux. But they won't tell us what it is.

1 Notably, Your Honor, notwithstanding the case
2 cited by Mr. McBride, the SCO Group has not cited a single
3 case to contradict these cases. The case to which Mr.
4 McBride refers from the Ninth Circuit does not contradict
5 these principals. Indeed, it's a copyright case, which at
6 present at least is entirely irrelevant to the SCO Group's
7 claims against IBM that they've asserted no copyright claim,
8 and even when they do, as they're now apparently going to
9 do, the copyright law has absolutely no bearing, Your Honor,
10 on whether or not they are required to tell us what the
11 supposed trade secret here is.

12 Now, why does this matter so much to IBM? Putting
13 aside the fact that we need to know what it is that we
14 supposedly did so that we can defend ourselves, the SCO
15 Group's activities are not limited, Your Honor, to telling
16 the world how great their case is. They are threatening
17 Linux users with lawsuits. It's like they're standing
18 outside the Barnes and Noble, Your Honor, and a customer
19 walks out having purchased a new Linux book, and the SCO
20 Group says, Wait a minute. Stop right there. That Linux
21 book includes our Unix property. You pay us or we're going
22 to sue you, and if you have a problem with it, go talk to
23 IBM. They know what they did. They took the secrets out of
24 Unix and they stuck them into Linux. Take it up with them.
25 We showed them what the evidence is.

1 Your Honor, they haven't showed us what the
2 evidence is. That's what these motions are about. Your
3 tentative ruling, I think, is right on the mark and we would
4 urge you to endorse it as your final ruling.

5 I don't contemplate, Your Honor, walking through
6 the shortcomings of each of SCO's requests. I think they're
7 laid out adequately in our briefs. Let me say simply this,
8 according to SCO's CEO, in a November 12th television
9 interview with KSL, This is, he says, the biggest issue in
10 the computer industry in decades. The balance of the
11 software industry is hanging on this. This, Your Honor, is,
12 as you can read for yourself, one of many statements made by
13 this company about its great evidence against IBM, and yet
14 it refuses to give us the evidence on which it's based its
15 present business model. Some of the responses give the
16 impression of providing specificity. In fact, they don't
17 provide any. The rules don't permit this approach to
18 discovery, Your Honor, and it is particularly troubling to
19 us, since SCO's CEO has publicly stated that he's glad to
20 see the case drag on since, in his view, delay merely
21 increases the SCO Group's damages against IBM.

22 It is undisputed that we're entitled to the
23 information that we've requested here. SCO hasn't even
24 argued otherwise, Your Honor. The only question on these
25 motions is whether they've given us what we've asked for,

1 and the answer to that is they have not. And I would
2 submit, Your Honor, that no reasonable person could
3 conclude, in view of our requests and their responses, that
4 they've given us what we've asked for. We think their
5 allegations are meritless. We don't believe they had any
6 evidence at the time they filed this case, and we don't
7 think they have any evidence now. And we submit we're
8 entitled to hear from them what it is they think they have
9 that IBM has done. If they're not required, Your Honor, now
10 to provide the answers to these questions, then we're going
11 to be in the dark as to what the case is about, we're not
12 going to be in a position to defend ourselves and we're not
13 going to advance this case to a just and a prompt
14 resolution.

15 THE COURT: I understand your position.

16 MR. MARRIOTT: Thank you, Your Honor.

17 THE COURT: Thank you for you comments.

18 Mr. McBride, I'll give you 10 minutes.

19 MR. MCBRIDE: Thank you, Your Honor.

20 I think my rebuttal is going to be a best effort
21 in open court to answer the questions posed by Mr. Marriott
22 at the broad level, and I believe that if I do this at the
23 broad level, I think that the requests that we are seeking
24 of fact and the methods that we are seeking is going to come
25 clear and that that should be the basis for the Court's

1 ruling.

2 There is no trade secret in Unix system files.
3 That is on the record. No problem with that. There are
4 trade secrets from Unixware, which is SCO's version of Unix
5 that was given to IBM in the joint development project.
6 Now, this may not be as much detail as we all need to get
7 into, but I'll clearly say that System 5 is in the book that
8 Mr. Marriott referred to and properly so. There's nothing
9 secret in there. There may be copyrighted code in there and
10 we assert that there is, but that's not trade secret. Their
11 trade secrets are in Unixware that emanate from the joint
12 development project. And as we move forward in discovery,
13 we should focus our efforts on the trade secret claims
14 relating to that joint activity between our companies that
15 started in 1997 and ended abruptly in 2000.

16 Now, confidential information, Your Honor, is a
17 very different animal. Confidential information is not
18 treated as a trade secret, necessarily, under the law. We
19 have a unique case here. The confidential information we're
20 talking about is stuff that Mr. Marriott's client created
21 but we didn't ever get to see.

22 THE COURT: The protective order addresses that.
23 There's a protective order in place.

24 MR. MCBRIDE: No, Your Honor, excuse me. The
25 confidential information is in the derivative works prepared

1 by Mr. Marriott's client that we hope to receive under the
2 -- under the -- our discovery requests but we haven't seen
3 one word of yet. We hope to see that. And once we see AIX
4 and all versions of it, then we will be in a position to be
5 able to say, Huh, you know what? This stuff you did in
6 derivative works, you own it, but you contributed to Linux
7 improperly, and, therefore, we have a claim in state law
8 contract for breach of confidential information, which is
9 completely separate from trade secrets. So it's just really
10 important that we get a scalpel here and understand what we
11 are looking for. Trade secrets, nothing in Unix System 5
12 that exists in Unixware with respect to the joint
13 development project. Confidential information emanates from
14 IBM's own development of AIX that we never got to see, but
15 we, nevertheless, have the contractual right to control the
16 use of in very limited instances, which is involved in this
17 particular case. So, hopefully that clarifies, and maybe
18 even for Mr. Marriott's arguments, if we haven't done a good
19 job of putting that information to him.

20 Now, if -- we're spending a few more minutes on
21 public statements made by our executives. And, Your Honor,
22 there are other companies that have contributed code to
23 Linux, the biggest one of which is Silicon Graphics.
24 Silicon Graphics Company has taken direct lines of Unix
25 System 5 code, not a derivative work code, Unix System 5 and

1 distributed it to Linux. I'll represent to the Court in
2 just broad terms that SGI has, at some level, acknowledged
3 that occurred. I won't characterize SGI's own writing, but,
4 in fact, wrote an open letter acknowledging, at some level,
5 that that occurred.

6 The evidence that our executives have talked about
7 in the public has had to do with Unix System 5 code
8 contributed by Silicon Graphics. Has nothing to do with
9 IBM. Now, the evidence against IBM that our executives have
10 talked about, Your Honor, that we know IBM has contributed
11 into Linux, specifically, and we've talked about this,
12 relate to the code that came from Dynix, that is the NUMA
13 code and the RCU code. IBM advertises the fact that they
14 contributed this. We have produced those files in discovery
15 saying, We think you contributed. We know you contributed
16 NUMA and RCU. We think it's a violation. Now, whether it
17 is a violation or not is not of moment in this particular
18 hearing. That's something that we will argue about at a
19 different day and a different time. But, Your Honor, just
20 at least in support of the statements made by our
21 executives, that's what they have talked about is that IBM
22 has taken the Dynix code and wholesale contributed very
23 important parts of it relating to multiprocessor code, and
24 IBM has taken the methods learned and really improved the
25 multiprocessing capabilities of Linux in a way that violates

1 either the confidential information or some copyrighted
2 code. That's what we've been saying all along, and that's
3 consistent with what we continue to say.

4 So, I don't know if my 10 minutes are up, but
5 here's what I think, Your Honor, is the appropriate order
6 that we would request is entered, that we, in fact, take a
7 scalpel out, and we -- and, Your Honor, just for fun here, I
8 brought the last CD's produced by both sides in this
9 particular case of information. Ours is numbered 126 and
10 theirs is numbered 21. This morning we actually received 22
11 and 23, as I understand it. Which is simply to say we've
12 produced a hundred more CD's of documents than they have.
13 What we want and what we need is all versions of AIX, all
14 versions of Dynix. We have repeatedly asked for it since
15 June. We have not seen one line of any of that until,
16 apparently, this morning two CD's of a version of Dynix were
17 produced. So the appropriate order, Your Honor, is simply
18 this, that first of all, IBM produces all of the Dynix and
19 AIX, and we then compare it with our Unixware code to be
20 able to draw more concrete allegations, more concrete
21 answers to the interrogatories, and that once IBM has
22 produced its code so we can compare it, and we have 30 days
23 to do that, we'll take another crack at answering the
24 interrogatories in another fashion. But we just think
25 that's the fair way of doing this, and, Your Honor, to stop

1 discovery would be absolutely unjust in this case because
2 then, again, remember, the derivative works, we never saw
3 them in the first case. We're not saying they're trade
4 secret. We're saying IBM had a contractual obligation to
5 not disclose those, so it would tie our hands, absolutely
6 improperly, and give IBM strategic advantages that would be
7 not right in this case, as far as how discovery should
8 proceed. So that's our request in terms of how this ought
9 to be handled, Your Honor.

10 THE COURT: Thank you, Mr. McBride.

11 Mr. Marriott, anything in brief response?

12 MR. MARRIOTT: Sure, Your Honor.

13 Unless the Court wishes, I won't respond in full
14 to SCO's motion to compel IBM except, Your Honor, to say
15 this, IBM has produced what amounts to the equivalent of
16 more than a million pages of paper. We have not refused to
17 provide discovery. We have said the discovery must be
18 tailored to the allegations in the complaint. We've
19 provided the discovery that we think can fairly be provided
20 in view of their allegations. We have provided Dynix code
21 as of last night. We would have provided it earlier, Your
22 Honor, but for the third party notice process that's
23 required. We intend to provide AIX code to them. We intend
24 to provide the code when the process of third party
25 notification is complete.

1 What we don't intend to do, unless this Court
2 makes us do it, is to produce every conceivable iteration
3 and version of AIX and Dynix. As we lay out in our papers,
4 that amounts to somewhere in the order of 40 million pages
5 of paper. There's no cause for that. It bears no relevance
6 to the case as we presently know it. And we would
7 respectfully ask that the Court adhere to its tentative
8 rulings, grant IBM's motions in their entirety and either
9 deny or hold in abeyance the SCO motion.

10 Thank you, Your Honor.

11 MR. MCBRIDE: One very brief sur-reply, Your
12 Honor? We want the 40 million pages. We'll digest it.

13 THE COURT: Are you yourself going to review them
14 by Sunday, Mr. McBride?

15 MR. MCBRIDE: Your Honor, if we have it in
16 computer readable form, our experts can analyze it. Unless
17 we have it from IBM, we can never know the ways they've
18 improperly taken their derivative work code and made Unix
19 better in violation of our contract. That would be an
20 injustice, Your Honor.

21 MR. MARRIOTT: May I just --

22 THE COURT: Last word.

23 MR. MARRIOTT: -- respond briefly to that one,
24 Your Honor? If you take a look at the little book that we
25 provided Your Honor of the Linux development process, what

1 makes this -- independent of the fact that there are no case
2 -- there is no case law authority for what Mr. McBride
3 suggests, independent of that, if you take a look, Your
4 Honor, at the chart, you will see that the Linux development
5 process is an open process. That's what makes Linux great.
6 It Mr. McBride and any of the SCO executives want to know
7 what anybody's contributed to the Linux operating system,
8 they can find it out for themselves by getting on the
9 internet at any one of the number of sites that exist there
10 and doing a search for IBM.

11 Thank you, Your Honor.

12 THE COURT: Counsel, I am ready to rule in this
13 matter. I think it is essential to get the ball rolling in
14 this circumstance, and I'm convinced that my initial
15 intended order is appropriate in this case. And I say that,
16 acknowledging, Mr. McBride, that at the conclusion of what
17 will be required of SCO, then we will visit your issues to
18 determine the breadth and specificity that will be allowed
19 you. We're going to do this both ways.

20 At this time, however, I will grant defendant
21 IBM's motion to compel answers to both sets of
22 interrogatories, and that would include, I think, 12 and 13,
23 if those are the ones that are questionable. SCO is to file
24 its responses within 30 days of the entry of this order, and
25 if, for some reason, it is in good faith unable to obtain a

1 particular portion of that, then it must file the
2 appropriate affidavits indicating why it cannot. It is to
3 respond -- it should file its discovery and respond in order
4 to comport with the -- or correct the deficiencies that are
5 set forth in the defendant's addendum that's filed November
6 the 4th.

7 Mr. Marriott, I would ask you, if you are able to
8 at this time, to identify those particular documents which
9 you are requesting. Are you able to do that?

10 MR. MARRIOTT: I can begin that, sure, Your Honor.

11 THE COURT: All right, let me just indicate
12 further that those responses are to identify, with
13 specificity, the source codes that you are claiming form the
14 basis for your action.

15 Now, with regard to the documents.

16 MR. MARRIOTT: Your Honor, I'm happy to, by way of
17 supplement, to provide a full list. We have a number of
18 document requests, somewhere in the order of 50. Of course,
19 we want answers to all of those. The principal problem here
20 has not been that SCO has objected to providing them. It's
21 said that it would provide them, but it simply hasn't done
22 it. We think that the process is being gamed in the sense
23 that we're told, Well, we're in a rolling production.
24 You'll get them eventually. We know there are important
25 documents that are missing, and let me try to itemize them

1 for the Court, if I may, some of those.

2 MR. MCBRIDE: Do you have a list?

3 THE COURT: I don't want to take -- perhaps if
4 they're in written form, you can provide that to Mr. McBride
5 and --

6 MR. MARRIOTT: I'm happy to do that, Your Honor.

7 THE COURT: -- the same requirement will be
8 enforced. In the meantime, all other discovery is
9 postponed. And the -- you -- both parties will be expected
10 to abide by the protective order that is currently in place.
11 I will set this matter for a hearing.

12 Mr. Marriott, I would ask that you prepare the
13 order in this matter and submit it to me no later than
14 Wednesday of next week. Assuming that it is an appropriate
15 order, then your 30 days would begin to run, Mr. McBride,
16 from that period of time. We will set a hearing, then, for
17 approximately two weeks thereafter, so we are talking about
18 the middle of January, all right. Does anybody have a
19 period of time, let's say, in the week of January 12th when
20 you could not be present for a morning hearing?

21 MR. MARRIOTT: No, Your Honor.

22 THE COURT: All right. Does that give you
23 sufficient time? I am holding you to the 30 days, but if we
24 get this order signed by Wednesday of next week, let's make
25 it even the fourth week of January, which is after the

1 19th. Why don't we do it Friday, then, the 23rd at 10
2 o'clock, again, and then we will address the remaining
3 motions of SCO, all right.

4 MR. MCBRIDE: So Your Honor is not ruling on our
5 motions at this point in time; is that correct?

6 THE COURT: No. I'm not ruling on your motions,
7 and that is inherent in my order that further discovery be
8 postponed.

9 MR. MCBRIDE: Very good, Your Honor.

10 THE COURT: We'll address them then.

11 MR. MCBRIDE: So and we'll, in this next -- the
12 January hearing then we will address the -- our pending
13 motions as well?

14 THE COURT: Yes.

15 MR. MCBRIDE: Thank you, Your Honor.

16 THE COURT: All right. That's with the assumption
17 that the discovery that SCO is to complete has been
18 completed, all right, and with the required specificity. So
19 what my intention is, then, is to then address the motions
20 of SCO.

21 MR. MCBRIDE: Just -- I'm just thinking
22 procedurally whether we will have time to actually brief and
23 agree upon whether we -- the specificity is required in
24 advance of the hearing or whether we will be doing that at
25 the hearing.

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THE COURT: No. I would think that should be in place prior to the hearing. If you want a date later than that, that's fine. I don't care.

MR. MCBRIDE: Let's hold that date for the time being, and then if, for whatever reason, it appears problematic, we'll notify the Court. Does that seem appropriate?

THE COURT: It does.

MR. MARRIOTT: That's fine by us, Your Honor.

THE COURT: If there's nothing further, counsel, we'll be in recess in this matter.

(Whereupon, the hearing was concluded.)

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STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

I, Dawn E. Brunner-Hahn, Registered Professional Reporter, within and for the county of Salt Lake, State of Utah do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein, and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In Witness Whereof, I have subscribed my name this 9th day of December, 2003.

Dawn E. Brunner-Hahn, RPR
DAWN E. BRUNNER-HAHN
REGISTERED PROFESSIONAL REPORTER