IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SCO GROUP, INC.,

Plaintiff/Counterclaim-Defendant,

-vs-

INTERNATIONAL BUSINESS MACHINES, CORPORATION,

Defendant/Counterclaim-Plaintiff.

2:03-CV-294 DAK

BEFORE THE HONORABLE DALE A. KIMBALL

DATE: SEPTEMBER 15, 2004

REPORTER'S TRANSCRIPT OF PROCEEDINGS

ARGUMENT ON MOTION

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SEPTEMBER 15, 2004 SALT LAKE CITY, UTAH

P R O C E E D I N G S

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THE COURT: We're here this afternoon in the matter of the SCO Group vs. International Business Machines, 2:03-CV-294. For plaintiff, Mr. Frederick Frei, Mr. Brent Hatch, Mr. Mark James and Mr. Robert Silver.

For defendant, Mr. Evan Chesler.

MR. CHESLER: Good afternoon, Your Honor.

THE COURT: Mr. David Marriott.

MR. MARRIOTT: Good afternoon, Your Honor.

THE COURT: Good afternoon.

Mr. Todd Shaughnessy.

MR. SHAUGHNESSY: Good afternoon, Your Honor.

THE COURT: And Mr. Chris Kao, correct?

MR. KAO: (Nods)

THE COURT: There are four motions set for hearing today: SCO's motion to dismiss or, in the alternative, stay defendant's counterclaim 10, Count X; IBM's motion for partial summary judgment on IBM's Tenth Counterclaim; Plaintiff SCO's Rule 56(f) motion; IBM's motion to strike material submitted by SCO in opposition to IBM's cross-motion for partial summary judgment.

Let's argue this way. Let's take SCO's motion to dismiss or, in the alternative, stay, and argue that one.

And then the other three we'll argue together.

MR. HATCH: Your Honor, Mr. James will be handling the motion to dismiss. We also had filed recently an expedited motion to deal with some of the discovery issues as well.

THE COURT: That hasn't been responded to. It's not in front of me today.

MR. HATCH: Okay, Your Honor. We're hoping, at some point, maybe, we can discuss some scheduling issues and other issues as well.

THE COURT: On motions that aren't yet in front of me or fully briefed? Is that what you're hoping?

MR. HATCH: Well, yes. We asked for an expedited review of that as well.

THE COURT: Do you want a review before the other side has responded? Is that what you want? You're not likely to get that, are you?

MR. HATCH: I understand the rhetorical basis you're -- I appreciate that. We can address those issues during --

THE COURT: We can talk about when they are going to respond and then when you can reply and when I might rule on it, if that's what you're asking me.

MR. HATCH: Yeah. What we have raised, Your Honor, is --

THE COURT: I know what you've raised. You want no motions for summary judgment filed until after discovery is done. That's basically what you want, isn't it?

MR. HATCH: In a nutshell.

THE COURT: Yeah, that's what you want. They don't want that, I would guess. There are two more motions filed that are not yet briefed that you've already been given 30 extra days to respond to those, but you don't want to respond to them at all until discovery is done, right?

MR. HATCH: Correct, Your Honor. There's also the issue -- as Your Honor knows, we originally were scheduled to have hearings on several motions that had been outstanding, in our view, longer than the motions we're in here for today that weren't heard by the Magistrate yesterday because of a request by IBM to get some additional time to respond to a supplementation that we made, given the length of time those motions had been sitting. Those hearings yesterday got put off.

We're becoming very concerned about the schedule, but particularly about our ability to proceed without having some of these basic discovery motions resolved. Some of them have been outstanding for a considerably long period of time.

THE COURT: That are in front of the Magistrate?

MR. HATCH: They were to be heard yesterday.

The Magistrate struck that hearing.

THE COURT: Let's take all this up for a minute after we're done arguing these motions, all right?

MR. HATCH: That would be fine. If we could just have a minute afterwards, I guess that would do it.

THE COURT: All right.

MR. HATCH: Thank you, Your Honor.

THE COURT: We're going to start with SCO's motion to dismiss or, in the alternative, to stay IBM's counterclaim, Count X. Mr. James. Who's going to argue this for IBM?

MR. CHESLER: I am, Your Honor, Evan Chesler.

THE COURT: Mr. Chesler.

MR. CHESLER: Thank you.

THE COURT: Mr. James?

MR. JAMES: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. JAMES: Your Honor, in what is already a complex case, laden with what we believe to be some very significant discovery problems and issues, IBM seeks to inject into this case what we also view as an extraordinarily broad and very complex Tenth Counterclaim that would impose very significant burdens in this case.

Now, back on June 10, when Your Honor extended the discovery cutoff in this case, it did so to provide

more time and a reasonable schedule; and under the circumstances that existed at that time, more time to do discovery. And the problem that Your Honor attempted to address at that time has not been fixed and is exacerbated by the Tenth Counterclaim, and I want to discuss why that is the case and why we believe Your Honor should either stay or dismiss if the Tenth Counterclaim.

We believe that it is IBM's strategy, at least in part, to attempt to control the timing and the schedule in this litigation to the extent possible, through counterclaims which are very broad, very discovery-intensive and very burdensome. And in that context, IBM has argued to Your Honor that you have no discretion, that the Tenth Counterclaim is compulsory and that it must go forward. In fact, Your Honor, I submit that the Tenth Counterclaim is permissive and, for reasons that I will attempt to discuss, it should be either stayed or dismissed.

In arguing that the Tenth Counterclaim is compulsory, the first and primary argument --

THE COURT: If it's compulsory, I, of course, don't have any choice, right?

MR. JAMES: I believe that is accurate, although I think you, potentially, could stay or severe and handle it that way. But I'm going to tell you why right now, Your

Honor, why it's not compulsory, why it's permissive, and why you should stay it.

The first and primary argument that IBM makes, in support of its claim that the Tenth Counterclaim is compulsory, is that IBM claims that its Tenth Counterclaim is simply the mirror image of SCO's Claims in this case because, according to IBM, SCO has challenged all of IBM's Linux activities. And this assertion, Judge, is factually inaccurate. It relies, we believe, on a significant mischaracterization of SCO's Claims.

The Tenth Counterclaim that SCO -- or excuse me -- that IBM has asserted in this case is extremely broad to declaratory judgment, and we have given you a binder of some slides that we're going to be showing, and I'll be trying to make this gun work to show some slides on the screen, too.

THE COURT: I'm sure you will be able operate it.

MR. JAMES: I hope so.

As you can see, the Tenth Counterclaim asks for a declaratory judgment that IBM does not infringe, induce the infringement of, or contribute to the infringement of any SCO copyright through its Linux activities, including use, reproduction and improvement of Linux and that some or all of SCO's purported copyrights in UNIX are invalid and unenforceable.

These claims go far beyond the issues that SCO's Claims raise in this case. SCO's Claims, Your Honor, are based primarily on issues arising out of what we contend are breaches by IBM and Sequin, a company that IBM acquired, of contractual agreements, license agreements with SCO.

In this case --

THE COURT: Do you believe there is any overlap at all between this Tenth Counterclaim and claims raised by SCO in its Complaint?

MR. JAMES: There is some overlap, and I intend, in a few moments, Your Honor, to address that overlap. We think it's quite small, the overlap.

Our case focuses principally on the contractual arrangements. We look to the contractual restrictions that existed in the license agreements between SCO and IBM, and the only counterclaim that we've asserted in this case against IBM relates to IBM's continued use of AIX and Dynix after the license agreements were terminated.

In stark contrast to SCO's Claims in this case, IBM's Tenth Counterclaim goes far beyond those issues. IBM's Tenth Counterclaim injects a broad range of new issues concerning the propriety of literally thousands of contributions to Linux by at least hundreds of third parties; many of those contributions which occurred long

before IBM ever made any contribution to Linux.

We believe, Judge, that if Your Honor allows IBM to expand the scope of this case to include all of IBM's Linux-related activities, a whole host of new, complex issues are brought into the case, including the contributions of millions of lines of source code into Linux by numerous third parties that, as I indicated, many of which occurred before IBM ever made a contribution to Linux.

And the reason why, Judge, those are brought in is because if Linux contains SCO's copyrighted material, no matter who contributed it, then IBM, as an end user, a copier or a distributor of Linux, would be liable for infringing SCO's copyrights, and SCO would have to take discovery to investigate the issue of the propriety of all of those third-party contributions, including all of the contributions that occurred before Linux ever made any contribution -- or before SCO -- IBM ever made any contribution to Linux.

The Tenth Counterclaim thus injects into the case all of IBM's many related Linux activities and seeks an extraordinarily broad declaration that all of IBM's activities relating to Linux do not infringe SCO's copyrights. And, Your Honor, those activities are numerous; many of which we know, but many of which we

don't. We do know that IBM's revenues from Linux activities in 2003 alone exceeded $2 billion.

We do know that SCO's Claims do not challenge and, in fact, they don't challenge many, in fact they don't challenge most of IBM's Linux activities. But if IBM's Tenth Counterclaim goes forward, it puts those activities squarely at issue, every one of those activities, in the context of the declaration that IBM seeks in this case.

SCO has cited for Your Honor a recitation of the cases that IBM references as alleged support for its mirror image argument. The cases, Judge, are not mirror image cases. They do not support what IBM says they support and, contrary to IBM's argument, their counterclaim is not the mirror image of SCO's Claims in this case. Their counterclaim injects many, many issues that go, in fact, far beyond the issues placed at issue in this case by SCO's Claims.

And I guess I would note, Judge, that in the event IBM were correct -- and we think it's not -- but were it correct with respect to its mirror image and were its Tenth Counterclaim merely a mirror image of SCO's Claims in this case, those counterclaims would be redundant and thus unnecessary.

In the Driver Music case that we have cited to Your Honor, a Tenth Circuit case, the Court sets forth four

factors that the Court should consider in determining whether a claim is compulsory or permissive. First, the Court said that compulsory claims must arise from facts, involve legal issues that are largely the same. And the factual issues between SCO's Claims and IBM's Tenth Counterclaim are not closely the same, let alone largely the same.

And, again, IBM's Tenth Counterclaim, Judge, seeks to inject new factual issues that include all of IBM's activities and the numerous third-party contributions to Linux, including who those parties that made contributions are, what those parties contributed and whether a particular third party's contribution into Linux violated SCO's copyrights.

The legal issues, as well, are not the same or even largely the same. The additional legal issues that are injected into this case, if the Tenth Counterclaim is allowed to go forward, include the liability of third-party contributors for potential improper use, the liability of end users of Linux for copyright infringement if any independent third party has contributed material from the UNIX System 5.

Thus, Your Honor, I submit that the Tenth Counterclaim raises numerous new facts and new legal issues that are very complex, and they go far beyond SCO's Claims

in this case.

Similarly, res judicata would not bar IBM from subsequently litigating third-party contributions to Linux. IBM suggests, Your Honor -- and you asked me a moment ago about the overlap question.

THE COURT: I did.

MR. JAMES: And I'm going to try and answer that now. IBM indicates that, because there is some overlap of its counterclaim with SCO's Claim, that res judicata would Apply if the Tenth Counterclaim is not litigated in this case, and that's not right. In fact, the significant part of SCO's Claim does not overlap with the Tenth Counterclaim. For res judicata to apply, it's not enough that there is some overlap.

And if you look at the Petro Management case, which is the case here, you will see that four elements or four factors must be satisfied in order for res judicata to apply. The facts at issue must relate in time with the facts at issue from the counterclaim. They are not related in time here. Hundreds and perhaps thousands of the contributions into Linux pre-dated any contribution to Linux by IBM.

Second question. Are they related in space? Again, they are not. Numerous third parties have made contributions to Linux independent of IBM. Those

contributions are not placed at issue by SCO's Claims.

Are the facts related in origin? Again, they are not. SCO challenges IBM's conduct only, not the conduct of the numerous independent third parties.

And, finally, are the facts of the claims related in motivation? Again, they are not. The third parties' motivations are completely different from IBM's motivations in connection with UNIX and Linux.

As to whether the same evidence supports or refutes the claims, another factor, it does not. IBM's Tenth Counterclaim raises significant additional new issues. IBM's cases that are cited for the concept of res judicata in this case, similarly, are inapplicable, similar to the cases they cited, and I showed you the screen previous. And this screen, Your Honor, summarizes those cases.

Let me come back a little more to the overlap because the last element or the last factor that the Court asks the District Courts to look at, the Tenth Circuit asks the District Courts to look at, is whether the claims are logically related. And it is here where IBM says that, because there is some overlap, the claims are logically related. And what they do is they say their claim is at least in part the flip side of SCO's Claim in this case and, therefore, because of that, they are logically related

and must be compulsory.

In other words, if you think about that, according to IBM's theory, a defendant can assert a counterclaim that is simply the other side or, as IBM calls it, the flip side of a plaintiff's narrow claim, then can add additional claims or issues as part of that counterclaim, take that entire package and, according to IBM, that claim would then be compulsory if there is at least some overlap.

And were that true, a defendant could make every counterclaim compulsory by bundling claims arising out of different transactions into a single sweeping counterclaim that included at least, as a part, the flip side of the plaintiff's claim and claim that because there are overlaps, the counterclaim is compulsory. And the District Court, in the Mille Lacs case, indicated that some overlap of issues is not enough.

As the Tenth Circuit stated in the Driver Music case, the issues between the claim and counterclaim must be largely the same. And that is not the case here. And, in fact, if you look back in our reply memorandum, we cited a number of cases where the relationship between the claim and the counterclaim was much tighter in those cases than it is here, yet the Courts in those cases held that the counterclaims were not compulsory.

Thus, because there is not a logical relationship between the claim and counterclaim, the counterclaim in this case, the Tenth Counterclaim, is not compulsory. In fact, as I've indicated, Your Honor, there are very, very. significant portions of the Tenth Counterclaim that do not overlap SCO's Claim, and they go far beyond SCO's Claims in this case.

Therefore, the counterclaim is permissive and Your Honor should dismiss or at least stay the counterclaim.

Let me talk about that for a minute. Courts have said that when a counterclaim unduly complicates litigation, when it significantly expands litigation, when it adds significant factual or legal complexities to an already complex case, if it would necessitate additional expensive discovery, threaten jury confusion or hinder or delay resolution of the case, it is an appropriate claim to be stayed or dismissed. And in this case, Your Honor, the Tenth Counterclaim --

THE COURT: The jury wouldn't otherwise be confused in this case if the Tenth Counterclaim were gone, right?

MR. JAMES: I think the issue is the risk of additional confusion. I think that risk would be great.

THE COURT: Thank you.

MR. JAMES: You're welcome. As to the various bases that I've just listed, all of those bases exist in this case, Judge, all of them.

Your Honor has alluded to this, and let me make that point. Claims that are already at issue in this case are complex. They involve complex legal and factual questions even without the Tenth Counterclaim. Independent of the status of discovery in this case, the Tenth Counterclaim would impose significant burdens and significant factual and legal complexities into this case.

Judge, when you combine that fact with the significant discovery issues that we do have in this case, the dismissal of the Tenth Counterclaim becomes even more compelling. Without question, if the Tenth Counterclaim is allowed to go forward, it will create substantial additional, expensive and time-consuming discovery, one of the factors that I listed previously for dismissal of the Tenth Counterclaim.

Your Honor has been made aware of what we believe are some very, very significant discovery problems and issues in this case. Independent of those problems, the Tenth Counterclaim injects a whole new realm of discovery complexity and burdens into this case. When you add to that the discovery problems that we're having, Your Honor, I submit it becomes absolutely compelling that the Tenth

Counterclaim should be dismissed.

We have had motions to compel pending for months. We believe that IBM has refused to produce to us absolute basic relevant discovery and, at the same time, we're being faced with multiple, fact-intensive summary judgment motions that place further burden and interfere with the discovery schedule in this case. Your Honor, I'm not here to talk in detail about discovery issues, but there are a number of discovery issues that play into our request that Your Honor dismiss this counterclaim, and we think that the Tenth Counterclaim would inject very, very significant and undue burden into this case given the context of the case as it currently exists.

Your Honor, SCO has been seeking, for a long time, some basic discovery in the base, and I am here to tell you that IBM has stonewalled us on discovery while proclaiming to the Court discovery compliance; accusing SCO of not providing evidence of the very nature that we think IBM has blocked our discovery efforts and pushing aggressively forward with dispositive motions. Then it comes before the Court with a very, very broad counterclaim and tries to tell Your Honor that it's compulsory, you must go forward with this claim, and we must inject all of these additional claims into this case.

And the point of all of this is this: The Tenth

Counterclaim -- and I've said it four or five times, and I'll say it one more time and sit down -- injects some very significant burdens and complex issues into this case. We will be faced, literally, with deposing numerous third parties who would -- or who have contributed code into Linux. Numerous of those parties contributed that code before IBM ever had anything to do with Linux. If the counterclaim proceeds, we'll be in the position of having to take discovery regarding all of IBM's Linux-related activities because IBM seeks a declaration as to all of those activities.

As the Court said in the ABC case, "Where the plaintiff's Complaint involves highly complex legal and factual issues and the counterclaim would add similarly complex questions, even concerns --" and, in particular, in that case, the same statute -- "dismissal of the counterclaim is warranted."

And, Your Honor, that is the position of SCO in this case. The Court should dismiss the Tenth Counterclaim. At a minimum, it should stay that counterclaim. Thank you.

THE COURT: Thank you, Mr. James.

Mr. Chesler?

MR. CHESLER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. CHESLER: Thank you for the Court's courtesy in allowing me to appear as a pro hac vice admission to the Bar. I'm happy to be here.

Your Honor, I think the most surprising thing about what I just heard and what the Court just heard is what we didn't hear and didn't see with all these charts that counsel put up. This is a pleadings motion. I didn't see their pleading nor ours. If the Court has a copy of the Second Amended Complaint, I won't need to hand one up, but we've brought some copies just for everyone's convenience.

THE COURT: I've got one, but it would be more convenient for you to hand it up.

MR. CHESLER: All right. Let me do that, if I may.

If Your Honor would, I'd like you to turn first to our Tenth Counterclaim, which begins on page 39 of our pleading. And, in particular, Your Honor, if you'd flip to the next page, page 40. The most important paragraphs for my purposes today are paragraphs 171 and 173 in which IBM says, in 171, that it does not believe that its activities, IBM's activities, relating to Linux, including any use, reproduction and improvement of Linux, infringe SCO's copyrights.

In paragraph 173 IBM says that it believes that

it's entitled to a declaratory judgment that IBM does not infringe, induce the infringement, or contribute to the infringement of any of SCO's copyrights through its, IBM's, Linux activities.

Now, counsel put a chart up for Your Honor that said our counterclaim was very broad because it related to infringement, inducement of infringement, and contribution to infringement of their copyrights. And that was extraordinarily broad and unwarranted in this case given what counsel here says their counterclaims are about. Well, I learned in law school, when you want to know what the claim is to which you counterclaim, you read the claim in the Complaint. And so I ask Your Honor to turn to their Complaint.

And, in particular, first, I'd like Your Honor to look at paragraph 179 of their Complaint, which appears at page 52. This is the critical paragraph for us. I'm going to walk Your Honor through, as quickly as I can, why it's perfectly clear, we believe, that our counterclaim is compulsory in light of what they have pleaded, as opposed to what counsel chooses to say today.

In paragraph 179 SCO pleads, "IBM's breaches of the IBM-related agreements --" I'll come back to those -- "and the Sequin agreements and its post-termination actions have infringed, have induced infringement of, and have

contributed to the infringement of copyright registrations of SCO and its predecessors."

The three verbs which counsel told you indicate the enormous breadth of our counterclaim come directly from their Complaint, in which they have accused us of infringing, inducing the infringement of, and contributing to the infringement of their counterclaim. We didn't make this stuff up. We simply pleaded back at them for a counterclaim to clear the air of all the charges their chairman has been making running around the country, saying we have done all sorts of terrible things. We are entitled to clear the air about that. And we took the verbs right from their Complaint.

Now, what does the Complaint actually mean by that? First, what do they mean by IBM-related agreements? Well, Your Honor, you will notice those are capitalized terms in paragraph 179. That's because it's a term of art in the Complaint. And If Your Honor would turn to paragraph 62 of their Complaint, Second Amended Complaint, which appears on page 15, they have a section entitled The IBM-related Agreements.

And I think Your Honor will see they list there, on page 15, a whole series of different documents which they define as the IBM-related agreements; the first of which is identified in paragraph 62(a) as the software

agreement. And they go on to identify other agreements. And so what they've said in 179 is that when we breached these agreements, we infringed, induced the infringement of, and contributed to the infringement of their copyrights. And that's what they are suing us for.

So now we have to look and see what they say we did to breach those agreements because they have related explicitly that it is those breaches which form the basis of their copyright infringement claim. So, in that regard, Your Honor, as I read this many, many months ago when we prepared this counterclaim, I went to their breach of contract section because that's what they say forms the basis for the copyright infringement.

And that begins, Your Honor, on page 32 of their Complaint, entitled First Cause of Action: Breach of IBM Software Agreement. And if Your Honor returned to paragraph 113, which is on the very next page in that section, they say in pretty simple English -- I'm going to skip some intervening words for clarity, but it's all before the Court and before counsel.

"IBM has violated Section 201 of the software agreement by, inter alia, using and assisting others to use the software products, parentheses, including System 5 source code --" that is the UNIX source code over which they purport to have copyrights. Then dropping down --

"for external purposes that are different from and broader than IBM's own internal business purposes."

Then the next phrase is critical. New sentence. "By actively supporting, assisting and promoting the transfer of UNIX technology to Linux." And then it goes on to say, "using its access to UNIX technology, etc., to misuse their code."

So this paragraph says, absolutely explicitly, that we breached that agreement by taking System 5 source code, which they say they have a valid copyright on, and actively supporting, assisting and promoting the transfer of that code into Linux. Now, in the same section on breach of contract, if Your Honor goes to paragraph 118, which appears on page 35, they say -- another breach:

"IBM has breached Section 710 of the software agreement by, inter alia, transferring portions of the software products, including System 5 source code," and then if you drop down several lines, "to Linus Torvalds for open distribution to the general public."

This is their Complaint, Your Honor. They have said, "Your breaches of these agreements are the copyright infringement and the inducement and the contribution."

So we read what it is they alleged that we did to breach the agreements and, so far, we have been through two of those. They say that we took System 5 source code and

we aided and abetted and ourselves transferred the technology into Linux. And they say, here again, we breached yet another section by doing the same thing, transferring portions of the software products, including the System 5 source code, which is what they say they have a copyright on, to Mr. Torvals so it could go into open distribution for the public.

And then again, in paragraph 122, on page 36, still in the breach section, they say, "IBM breached its duty of confidentiality by contributing portions of the software product, including System 5 source code --" you drop down to the next line -- "to open source development of Linux."

So, Your Honor, we didn't pick this fight, but they have alleged, in simple English, that we took their copyrighted code, System 5 source code, and we, on our own, and we assisted others to take that code and put it into the public domain in Linux, thereby infringing their copyrights, contributing to the infringement by others of their copyrights and inducing the infringement of their copyrights. It's here, in simple English, in their own pleading.

And our declaratory judgment counterclaim says we want a declaration that we have not, in fact, violated their copyrights by engaging in our Linux activities, which

they, themselves, allege in their Complaint. That's what this is about; not about Counsel's charts but what they plead in the pleading.

Now, in that connection, Your Honor, it's also interesting to me that we didn't hear anything about the other cases that SCO is litigating around the country because the things that they have said to those Courts bear directly on the credibility of what they are telling this Court. For example, there's a case in the District Court in Wilmington, Deleware called Red Hat against SCO. Red Hat is a provider of Linux. Red Hat, as was IBM, was threatened in many, many press conferences and public statements by Mr. McBride and his colleagues with all sorts of lawsuits and accusations about infringing their proprietary rights, infringing their copyrights. So Red Hat brought a declaratory judgment action.

What was the action? It said, "We distribute Linux. We want a declaratory judgment action that in creating copies of Linux and distributing Linux we are not infringing your copyrights as you're telling the world we are."

What did SCO do in that case? They moved to dismiss. And here's what they said in their motion to dismiss that case, which had nothing to do with the narrow question of whether IBM distributed its own version of UNIX

called AIX after they purportedly took back our license, which is what they are telling you this case is about.

Red Hat had no interest in that question. It had nothing to do with their lawsuit. Their lawsuit was, is what Red Hat's doing, shipping Linux to thousands of customers, infringing SCO's copyrights? They wanted a declaratory judgment that it's not.

And SCO moved to dismiss. And here's what they said, May 18, 2004, four months ago. "This precise issue will be litigated in a case filed by SCO against Autozone in Federal District Court in Nevada --" excuse me. I'm misreading a little bit. This is what they said when they first moved to dismiss our Complaint here. They said this issue; namely, the issue we raised, will be litigated in the Autozone case in Nevada. That's what they said there, in the Autozone case.

And in the Autozone case -- I'll come back to Red Hat in a moment -- the allegation in the Autozone case, which they made against Autozone, is that they, Autozone, are a user of Linux, and by using Linux, they are infringing their copyrights. So they told this Court that the questions that we were raising by this counterclaim, which they now portray as a completely different question, are going to be litigated in the Autozone case. And they asked Your Honor to dismiss or stay this case in favor of

Autozone, a position which they abandoned in their reply brief.

Now let me come back to the Red Hat case. Here's what they said when they moved to dismiss the Red Hat case, quote -- this is September of 2003, the motion to dismiss -- "The infringement issues that Red Hat seeks to adjudicate in this case are currently before United States District Judge Dale A. Kimball in the SCO v. IBM case pending in the Utah Federal District Court."

Now, how can it be, Your Honor, that when Red Hat sought a declaratory judgment that the entire distribution of Linux by Red Hat was not an infringement, they told that Court that that's the issue you have? And now they're telling you that we would be injecting so much more into this case if we sought to litigate that issue here.

In deed, what happened in the Red Hat case was, the motion to dismiss the declaratory judgment case was denied, but the case was stayed on April 6 of this year. In May, Red Hat moved to lift the stay, and SCO filed a brief three months ago -- four months ago, opposing the lifting of the stay. And here's what they said in that brief.

"It would be a waste of judicial resources and of the resources of the parties to litigate this case while a substantially similar question is being litigated in the

Federal District Court in Utah."

So, all of these charts about how we're trying to broaden this case and make it into some humongous monster for some cynical purpose, I would submit, Your Honor, you cannot reconcile that representation, that was made to you today, with the representations that were made to the Court in the Autozone case. That case has nothing to do with IBM putting contributions into Linux or anything to do individually with IBM distributing its own version of AIX after they purportedly terminated our license.

Red Hat has nothing to do with any of that and yet they told that Court those issues, the Red Hat issues, are before Your Honor and, therefore, that case should remain stayed.

The strategy, Your Honor, seems to be the anywhere-but-here strategy. When we bring the counterclaim, they tell you: Defer to the Autozone Court in Nevada.

When Red Hat brings a declaratory judgment case, they say to the Court in Deleware to defer to you in Utah. Wherever we are, it seems to be the issues should be litigated some place else.

Your Honor, we have a right, we believe, we respectfully submit, to have it litigated here. I say, again, we didn't pick this fight. We didn't write their

Complaint. Their Complaint is absolutely clear that it says we have been aiding and abetting, assisting, contributing to the infringement of their copyrights and directly infringing their copyrights by taking the System 5 source code and putting it out in the public domain. That's what we're responding to.

If you take the standards which counsel put before Your Honor, and I agree those four bullets are the standards, we plainly satisfy them for a compulsory counterclaim.

Let me take res judicata as one example, Your Honor. We are not -- their entire res judicata argument, that it would not apply here, is premised on a false premise. And that is that we are somehow seeking a declaration for what somebody else did. We're not doing that.

And, again, the pleading is what governs. And I say again to Your Honor, in paragraphs 171 and 173 of our counterclaim, we said that we are suing for a declaratory judgment for our activities because that's what we've been accused of doing in violation of their copyrights. Our activities. They have defined the broad scope of our activities, and that is what we are responding to.

Even, Your Honor, even if their case were somehow amended by virtue of counsel's argument, as opposed to

pleading, to be about our continuing to sell and distribute AIX, our UNIX software, after they purportedly terminated our license; even if that's what this case were about -- and the pleading makes clear that that's only a piece of what it's about -- even if that were all of what it was about, we would be talking about the same SCO copyrights that we're talking about in the counterclaim as it presently exists.

We would be talking about the same issues of whether those copyrights are valid, who the authors are, what the ownership of those copyrights are. All the same issues would apply in that case as well as this. We would be talking, most importantly, Your Honor, about whether IBM actively put -- actually put their protected code into Linux because the purported basis for their cancelling our AIX license was the very same contributions, alleged contributions, of their protected code into Linux.

They said to us, "You, IBM, have given away our copyrighted code without our consent -- that's what they accused us of -- "by giving it to the Linux community. And the penalty for that is we are terminating your license to distribute AIX."

So, even if we were actually talking about that narrow subset of what they in fact pleaded, we would be right back to the question of IBM alleged contributions to

Linux in violation of their copyrights. Those are the activities we are talking about and they plead, and that's why this is a compulsory counterclaim.

Now suppose, Your Honor, you disregard everything I have said up to this point and you say, "I think it's permissible."

THE COURT: Suppose I did, then what are you going to tell me?

MR. CHESLER: What I'm going to tell you -- and I'm sure you won't be surprised to hear -- is that you should clearly exercise your discretion not to dismiss or stay this counterclaim because it is not going unnecessarily to add to the complexity of this already complex case. And it's for just a couple of very simple reasons, and I'll sit down.

Reason number 1. The core of the evidence which we've been trying unsuccessfully to get for a year, that relates to this issue, is our Interrogatories 12 and 13. There have been two court orders from the Magistrate Judge ordering them to give us answers, neither of which has been complied with. Those counterclaims, in simple English, ask for just this. They say, "What is yours that we took, and what did we do with it that causes you to you sue us?"

We've been asking those two questions for a year. What did we take, and what did we do with it?

That's already in this case in all of the litigation before the Magistrate Judge over those two questions. They never once stood up and said, "Your Honor, the reason we shouldn't be obligated to answer those questions is they are not in the case. You will be expanding the complexity of this case beyond what it already is by asking us to produce that information."

They made lots of arguments, unsuccessfully, to not to have to answer those questions. They never made those arguments. That is the proof on which our counterclaim will rely because they can't, as Mr. Marriott will describe to the Court very soon, and as I'm sure Your Honor knows from reading the papers, it is their failure to provide that proof which is the basis for our summary judgment motion on this very counterclaim. It's not adding anything to the case that isn't already in the case, Your Honor. It's the information we have been chasing all this time.

What they need to do to prove their claim is very simple. It's like every other copyright claim. You take the copyrighted work, which they have, and you match it against the allegedly infringing work, which anybody in the world can download off the internet, and you see if they are sufficiently similar to constitute infringement. And then you litigate any defenses, if there are any, if they

are sufficiently similar.

They have, and have had all of that information from the time they brought this lawsuit. If they don't have a basis for alleging the infringement, then I would wonder where they got the basis for suing Autozone for allegedly infringing the copyrights for using Linux. They've got the basis or they don't. We have been asking for it for a year. They won't tell us. This is not about complicating this case, Your Honor. It's about the anywhere-but-here strategy. It's always some other Court in some other place, but not here, that ought to litigate these issues.

And lastly, Your Honor, why it would be in the case properly even if permissiveless. This is not about third-party claims. It's not about third-party activities. They pleaded that we violated their copyrights. We plead for a declaratory judgment that we did not violate their copyrights. They want to turn that into a war about what thousands of other people did in hundreds of other contributions to Linux. The reason they want to portray it that way is to get this claim out of here so it isn't litigated here.

That isn't what they plead. It isn't what we plead. Thank you, Your Honor.

THE COURT: Thank you, Mr. Chesler.

You get to reply, Mr. James.

MR. JAMES: Your Honor, and I'm going to, and when I'm finished, what I'd like to do, if Your Honor will allow, is Mr. Silver was very involved in the Red Hat case and the other cases, and I haven't had the involvement, and with Your Honor's indulgence, if you will allow him to make a couple points, I would appreciate it. And I'm going to ask you to allow him to do that.

THE COURT: Go ahead.

MR. JAMES: Thank you. We have not put at issue all of IBM's Linux-related activities. We have not placed at issue the contributions made by numerous third parties into Linux. And let me see if I can make that point clear, Judge.

THE COURT: Your Complaint is reasonably broad, is it not?

MR. JAMES: It is, as all Complaints, reasonably broad, but it does not pick up the claims that you are hearing today that it does. When we talk about third-party contributors of code into Linux and how that relates to IBM, the only third parties that implicates are third parties that acted in combination or in conjunction with IBM, a very small group.

On the other hand, what their claims put at issue, Your Honor, is all of the third-party contributions

into Linux even before the year 2000, when IBM first made a contribution into Linux. IBM couldn't have acted with those third parties because those third parties made their contributions before IBM ever did.

But by saying, "We want a declaration from this Court that we don't violate SCO or infringe SCO's copyrights," the problem with that is, is to the extent that all of those third parties preceded IBM's contribution, to the extend they do violate SCO's copyrights, and to the extent that IBM then distributes, copies, uses Linux, they are violators as well. And, therefore, that question must be decided and therefore it injects into this litigation all of that discovery.

And we have made that point very clearly in our reply. IBM has never denied it. That is clearly the law. That is clearly, Judge, the case.

Now with respect to a couple of additional points relating to Red Hat, relating to the Autozone case --

THE COURT: I thought you said that's what Mr. Silver is going to talk about.

MR. JAMES: That was my lead in. Mr. Silver has been very involved in those cases, and with Your Honor's permission, I'll have him address those.

THE COURT: Mr. Silver.

MR. SILVER: Yes. Thank you. Thank you, very

much, Your Honor. If I may proceed very, very briefly. Your Honor, there seems to be some contention about how broad our Complaint is, what is included, what is not included, what the Complaint encompasses. I'd like to make just a very few points about that.

THE COURT: I thought you were going to make points about Red Hat and Autozone. He has already made points about the breadth of the Complaint. He said you have been involved and Red Hat and Autozone.

MR. SILVER: Actually, I believe there may be confusion about that. My perspective on Red Hat and Autozone is the perspective that I have in retrospect because of my understanding of the breadth of these actions. I do not actually have direct involvement in Red Hat and Autozone, and if the only reason Your Honor is allowing me to speak is on that premise, I should sit down.

THE COURT: I thought that was the premise. Isn't that what you said, Mr. James? Did I misunderstand you? I mean, you have made your arguments about the Complaint, and you and Mr. Chesler have made those arguments about what the Complaint says and what it doesn't say and how broad it is and how broad it isn't.

MR. JAMES: Let me say at this point, then, Your Honor, if I may: At a minimum, counsel's familiarity with Autozone and with the Red Hat case is significantly greater

than mine. He wrote the portions of the reply memo that address those cases. He has perhaps not entered an appearance, but he has much more familiarity. I will struggle through those if you'd like me to, but Mr. Silver will do it more succinctly.

MR. SILVER: My familiarity, Your Honor, is with the overview of the entirety of the matters presented before the Court, and that allows me to describe the relationships between the different matters Mr. Chesler has presented. If Your Honor will allow me to speak to that very briefly, I would appreciate it. However, the last thing I want to do is try Your Honor's patience.

MR. JAMES: And, Your Honor, if -- when we're finished here, if counsel would like to contribute to Mr. Marriott's argument, we would have no objection.

THE COURT: What I don't want you to do is to repeat what Mr. James has already told me. He suggested to me, and I understood you were going to add something new. If you're just going to repeat what he has told me, then I don't need to hear it. I'm not trying to be impolite, but I've heard what he has to say.

MR. SILVER: I think that what I have to add, very, very briefly, may help to put the other cases that Mr. Chesler --

THE COURT: All right. Go ahead and tell me,

very, very briefly, as you say.

MR. SILVER: Okay. I will try to be very brief. Our Complaint, our Complaint was about and is about the course of conduct in which IBM is alleged to have violated contracts it had with SCO and its predecessors. It is not about, it never was about copyright violations. However, because it alleges a course of conduct, as is true as a matter of basic federal res judicata law, that will involve copyright issues.

That is a very different thing than raising the question whether contributions made to Linux, long before IBM ever became involved in Linux, are involved in our lawsuit. Those are two very, very different things. I have not seen anything Mr. Chesler raises to connect the two. There is nothing in our Complaint to connect the two. Mr. Chesler has not pointed to any allegation in our Complaint to connect the two. There isn't any connection. None.

Number 2. A lot of complaints have been made about what we have said in Autozone, what we have said in Red Hat. The Autozone case was focused on a matter that is very specific to Autozone. It doesn't have to do with the world of Linux. It has to do with a specific Autozone problem. If you will examine -- and Mr. Chesler, I'm sure, has -- our reply papers, we have said we are not relying on

Autozone as a ground for staying the present action, and we are not.

THE COURT: Okay. What do you have to tell me about Red Hat, if anything?

MR. SILVER: Red Hat -- in the Red Hat case, what we have said is the following. And this is very important for everyone to understand. I believe it is essential for Your Honor to understand. We began this case in the belief that the principal problem we confronted was a contractual violation by IBM which resulted in an improper contribution of material that resulted from an uncontrolled exploitation of a seminal innovation by AT&T, inherited by SCO, into UNIX, a seminal innovation that drove the industry, providing an innovation IBM did not want to supply for itself, which it misappropriated in violation of its contracts and ultimately contributed to Linux. That is the core of our lawsuit.

Now, what that has to do with Red Hat is the following: Because of that violation, obviously uncertainty exists as to the status of Linux. A great deal of people have concerns about that. A declaratory action was brought. The Red Hat Court decided to stay that action sui sponte. That sui sponte decision was litigated on reconsideration. Now, a great deal of accusations have been made that we have misrepresented to various Courts

what our position has been. I want to be clear as day that that is not the case.

When that sui sponte decision was made, we came in and we said, "At this time, IBM, has placed, by virtue of its Tenth Counterclaim, all conceivable issues relating not only to its contributions to Linux, but to every contribution by any person on earth into Linux," which is precisely why it has unduly complicated this case to the point where any hope of making it manageable has disappeared, but it has done it.

And, therefore, we told the Red Hat Court that that is what has happened. The Red Hat Court was under no illusion. At the very same time we told the Red Hat Court we were opposing that, the Red Hat Court was under no illusion about that either. The Red Hat Court still has not resolved the matter. But the suggestion that we mislead any other Court about anything is absolutely false.

As to Autozone, that suit was about something very specific to Autozone.

THE COURT: You have already told me that.

MR. SILVER: Okay. I want to be clear about all these matters. Your Honor, I wish to thank you very much for the time you have given me.

THE COURT: Thank you, Mr. Silver.

All right. That motion is taken under

advisement. Now we'll argue the three remaining motions: IBM's motion for partial summary judgment under its Tenth Counterclaim. Mr. Marriott you're going to argue that.

MR. MARRIOTT: I am, Your Honor.

THE COURT: You are going to tell me why I ought to grant that, and you're going to tell me why, while you're up there, why I ought not to grant the Rule 56(f) motion, and you're going to tell me why I ought to grant your motion to strike as well, right?

MR. MARRIOTT: I will.

THE COURT: All right.

Who's going to argue these for the plaintiff?

Mr. Hatch?

MR. HATCH: Your Honor I will, as well as some of the technical issues, Mr. Frei is going to address.

THE COURT: All right.

MR. FREI: Your Honor, I'll also be addressing the motion to strike issues along with the 56(f).

THE COURT: Very good.

Go ahead, Mr. Marriott.

MR. MARRIOTT: Thank you, Your Honor. Your Honor, there are three principal reasons why the Court should enter summary judgment in favor of IBM on its Tenth Counterclaim. The first reason, Your Honor, is that SCO has failed to supply evidence to substantiate its public

accusations of copyright infringement by IBM and others.

THE COURT: They are going to tell me that part of the reason for that is that you haven't given them the discovery. Isn't that what they are essentially going to tell me?

MR. MARRIOTT: I have no doubt in my mind that that is what they will tell you.

THE COURT: So what are you going to say when they claim that?

MR. MARRIOTT: I'm happy to address that now, or I can come to it momentarily. Would you like me to address that now?

THE COURT: Whatever you want, whatever order you want.

MR. MARRIOTT: That's the third point I would like to make. I can make it now or --

THE COURT: Make it third, then.

MR. MARRIOTT: Okay. Thank you, Your Honor.

The first point I want to make is that despite its public accusations of infringement by IBM, SCO hasn't produced any evidence of copyright infringement by IBM or anyone else with respect to Linux. The summary judgment, Your Honor, as you know, is appropriate unless SCO can demonstrate a genuine issue of material fact as to two things; that it owns valid copyrights and that IBM has

copied protectable elements of those copyrights.

With the Court's permission, I would like to hand up, if I may, a little booklet.

THE COURT: Sure, as long as everyone gets it.

MR. MARRIOTT: Your Honor, from the beginning of this case, SCO has publicly claimed that Linux is an unauthorized derivative work of UNIX and that the use of Linux by anybody infringes SCO's alleged copyrights. And with respect to IBM in particular, SCO has claimed that IBM is responsible for dumping SCO's allegedly proprietary UNIX code into the Linux operating system.

SCO has represented that in press releases. It has sent letters to the Fortune 1000 companies, and it has sent letters to every member of Congress making the point. It has basically told the world, Your Honor, that if you use Linux, you have infringed SCO's alleged copyrights. And we have provided a listing of those allegations for Your Honor at pages 2 through 4 of our book, and I won't repeat those here.

From the beginning of the case, Your Honor, SCO has publicly claimed to have substantial evidence to support its allegations of copyright infringement. Its CEO is on record as saying that it has done a deep dive into the Linux code, that it has compared Linux to UNIX ever which way but Tuesday, and it has found substantial

evidence of copyright infringement. And if I may refer the Court to pages 5 through 7 of our book, I would like to focus, Your Honor, if I may, on a couple of those.

In April of 2000 the company SCO said, "We are using objective third parties to do comparisons of our UNIX System 5 source code."

In May of 2003, SCO said that it had hired outside consultants to compare source code from the Linux kernel to its System 5 source code and that those experts had found line-for-line copying. May of 2003 it said that over the past several weeks, it had three different teams of people from outside SCO going through various distributions of Linux and comparing the code to its System 5 code and that what those individuals had been finding, Your Honor, is that there were chunks of code from SCO's UNIX System 5 in Linux.

At page 6 they said that in June, 2003, that they had hired three teams of experts, including from the MIT math department, that they analyzed UNIX and Linux and that they had, quote, all three found several instances where a UNIX source code had been found in Linux, close quote.

In June of 2003, the company's CEO said, quote, "Everybody has been clamoring for the code. Show us two lines of code. We're not going to show two lines of code, we're going to show hundreds of lines of code. And that's

just the tip of iceberg of what's in this."

In August of 2003 the company said that it had retained pattern recognition experts who had already, quote, found mountains of code.

The same month, Your Honor, they said that they knew exactly which version of UNIX System 5 the code came from and which licensee was responsible for illegally contributing to Linux.

Finally, on page 7, in November of 2003, the company's CEO said, quote, "Along the way, over the past several months, once we had the copyright issue resolved where fully we had clarity around the copyright ownership on UNIX and System 5 source code, we have gone in and done a deep dive into Linux. We have compared the source code of Linux with UNIX every which way but Tuesday. We have come out with a number of violations that relate to those copyrights."

November of 2003, Your Honor, again the company said, quote, "There are other literal copyright infringements that we've not provided. We'll save those for Court," close quote.

And then, finally, and most recently, the company said to the Red Hat Court that it had discovered significant instances of line-for-line, substantially similar copying of code from UNIX System 5 to Linux.

It was in light of those allegations, Your Honor, that IBM propounded its Interrogatory Numbers 12 and 13. And you will see those at page 8 of our book. Those requests, I think, quite clearly ask, simply, that SCO substantiate its allegations, its public allegations of wrongdoing by IBM.

Interrogatory Number 12 says, "Please identify the material in Linux which plaintiff has rights to and the nature of plaintiff's rights."

And then Interrogatory Number 13, Your Honor, says, "Please state whether, A, IBM has infringed plaintiff's rights and, for any rights IBM is alleged to have infringed, describe in detail how IBM is alleged to have infringed plaintiff's rights."

SCO repeatedly declined to respond to those interrogatories, Your Honor. At no point did it disclose the copyrights we were alleged to have infringed. At no point did it disclose a single line of UNIX code which we were alleged to have infringed, and at no point did it disclose a single line of allegedly infringed Linux code.

It was against that backdrop that we made our position motion to compel to Magistrate Judge Wells. We asked Judge Wells to require SCO to provide complete and full and detailed responses to those interrogatories. And Magistrate Judge Wells did that. If you will look at the

next page of the book, Your Honor, you will see that in a December 12 order Magistrate Judge Wells ordered SCO to, quote, respond fully and in detail to Interrogatory Numbers 12 and 13, as stated in IBM's second set of interrogatories.

SCO didn't provide the information called for by those interrogatories, Your Honor. It didn't identify the copyright we were alleged to have infringed, and it didn't identify a line of allegedly infringing UNIX System 5 Code, and it didn't identify any allegedly infringing Linux code. We approached Magistrate Judge Wells and asked again for an order requiring SCO to provide the information we requested. And, again, this time on March 3, Magistrate Judge Wells ordered SCO again to comply.

In this connection, by the way, Your Honor, she indicated that SCO, by this time, had provided enough discovery with respect to IBM's other claims that she found good faith sufficient to lift the stay, which she had sui sponte imposed, because SCO had failed to comply with IBM's discovery requests.

Nevertheless, that same day, she enters another order ordering SCO to provide responses to Interrogatory Numbers 12 and 13. And, again, Your Honor, SCO did not provide answers to IBM's Interrogatory Numbers 12 and 13. To this day, we do not have responses to those

interrogatories which indicate which copyright we supposedly infringed, which lines of code in UNIX are supposedly infringed, and which code in Linux is the allegedly infringing code.

Now, why is that the case, Your Honor? That is the case, we respectfully submit, because SCO has no evidence whatever that IBM's Linux activities, the copying and the distribution of Linux, infringe SCO's alleged copyrights. And Your Honor need look no further than SCO's own documents, which we have cited in our papers and which I'm constrained somewhat from disclosing and describing in any detail here today, but I would like to provide the Court, nevertheless, with a copy, if I may, of that e-mail.

The document, Your Honor, has been marked confidential by SCO and therefore I'm not at liberty to describe it in great detail, but Your Honor can read it for himself. I think the document is quite clear that the reason SCO has not provided evidence responsive to IBM's interrogatories is because, simply put, it has none.

Now, SCO claims, Your Honor, in its opposition papers, that IBM bears the burden here of proving that its Linux activities do not infringe SCO's alleged copyrights. And, respectfully, Your Honor, that's wrong as a matter of law. And I would refer the Court to the cases cited in our papers and also here at page 10 of our book.

It is well established, Your Honor, that when a declaratory judgment plaintiff seeks a declaration of non-infringement, the party claiming infringement -- here the declaratory judgment defendant -- bears the burden of proof. And the moving party -- in this case IBM -- need not, the Tenth Circuit has said, negate the non-movant's claim with any evidence in order to prevail on its motion. Rather, according to the Tenth Circuit, the moving party is entitled to summary judgment if it can point the Court, as I believe I just did, to a lack of evidence from the non-movant on an essential element of the non-movant's claim.

The cases cited by SCO, Your Honor, in support of the proposition that it is in fact IBM that bears the burden here to negate their claim of infringement, are simply not supportive of that proposition. One is a Tenth Circuit Court of Appeals case called Steiner Sales from 1938 in which SCO cites to a West headnote, not to the holding of the case; which holding, in any case, does not support the proposition that the declaratory judgment plaintiff, seeking a declaration of non-infringement, bears the burden of proof.

SCO cites to a decision from the Northern District of Texas called Erickson v. Harris. That decision, Your Honor, was vacated by the Court following a

motion for reconsideration on grounds relating to the burden of proof.

SCO cites a decision from the Eighth Circuit called Reliance Life, which has subsequently been distinguished by the Eighth Circuit Court of Appeals as not standing for the proposition for which it's cited by SCO That, Your Honor, is my first point.

The second point which I would like to make is that the alleged evidence submitted by SCO in its opposition papers is in no way competitive to the entry of summary judgment here.

SCO relies entirely upon the declaration of one of its employees, a Sandeep Gupta, and Mr. Gupta's testimony, however, fails for at least three reasons. First of those reasons, Your Honor, is that SCO submitted the Gupta declaration for the very first time in response to IBM's motion for summary judgment. The contents of that declaration are not found in SCO's response to IBM's Interrogatory Numbers 12 and 13. They aren't found in what we got in response to Magistrate Judge Well's orders. They still don't exist in response to IBM's interrogatories.

SCO can't, Your Honor, we would respectfully submit, in fairness, rely upon the contents of that declaration in opposition to this motion.

Second, the testimony of Mr. Gupta is, in any

case inadmissible for the reasons that we lay out in our motion to strike. SCO has failed to show, Your Honor, that Mr. Gupta is an expert. Indeed, SCO goes out of its way to make clear that Mr. Gupta is not an expert and that it is not submitting expert testimony in support of this motion. The fact that it hasn't submitted expert testimony is part of its argument why it needs more time to respond to this motion.

Mr. Gupta is simply a lay witness, Your Honor, as SCO acknowledges, and as such, he can't offer his opinion, as he does, that, quote, "Several routines and groupings of code, for which SCO has copyright protection, were copied into the Linux operating system."

That kind of testimony is not rationally based upon the perception of the witness. That kind of testimony is plainly scientific, technical and otherwise specialized knowledge. It is expert testimony dressed up as fact testimony. Mr. Gupta's testimony is inadmissible and should be stricken.

Third, Your Honor, even if you ignore the fact that we get the Gupta declaration for the very first time in response to our motion for summary judgment, and even if you ignore the admissibility of the Gupta testimony, the Gupta testimony is, nevertheless, no impediment whatsoever to the entry of summary judgment. Mr. Gupta identifies

less than 300 lines of code as to which he says there is a similarity between Linux, on the one hand, and UNIX on the other hand.

However, Your Honor, Mr. Gupta's commentary about that code is flawed as a matter of law. He fails altogether to take the count of the controlling test of this Circuit and most Circuits relating to substantial similarity. That is the lynch pin of a claim for copyright infringement. The test is set out in the Tenth Circuit's decision in Gates Rubber, and as set out in the Gates Rubber decision, Your Honor, before a Court compares two works -- here Linux and UNIX -- to determine whether there is substantial similarity, the Court must first filter out --

THE COURT: The extraction, filtration and comparison test?

MR. MARRIOTT: You've got it.

THE COURT: I don't know if I've got it. I know how to say it.

MR. MARRIOTT: You said it, and I think you've got it, Your Honor. You must first filter out of the allegedly protected work those elements which are not protectable. Mr. Gupta doesn't even attempt to filter out the unprotectable elements. The only similarities identified by Mr. Gupta here, Your Honor, are similarities

of absolutely no legal significance. They are the result of Linux and UNIX both being operating systems; utilitarian works written in the same computer operating system language and based upon basically the same industry standards and programs and practices.

The kinds of similarities, Your Honor, which are identified by Mr. Gupta, are the very similarities that Your Honor will see referenced at the end of the e-mail which I handed the Court, if you will look at the last paragraph. The kinds of similarities identified by Mr. Gupta, Your Honor, without reading that, are similarities of no legal significance. SCO recognizes that.

We have submitted for Your Honor's review a declaration of Professor Brian Kernighan. Professor Kernighan is one of the leading authorities on the language, the computer program language, in which Linux and UNIX are written. He's one of the authors of the leading text on that subject. And as explained in Professor Kernighan's declaration, the less than 300 lines identified by Mr. Gupta are plainly all filterable. They are ideas, processes, merger material, scenes a faire material, and material dictated by externalities.

Moreover, Your Honor, when you actually look at the code identified by Mr. Gupta, it is instructive -- and

if the Court would permit. For one thing, Your Honor, the 300 or so -- less than 300, actually, lines of code identified by Mr. Gupta are plainly edited and rearranged and juxtaposed to give the appearance of similarity when, in fact, no similarity exists. And Your Honor can see that by comparing the two pieces of paper that I have provided to the Court.

One, entitled Exhibit H, is Mr. Gupta's. That is from his declaration. The other is a book we put together which contains the actual files of code from which Mr. Gupta has selected, juxtaposed, cherry-picked code to give the impression of similarity. And if Your Honor flips through the larger book, you will see that where there is yellow highlighting is where Mr. Gupta says there is matching code. It is that matching code that he then replicates in his Exhibit H for the proposition of suggesting that somehow the allegedly infringing code identified by him appears continuously in files, which demonstrate blatant copying.

Put that aside, Your Honor, entirely, if you would. Look solely at Mr. Gupta's Exhibit H. It doesn't require any technical experience for a non-technical type like myself, Your Honor, to look at Exhibit H and see that the very code which appears in the far left column and the far right column, which Mr. Gupta says is substantially

similar, if not identical, isn't anything remotely close to being substantially similar or identical.

And we have laid out in detail, in Professor Kernighan's declaration -- or, rather, he has laid out why it is that, in fact, there are here no similarities of consequence. Even if, Your Honor, you were to assume that Mr. Gupta had properly done a filtration analysis, as the Tenth Circuit requires, and even if you were to assume that the code he identifies is in fact all substantially similar or identical code, which it clearly isn't, the 300 or so lines of code he identifies is plainly insufficient to give rise to a genuine issue of material fact with respect to a finding of substantial similarity.

The universe of UNIX code to which SCO contends it has copyright protection, Your Honor, consists of tens of millions of lines of code. Mr. Gupta identifies 300. And there is nothing substantial about that either quantitatively, or as Professor Kernighan explains, qualitatively.

And if that's not enough, Your Honor, the Court ought to look carefully at the opposition memorandum submitted by SCO in connection with IBM's motion to strike. If I could refer the Court to page 11 of our little book. In opposition to IBM's motion for summary judgment, SCO said in its brief, and I think Mr. Gupta's declaration is

quite clear that SCO is setting out evidence sufficient to create a genuine issue of material fact. And we have provided the citations for Your Honor on our page 11.

Mr. Gupta and SCO were quite clear that what Mr. Gupta had to say was sufficient to create a genuine issue of material fact.

Now, Your Honor, in opposition to IBM's motion to strike, SCO concedes that the Gupta declaration, quote, does not discuss whether any of the Linux code he observed infringes any of SCO's copyrights. SCO claims that, quote, "Mr. Gupta's declaration was offered not to show IBM's copyright infringement of SCO protected code. Rather," it says, "it was submitted for the," quote, "very narrow purpose," close quote, to support SCO's Rule 56 request.

SCO effectively concedes, Your Honor, that the very evidence submitted by Mr. Gupta, not withstanding all of its other problems, is insufficient to create a genuine issue of material fact. That's my second point.

Third point, Your Honor, and one I hope is responsive to the Court's question, is the following: SCO's opposition, in the end, hangs on a single untenable proposition. And that proposition is, Your Honor, that SCO should be allowed more time and more discovery to find the evidence which it's publicly told the whole world that it has but which it plainly does not have.

The only information, Your Honor, that is necessary to show copyright infringement has been available to SCO, as Mr. Chesler said in his remarks, from the very beginning of this litigation. There is no need for any discovery on this claim, and SCO's Rule 56(f) application should be denied. Under Rule 56(f), Your Honor, as you well know, a party is not entitled to relief simply because it can compose a long wish list of desired discovery.

We have laid out some of the principles for the Court at page 12 of our book. "A party may not invoke Rule 56(f)," quote, "by merely asserting that discovery is incomplete or that specific facts necessary to oppose summary judgment are unavailable," close quote.

If the information sought is irrelevant or cumulative, no extension, says the Tenth Circuit, will be allowed.

Now, a Rule 56(f) application, Your Honor, needs to be evaluated in light of the elements at issue in the claim under motion. Here the summary judgment is appropriate, as I indicated at the outset, unless SCO can show two things. And the 56 analysis, Your Honor -- Rule 56(f) analysis should focus on those two things. SCO has to show, in order to avoid summary judgment -- this is in the first page of our book -- that it owns valid copyrights in UNIX software and that IBM has copied protectable

elements of the allegedly copyrighted UNIX software.

And with those elements in line, Your Honor -- or in mind, rather, let me explain why the Rule 56(f) application here is meritless. First of all, SCO doesn't need any discovery from anybody to determine whether it owns the alleged copyrights. It's the supposed owner of the copyrights. Although it has failed utterly here to prove that it has valid copyrights, it has publicly claimed for more than a year and a half that it owns them. It has sued Autozone for infringing them. It has sued IBM for infringing them.

It can't sit here and say it needs discovery with respect to whether it owns copyrights that it sued IBM and Autozone for infringing and for which it was required, under Rule 11, to have a good faith basis for bringing in a claim of copyright infringement.

Secondly, Your Honor, SCO doesn't need any discovery regarding IBM's copying, which is the second and the last --

THE COURT: Regarding what?

MR. MARRIOTT: IBM's copying, IBM's copying of Linux, which is the second and the last element essential to a claim for copyright infringement. There is absolutely no question, Your Honor, that IBM has copied and has encouraged others to copy Linux. We admit it. It is in

our statement of facts. SCO doesn't contest it. It is deemed admitted for purposes of this motion. The only remaining question is whether Linux, which IBM indisputably copies, is substantially similar to Linux. That's the question.

And determining substantial similarity, as we lay out at page 13 of our book, Your Honor, is about a comparison. It's a comparison between Linux, on the one hand, and between UNIX on the other hand. And the Tenth Circuit has said as much. Quote -- according to the Autoskill case. "Substantial similarity analysis involves," quote, "a comparison of portions of the alleged infringer's works with the portions of the complaining party's works which are determined to be legally protectable under the Copyright Act.

SCO concedes this, Your Honor. If you look at the declaration submitted by Mr. Sontag in support of SCO's opposition, he says, quote, "To show that Linux code is substantially similar to UNIX code requires a comparison to that code."

The only question is whether the two bodies of code compare or are. That's it. The only materials, Your Honor, that SCO or anyone else needs to determine whether Linux is substantially similar that UNIX is Linux and UNIX. That's it. SCO has had those materials from the beginning

of this case.

Linux, as Mr. Chesler has indicated, is written publicly over the internet, and it is available free for download by anybody. SCO was founded in 1994 as a Linux distributor. It has distributed thousands of versions of the Linux kernel. It doesn't need Linux or IBM or anyone else for purposes of that comparison.

What about the UNIX code? They purport to be the owner of the alleged UNIX code. They say, at least as of their 2001 acquisition of certain divisions of the Santa Cruz Operation, Inc., that they have the code. The only materials necessary, Your Honor, they have. And they have long had it.

Now, they suggest -- SCO suggests, in opposition to IBM's motion, that it needs years of additional discovery to determine whether or not Linux infringes UNIX. In fact, Mr. Sontag says, Your Honor, at one point, that up to 25,000 additional man-years are required in order to do this comparison. That estimate, of course, is based entirely upon his opinion which, for the reasons we set out in our motion to strike, is an impermissible opinion.

He has no personal knowledge of that, and much like Mr. Gupta, he's not qualified as an expert. SCO doesn't pretend Mr. Sontag has been submitted here as an expert, and whether or not there is substantial similarity

between Linux and UNIX is clearly a question of expert testimony. It is a question, Your Honor, that Mr. Sontag is not capable of opining as to. Now, putting aside entirely the admissibility of Mr. Sontag's opinions, they are untenable on their face, Your Honor.

We asked the question of how long it would take to compare UNIX to Linux to Professor Randall Davis of MIT, the same school from which SCO's purported experts come. He was the Court-appointed expert, Your Honor, in the Computer Associates Case, which is one of the leading cases on substantial similarity, and as he explains in his declaration, it would take capable programmers no more than a couple months to compare Linux to UNIX to determine whether there was infringement.

Mr. Sontag's opinions about 25,000 man-years being required to compare UNIX to Linux, Your Honor, cannot be reconciled with SCO's public statements. I mean, SCO said, as I indicated at the outset, and has been saying for 15 months, that it has three separate teams of experts doing deep dives into Linux and UNIX, comparing Linux to UNIX every which way but Tuesday, and finding substantial evidence of similarity; evidence which, by the way, we have never seen.

Moreover, Your Honor, if you need any further indication as to how long it really takes to do the

comparison, look at the e-mail, in which it's quite clear that it didn't take anything like 25,000 man-years to do a comparison between Linux and UNIX. Mr. Sontag says, Your Honor, that comparing a single version of UNIX to a single version of Linux would take this 25,000 man-years. The e-mail, which Your Honor has before you, makes reference to comparisons of Linux to multiple versions of UNIX. It doesn't appear that took anything near 25,000 man-years.

Now, having created the straw man of the need for 25,000 man-years in order to do this comparison which, parenthetically, it's already done, SCO says the only way that we can avoid the conundrum of the 25,000 man-year comparison is if the Court gives them what amounts to four categories of discovery. And what I would like to do, Your Honor, with your permission, is to explain to you, category-by-category, why none of that matters at all to this motion.

First, SCO says it needs discovery with respect to IBM's Linux activities. IBM seeks a declaration that its Linux activities, its copying of Linux and its encouraging of others to copy Linux, doesn't infringe SCO's copyrights. As I indicated, it's not disputed that we copied Linux and we encourage others to copy Linux. That isn't in dispute. It is unimaginable to me, therefore, why they need any discovery with respect to the only Linux

activity of any consequence. The relative discovery, Your Honor, is determined and framed by the elements of the claim they have to substantiate.

Copy. We admit that we copied. No discovery with respect to IBM's Linux activities is required, let alone the, quote, "substantial and time-consuming discovery" that SCO imagines is necessary here.

The second category of discovery they are seeking, Your Honor, is discovery with respect to IBM's access to the allegedly copyrighted materials. Well, IBM's motion is not focused on the question of access, Your Honor. Your Honor may assume access, if you wish, for purposes of this motion, because a mere showing of access is insufficient, in any case, to create a question of material fact unless there is substantial similarity.

SCO must show, to avoid summary judgment, there is substantial similarity, and that's something they cannot show. Discovery as to access is under development as to that question, so assume full access, if you wish, for purposes of evaluating this motion.

The third category of discovery they seek, Your Honor, is with respect to IBM's AIX and Dynix products. This is the one about which they are making such a big deal. IBM has produced in this litigation already, Your Honor, hundreds of millions of lines of AIX and Dynix code.

And just to be clear, AIX and Dynix code aren't Linux code, and they aren't the System 5 code which SCO says has allegedly been infringed here. They are IBM's separate products.

We have produced hundreds of millions of lines of that code, not sporadic productions of the code. For the period for which they have originally asked for that discovery, we have produced every release of that code. It amounts to hundreds of millions of lines of code. That, they say, isn't good enough, though, frankly, that's entirely irrelevant to the question of copyright infringement.

And, parenthentically, that is cited, in the first instance, not for purposes of copyright infringement, Your Honor, because as you heard them say they didn't put the copyright question, which we say should be here, in the case. That isn't what they were seeking originally. They were seeking discovery with respect to their contract claims and, indeed, a good portion of their opposition to IBM's motion for summary judgment is about their contract claim.

We produced hundreds of millions of lines of the AIX and Dynix code. None of it has anything whatsoever to do with the question of substantial similarity. Whether UNIX is infringed by Linux, Your Honor, depends upon a

comparison of UNIX to Linux. Even if certain code originally originated from AIX or Dynix and made its way into Linux, it makes no difference if UNIX and Linux are not, at the end of the day, substantially similar.

Now, in any event, if you look closely at the Sontag declaration, what Mr. Sontag seems to be saying is the conundrum is this 25,000 man-year comparison. If we can get all this discovery from IBM, and particularly the AIX and the Dynix code, that will be the map that will guide us to the smoking gun evidence. Your Honor, the code that they want, the additional AIX and Dynix code, is code that is effectively, for most of the period, draft code, iterive code, not the actual releases that IBM made for the period '99, I think it was, to the present.

The code amounts to two plus billion lines of source code. So if Mr. Sontag says if you compare one version of Linux, which they say is about 4 million lines of code, to one version UNIX, which they say is about 3 million lines, they say is going to take 25,000 man-years, well, how long do you think it's going to take to compare two plus billion lines of code to whatever it is they want to compare it to?

The notion that the production of two plus billion lines of code, none of which has anything to do with substantial similarity between Linux and UNIX, is

somehow going to cure the problem presented by the straw man of 25,000 man-years of discovery is, Your Honor, untenable.

Finally, the fourth category of discovery that SCO seeks concerns the third-party contributors to Linux and their supposed contributions to Linux. Again, here, Your Honor, what matters is whether Linux is substantially similar to UNIX. It doesn't matter where the code came from. It doesn't matter how it got there. What matters is whether they are, in fact, comparable.

In any event, all SCO could ever possibly hope to know and have with respect to Linux is publicly available. Your Honor could go to www.Linuxhq.com. Now, at that website, you can find every version of the Linux kernel, from version 1.0.0. Not just that, but you can find every change that was ever made to the kernel since its inception.

So the notion that more discovery is required, depositions of Mr. Torvals and others, is simply, Your Honor, untenable. There is no reason, in any event, for Mr. Torvals or the other contributors, who are no secret, who will be deposed already.

To conclude, Your Honor, IBM's motion should be granted for three reasons. It should be granted because, despite the public accusations of infringement by IBM, SCO

has no evidence whatever to support its allegation. Mr. Gupta's evidence of infringement, Your Honor, is insufficient, and they now acknowledge it's insufficient to create a genuine issue of material fact. And the sole proposition that they can stand here and argue for is delay, more discovery, and there is no additional discovery or delay required to compare Linux to UNIX when they have had it since well before the inception of the case.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Marriott.

Mr. Hatch.

MR. HATCH: Your Honor, would it be appropriate to ask for a short recess at this point?

THE COURT: Yes. We'll take 10 minutes.

(Short recess.)

You may proceed, Mr. Hatch.

MR. HATCH: Thank you very much, Your Honor. At the beginning of the hearing today, Your Honor, I raised issues regarding discovery, and I want to raise those again in the following context: What we -- a lot of Mr. Marriott's argument that we just heard was very good, very polished, in the following way: It's now about the third or fourth time we've heard all of that.

The problem is that we heard a little bit of it in front of you the last time we were here. We have heard

it repeatedly over the course of several hearings in front of Magistrate Judge Wells. Regrettably, and I think that was part of our frustration that caused me to raise the issue at the beginning of this hearing, and also was the cause of the pleading, the emergency expedited pleading that we filed just recently before Your Honor, was that these matters -- and this really kind of, I think, shows the danger of going forward on summary judgment motions of this type this early -- at this stage in the case, let's say.

THE COURT: Well, but he says with respect to this particular claim, you claim what you had at the beginning, and all you have to do is compare yours to what everybody can get.

MR. HATCH: Yeah. That's real nice, and I appreciate him saying that, but, Your Honor --

THE COURT: He read your client's public statements about that.

MR. HATCH: Well, and I'm going to address those in a few minutes because I think, one, he mischaracterizes those quite a bit. And, you know, I really view this as somewhat akin to -- if this were the legal principle going forward, it would be really a defendant's bonanza because what essentially they are saying, at this stage of the game, is that you can have enough to go forward and make

your claims and push forward, but where the claims are such that, in this instance IBM -- but say it was a products liability case before the -- a securities case, it could be the brokerage house, where the defendant actually controls a good portion of the documents and information, it would be real nice for defendants to be able to come in at a preliminary stage, after they haven't given any discovery, and say, "Gee, you can't show enough. We are out of here."

THE COURT: Well, but UNIX is yours, and Linux everybody can get a hold of; isn't that right?

MR. HATCH: Well, no. It's somewhat disingenuous, Your Honor.

THE COURT: Show me how it's disingenuous.

MR. HATCH: Well, Mr. Frei is going to deal with that a little bit on the 56(f), but let me at least put it short. This is why this is unfortunate we're here arguing this now.

THE COURT: Well, but we are.

MR. HATCH: We are. We expected that this would be argued yesterday so that we would have the benefit of that argument and potentially Judge Wells' ruling because we have now -- what Mr. Marriott fails to mention is that we have now, for the second time, renewed a motion to compel in front of Judge Wells to get the information from them that they have repeatedly refused to get us. Now they

are saying "Well, you refused to give us stuff."

We are saying, "You refused to give us stuff."

And instead of arguing that either in front of Judge Wells or in front of you -- and I'm happy to do it either place, with the Judge who's deciding it having the benefit of the briefing on the issue and understanding -- we have now argued this two or three times in front of Judge Wells -- he now wants to do it in front of you without the benefit of those briefs, without the benefit of the hearing yesterday and say, "Give us summary judgment," when we can't even get, after a year and a half, get predicate discovery out of IBM.

Now he wants you to just take it on good faith that -- "trust me, you know, I'm a good defendant."

And Mr. Marriott is a highest caliber lawyer. But he's an advocate, and I don't think we put ourselves in a position where, without briefing, without anything else, we come in and just say, "Trust me, even though this matter is over in front of another judge and hasn't gotten to you yet, which it may, and on that basis give us summary judgment."

THE COURT: Well, the discovery matter is in front of the Magistrate Judge, but the partial summary judgment matter is in front of me now, here.

MR. HATCH: I understand.

THE COURT: What is it you think you need? Well, you say Mr. Frei is going to address that.

MR. HATCH: Well, if I can address that because, I mean, part of what you just said, I think is -- it was their lead argument; in their brief, their lead argument -- and I'm going to play the gun game, too, if you don't mind.

THE COURT: No. Let's see if you can work it better than Mr. James worked it.

MR. HATCH: Boy, you're really creating controversies there. In their opening brief, this is what they said. And this was the basis. I mean, there are a lot of new issues that have been raised in Mr. Marriott's argument today, and we're going to address those. It will take a few minutes. But let's go to what their lead arguments were.

They went back to this discovery dispute, and what they don't give us is a little bit of a framework. We had, understandably, both parties at the earliest stages of this saying, "We need your stuff."

"No, we need your stuff."

And Judge Wells -- and I don't think it would be unfair to her to say she kind of threw up her hands and said, "Someone has got to go first." So she ordered us to produce what we had and ultimately said, "Fine. Now you've gone. IBM, you produce stuff."

But, initially, this is what they said, and they have taken this kind of discovery dispute and turned it on its head and said that we have -- "Despite certifying twice it has complied with the Court's orders, SCO has in fact failed to comply with the orders."

Okay? So they are saying now that we have violated orders.

THE COURT: They say you haven't answered Interrogatories 12 and 13.

MR. HATCH: That's correct. And this is not a motion they have got in front of Judge Wells. This is just a statement to you that now they want sanctions on. Okay? So then they go forward and, as Your Honor just said, they say, "You haven't answered completely Interrogatories 12 and 13."

And what they want from this --

THE COURT: Which, arguably, is your evidence of their copyright infringement.

MR. HATCH: Right. And what they want from this, even though it was an interrogatory imposed near the beginning of the game, is they want to say, "Guess what. This now bars the game. We're done. Litigation is over. Discovery is over. Despite the fact discovery now ends in February, it should end now. You've had your chance."

THE COURT: At least as to Counterclaim 10.

MR. HATCH: I understand. But, Your Honor, what Judge Wells left open, that they didn't cite in their brief, is -- well, you see here from the order itself, it says, "SCO does not have sufficient information in its possession, custody or control to sufficiently answer any of IBM's requests that are subject to the order. SCO should provide an affidavit."

Okay? So she didn't say, "Give everything now and you're done," because that would be absurd. I mean, litigation doesn't work that way. You give what you have and then you -- if they won't give you discovery, you indicate what you need, and we're going to -- Mr. Frei will do that in the context of the 56(f) motion. But, as a summary, we indicated, and we argued vociferously in front of Judge Wells, that we need something. And she has ordered them to produce things.

So the next light is, again, from their summary judgment brief. And this is their lead argument. They say, "Despite the Court's orders, SCO failed fully to respond."

And they again are admitting -- I mean omitting the fact that SCO stated -- we did respond. They quibble with how extensive our response was, and we indicated that we required complete discovery from IBM, including versions of AIX and Dynix and that there, undoubtedly, will be

additional information that we will need. Okay?

And then we provided other discovery certifications that were in front of Judge Wells, and we were indicating what we were missing from their discovery. Now, I have been involved in my share of cases but, you know, I have never been really faced with the kind of issue that we are dealing with here, which is, at a preliminary stage of the game, and particularly where someone wants to file summary judgment motions, the litigants are saying, "We are going to determine relevance. You don't need this stuff."

You know, the new discovery rules have been pretty clear. If it's at all relevant, then you should have it. And then we can argue later whether or not there was something in there or not. And Mr. Frei is going to go through, at some length with you, I believe, one of the things that has been being argued about in front of Judge Wells for some time and is directly at issue in our renewed motion to compel because we believe it's been -- you know, that they have been ordered to produce this, and in the context of the information it contained in the system and what's called the CMV system and the RCS system.

Now, the information that's in there, they have been asked to supply. They have not been specifically asked yet to -- ordered yet to produce those systems.

We've got another lengthy memorandum called Memorandum Regarding Discovery in front of Judge Wells that addresses this issue. And pursuant --

THE COURT: Is Mr. Frei going to go over all this? Because I don't want you to go over it twice. I don't want you to go over it and then I don't want him to go over it.

MR. HATCH: Okay.

THE COURT: I just want to hear stuff once. So, I assumed he was going to do something different than you are going to do.

MR. HATCH: Okay. Right. My point is, solely, these are issues that are in front of Judge Wells to impart the information they were supposed to provide us and they didn't, and we still need that information. And, again, you're handicapped because those motions aren't in front of you. And we're all handicapped because the hope was that those motions would have been decided before we were here and, one way or another, they would have impacted this motion pretty substantially.

Well, the upshot of it all, as one of the slides shows, Your Honor, is there isn't some issue out there that we haven't been producing discovery. Judge Wells specifically found that we had complied in good faith. And that included our responses to Interrogatories 12 and 13

that they are complaining about now. So they want to turn this discovery dispute on its head and say, "Guess what, you're cut off."

And that's not what the Judge said. The Judge said, as I would have expected the Magistrate Judge would say -- and she is an excellent Magistrate Judge -- is that we have gotten where we need to be at this preliminary stage of the litigation. Then what did she do? She ordered IBM to turn over information.

Now, give me just a second, Your Honor. Based on Mr. Marriott's arguments, I'm kind of taking this out of order. To show you we're still kind of in the same posture, I'm sure you will recall, Your Honor, that -- and this wasn't in the body of what I was going to present, so that's why it took me a second longer. You recall last time we talked about some of the discovery problems we were having in the context of changing the scheduling order.

And you will recall that I raised the fact that we had given an interrogatory to IBM that specifically asked for who worked on AIX, Dynix and Linux at IBM and what were the precise contributions. And you will recall, Your Honor, that we were a little disappointed that -- and we presented a -- I think it was an article, you know, if we're going to both use the press to get after each other -- I used an article where someone from IBM had

limited that -- had said it was a few hundred people.

That's not on the slide, but we talked about that at the last hearing. They said it was going to be a few hundred people. But in response to the request, we got a list of 7200 people, and none of them were identified with contact information, and not a single one of them were identified as to what they contributed. And it's pretty clear from the question that -- what we were getting at. And what we got was 7200 people which, you know, it has never been disputed included probably secretaries, administrative staff, people who had absolutely nothing to do with the subject matter of this litigation.

Well, since that hearing, Your Honor, we filed motions to compel, and actually that was before this hearing I am talking about with you. And the Magistrate Judge ordered them to provide the information. So, what they ended up doing is they eventually gave us contact information on the 7200 people -- or portions of the 7200 people -- and still have not -- we're still fighting about, and it's part of the discovery dispute in front of Judge Wells, who are these relevant people? How do we proceed here? Which programmers are we going to depose?

IBM is still fighting with us because the original scheduling order said we get 40 depositions a side. And you recall when we were in front of you last

time, Your Honor, we said the copyright counterclaims -- all their counterclaims came after that decision was made and 40 was a ridiculous amount. Well, we still have not resolved that before Judge Wells, and IBM has still been taking the position with us --

THE COURT: How does that relate to this motion, at this time, on this counterclaim?

MR. HATCH: Well, the following way, Your Honor, is -- and if I can go -- it relates in the following way: Their argument essentially is, Your Honor, and it's a truism, is they have a right to bring a summary judgment motion at any time. Okay? But the corollary to that is the Judge, in his gatekeeping opportunities, is -- it has a right to decide whether or not to stay the briefing on that and the decision on that.

THE COURT: I clearly do have that discretion if I decide to utilize it in that way.

MR. HATCH: And they have completely ignored that, and they have ignored the discovery that we need. Now, the interesting thing is the arguments that they raise as those lead arguments, and why we were at the end and we are precluded from going any further, those were their lead arguments. But in their reply brief, once we showed that that isn't what Magistrate Wells ordered, that we were at the preliminary state of discovery -- the Magistrate did

say that we had complied in good faith. She didn't say, "I still think you're weak on 11 and 12, Interrogatories 11 and 12." She said, "You complied with good faith. Let's move on."

We haven't gotten anywhere. They clearly can't cut it at that point. Now, in our opposition papers, you've heard a lot about Mr. Gupta. And I don't want to address specifically, because Mr. Frei will, what Mr. Gupta had to say and why that's relevant and shouldn't be enough, but it's very interesting the kind of theme that goes here because if you go to page 12 and 13 in their reply -- now, in their reply they completely abandon essentially, because they don't discuss it, and they don't deal with the issues about how we have complied with Judge Wells' orders and the discovery going forward, but they say this as to Mr. Gupta, who presented evidence:

They say, "SCO never disclosed the information contained in the Gupta declaration in response to IBM's discovery requests or the Court's discovery orders. The Court should, therefore, disregard Mr. Gupta's declaration considering IBM's motions."

Well, in other words, the last time I checked, that's the way you do -- one of the ways you oppose a summary judgment motion is to provide declarations, and we are at a preliminary stage. What they are essentially

saying is, "Okay, if you really weren't cut off back in April, you know, from these declarations you made, and maybe it's true that Judge Wells had said that we can move on and you have produced in good faith," they are now saying, every time we pick up some piece of evidence, is: "Well, it's too late. You shouldn't be able to put this in."

Well, we are not even at the end of discovery. And then they complain about Mr. Gupta because he says he does expert things. We are not even at the end of expert discovery. And, Your Honor, your -- that goes directly to the issue of whether or not this matter, as a matter of law, is premature. And I draw your attention to a case that I'm sure, given the amount of opinions I saw in the reporters on this, is probably near and dear to your heart.

THE COURT: It's one of my favorite cases.

MR. HATCH: One of your favorite cases. I won't ask you to rank it with this case. But the same type of argument was being made, apparently, and it was not as clear to me from the opinion, the full stage of where that was at, but they were making a similar argument in that case, apparently, is that it was a preliminary enough stage that they weren't coming up with evidence on their own and they needed, apparently, additional evidence from the other side. And Your Honor said, and I think rightfully so, that

P&G's evidence is not fully developed and that Amway's motion is premature.

And for a lot of reasons, not the least of which is that IBM is really, through this process, trying to restructure how the discovery process should be; in other words, they are saying, "You should have to take your experts now." Okay? "And you should have all your discovery done on this counterclaim," which is really -- you know, this case primarily is --

THE COURT: One of the things they are saying is discovery isn't going to help on this counterclaim. Discovery is not going to illuminate anything on this counterclaim. That's one of the their arguments. They say you know what you own and have, and anybody can find out what's in Linux. And so, you know, you compare it. That's what they are saying, discovery won't get us anywhere on this particular matter.

MR. HATCH: And that's just not true, and that will become more evident with the things Mr. Frei is saying.

THE COURT: All right.

MR. HATCH: The cases are fairly clear, and the Huthwaite case is not really different than any other case out there, but it was a little bit more directly on point. It did say the motion is premature at this point because

it's brought before the submission of expert reports on the substantial similarity question and, you know, rightfully it talked about that being a significant question in, of course, a copyright claim. He cited, I think, Tenth Circuit law on that point. And there are a number of cases that deal with that.

But that is the quintessential expert opinion that has to be given through expert evidence, and we're not even anywhere close yet to our discovery cutoff. So essentially what, again, they are doing is attempting to push that up. Where we are all trying to manage this thing and get this thing done in time, they are trying to push that up. And that's another basis for why this Court should use its discretion to not hear this motion -- not hear it, but not to decide this motion at this time.

There are a number of reasons. I wanted to put them together in this form because I wanted to go through them reasonably quick. But Rule 56(f) -- what I'm talking to you about, your discretion, and what Mr. Frei is going to talk about in technical detail are indeed 56(f) arguments. But that's to provide a safeguard against an improvident or premature grant of summary judgement, and I think that goes directly to my part of the argument -- certainly Mr. Frei's argument, but my part of the argument that this stuff is all preliminary.

We haven't even gotten a hearing in front of Judge Wells on this matter yet. The fact-intensive nature of the substantial similarity test is a classic issue for the jury, and Mr. Marriott has spent a considerable amount time arguing about, you know, what we can or cannot show there and whether, you know -- and that ultimately will be -- once we get to that point, that's ultimately a question for the jury. And then the use of experts, as I've just talked about, is really a paramount necessity here.

I want to make a couple of other quick points.

THE COURT: You could have put in a declaration of an expert as part of your response to their motion for partial summary judgment on the counterclaim and 59.

MR. HATCH: Well, as a theoretical matter, yes. As practical matter here, and I think that's what we're arguing in front of Judge Wells, too, is a lot of the predicate discovery that would be necessary for that and that would make it meaningful -- certainly make it more meaningful -- is still required. So I think it's obviously premature.

I want to talk about, quickly, two issues that Mr. Marriott raised; one of which he raised, the Davidson e-mail, because it's very interesting. He indicated, well, this Davidson e-mail seems to indicate that we could do all

this stuff without discovery for them. One, it begs to the question of whether we are entitled to discovery anyway. Mr. Frei is going to tell you, you know, what we're looking for is the most efficient way of dealing with the type of evidence -- they talk about -- I think Mr. Marriott -- I wrote down this. He said, "How long do you think this -- there's two billion lines of total code that has to be compared, how long do you think that's going to be if we were saying it's going to be 25,000 man-years?"

Well, Mr. Frei is going to go to some length and show you how IBM knows that that can be done in a rather efficient manner with materials that they have in place and refuse to give us.

THE COURT: At some length? Maybe he'll give us the summary version.

MR. HATCH: Well, okay. I'm sure he will. But they raise this e-mail for that purpose. But a couple of things that they don't point out -- and I'll go to that -- is the study itself because one of the things that is talked about in the e-mail -- and that was confidential, so I would ask Your Honor to just turn to -- I think in your book it's tab 55.

THE COURT: Are you looking at the e-mail?

MR. HATCH: Yeah. It's a quote from the e-mail.

THE COURT: Okay.

MR. HATCH: I mean, essentially what they did is they left out information that said he worked with him, but he may have done things. Finally -- I don't think that's confidential -- and that, I don't have copies.

Okay? And so he's working, and at some period of time, years after this report -- and it's being offered in some fashion in front of Your Honor to say that this -- you know, that it should be easy and that we have already made conclusions that there is no copyright problem here. And nothing could be further from the truth.

If Your Honor would go to the next -- and this one is not confidential, so I'll put it up. The actual report itself -- if Your Honor would like, I could give you a copy of the report itself.

THE COURT: If you want to.

MR. HATCH: I mean the actual report.

THE COURT: That's fine.

MR. HATCH: I mean, the conclusions were a little different than were represented in the brief and in argument today. In the brief I understand somewhat because I don't -- my understanding is they did not have a copy of the report at the time they wrote their brief. The report itself makes some very interesting actual findings. First, that many portions of Linux were clearly written with access to a copy of UNIX sources. Okay? That's somewhat

different from what we're being told.

Second, there is some code where Linux is line-for-line identical to UNIX. Again, somewhat slightly different than what we're being told.

It says, thirdly, there are also portions of the program which appear to have been rewritten, perhaps only for purposes of obfuscating that the code is essentially the same. These techniques also apply if whoever modified the code did just that because there are a few lines which are completely identical.

Fourth, it says that we did not look through the programs to find substantial similarities or structural similarities.

So, he's starting out by saying kind of the opposite of what the e-mail was used for, to say, well, there really isn't any copying. There is nothing there. He's actually saying there's quite a bit there, but then he indicates in the last two highlighted portions, he indicates that, yeah, my study is somewhat limited and there's obviously still a lot that has to be done.

So I think Your Honor needs to be aware of that, because the Davidson thing offers absolutely no support for their allegations that this somehow has already been done and what have not. The interesting thing, too, is even though the Davidson e-mail, Your Honor, is dated three

years later, the interesting thing is the date of that report. That report is actually pre-IBM. As we understand the dates at this time, this report was done previous to IBM's beginning to engage in the behavior that we have sued them for here.

So, again, it certainly can't be evidence, some kind of conclusive evidence, that we have already done this and can't find anything because he did find those. He doesn't say -- and he doesn't say who he found them regarding because IBM wasn't an issue at the time. And so it's somewhat disingenuous to say that, oh, we have already found this stuff, and the Davidson memo says we have, because, yeah, we found stuff, but it was stuff from other people. They are not here. They are not defendants here. But that can't be a basis for saying that we have already done all the work regarding IBM or that we can.

The last point I wanted to make, real quickly, is they raised at some length today in the argument, and it was interesting because they didn't really raise it in their initial brief, but they did mention it in the reply, is they started raising for the first time in the reply brief issues about ownership. And those just aren't properly before the Court.

In their opening brief, this is what they said about that issue. And you raised this earlier, Your Honor.

They said, "Ownership of these copyrights is a central issue in SCO's lawsuit against Novell, which is currently pending before this Court, but the Court need not decide that question on this motion."

That's what their opening brief said. And when we dealt with the opposition, we took them at their word, and I think they have made that statement elsewhere in front of the Court. And so we expressly noted that and understood that they were excluding from this present motion issues on ownership. Well, then, in their reply, they raised them and again today they raised them.

And I think, as a matter of law -- and I will just cite, because we don't get a surrebuttal on this thing, but the Wagner vs. Guy's Foods case, the Tom vs. First American, and the Malhotra vs. Cotter case, which indicate that summary judgment shouldn't be granted on issues first raised in reply briefs. And so, you know, I think raising that now, particularly where it really, one, it isn't an issue and, two, they said it wasn't an issue, and to now kind of slide down to hope to put that in at the last minute, it shouldn't a part of that, your decision.

Your Honor, at this point I think it would be appropriate for me to turn the podium over to Mr. Frei --

THE COURT: All right.

MR. HATCH: -- to discuss the aspects of

discovery under 56(f) and answer some of those questions that you raised.

THE COURT: Okay. Thank you, Mr. Hatch.

Mr. Frei.

MR. FREI: Your Honor, I'm Frederick Frei. I'll be presenting argument on the 56(f) motion and on the motion to strike the three declarations.

THE COURT: All right.

MR. FREI: I will endeavor to answer every question you have on this discovery issue, and at end of the argument, I hope you will have an understanding of what we are asking for, why we need it, and what we are going to do with it when we get it.

I want to start off with, IBM says that all we need is the UNIX code, UNIX source code, which we have, and the Linux source code, which is publicly available, that we have. And as they say on page 28 --

THE COURT: Are you're going to tell me why that's isn't so.

MR. FREI: I'm going to tell you why that's not so. I'm going to show it to you graphically. They say that it's nothing more than a side-by-side comparison, and I believe Mr. Chesler said, a while ago in court, it's very simple. Well, that is the Linux kernel, 4 million lines of code, 8,750 files. Those files contain anywhere from tens

of lines of code to over 10 thousand lines of code. UNIX is of a comparable size; somewhat smaller, but of a comparable size.

Now, if you were to line up 8,000 files on the left-hand column and 8,000 files on the right-hand column, and I said to you, "Compare them," well, your first thing would be, where do I begin? Do I compare the top file with all 8,000 and then the second with all 8,000? If you did that, you would have 64 million comparisons. The number, 25,000 years, that Mr. Marriott made so much of, that was a hypothetical number that was based on manual comparison, and the exact assumptions and calculations were set forth in the declaration. Okay?

We will use software comparison tools. We will rely on the expertise of people who know UNIX and people who know Linux, but even with that knowledge, it is a huge, huge task. It's like if I sit -- you know, put you --

THE COURT: Are you saying that you need more time to make the comparisons or that you need something from IBM to make the comparisons or both?

MR. FREI: Both.

THE COURT: What is it you think you need from IBM?

MR. FREI: What we need from IBM is the information that will constitute a road map, that will

enable us to zero in on particular parts of Linux to compare with particular parts of UNIX. That's what we need from IBM as to their AIX and Dynix contributions.

THE COURT: One might conclude, from some statements previously made, that a lot of these comparisons had already been done before the lawsuit was even filed.

MR. FREI: I believe that many of those statements referred to that 1999 report that you were just given, and that was when Linux was half the size of what it is now. That was when Linux was maybe two-and-a-half million -- 2.9 million lines, and now it's, I think, 5 million. So there's double the amount since then. There's everything that IBM put in since then. So I read those statements in IBM's brief. And most of them, if not all of them, seem to relate to what was done in that 1999 report.

But even aside from that, those analyses were not done by lawyers applying copyright law, applying abstraction, filtration, and comparison. Those were done by computer programmers who were trying to identify segments of code to show that one was the same as something else or was similar, from the standpoint of a computer science person, not from the standpoint of what we, as plaintiffs, would need to establish or what we need to defend IBM's motion.

And there's a world of difference between what

was done in the past and what must be done in this litigation. Now, I have a case, Your Honor, that I came across when I was preparing for this argument, not cited in our briefs, but I would like to give you a copy. May I approach the bench?

THE COURT: You may.

MR. FREI: Thank you. I think this case is pretty on point factually, and I'm just going to read a very tiny point from the -- I guess it's the third page.

THE COURT: How come it wasn't cited if it's on point?

MR. FREI: It's June 28, Your Honor. I didn't find it until -- I think I found it September 8.

THE COURT: All right.

MR. FREI: This was a case involving two software programs. One had several million lines of code, the other had several million lines of code. But in this particular case, five employees from the plaintiff went to work for the defendant and took the source code with them and started coming up with this competitive product. The Court said, "There does not appear to be any perfect way to compare millions of lines of source code."

THE COURT: Where are you reading from?

MR. FREI: It's on page 3, Your Honor. It's at the tail end of the third -- it's on the third page of this

opinion, the paragraph beginning with, "The methodology," right below the footnote 1. "There does not appear to be any perfect way to compare millions of lines of source code, especially in a case like this, where the plaintiffs claim both literal and non-literal copying. Hubel began by attempting to use software programs to count the number of identical lines in the two codes. He claims these programs were both over- and under-inclusive and returned results that did not make any sense. He then manually compared the source codes, directing his attention to the areas of the program that they believed copying would be found."

And those were the areas that the five individual defendants, who bolted with the source code, worked on. A real focus, a real target. We've been seeking that information. We haven't gotten it yet.

There are such things as automated tools. We have used them. We have modified them. We found they weren't all that helpful. If the code is copied identically, it will help you. If the code is substantially similar, it's not going to help you. When you change words, when you change punctuations, if you insert a line, if you put something out of sequence, if you put it here when it should be there, it doesn't help you. And that was the experience that we found.

So, even if all we had to do was compare lines of

source code, side-by-side, it's still very labor-intensive, and that's a very long process.

But we're going way beyond that. We say there is non-literal infringement. Software is much like a book. It can be broken down into non-literal elements, like in software you have source code, in a book, you have the text of a book. But you also have the plot of a book. No software developed can read a book and identify the plot and compare that plot with the plot in another book. You have to read both books, just like in this kind of a situation, when you are trying to identify and compare the sequence, structure and organization of a program or compare algorithms of a program.

You don't get that by just eyeballing it. You don't get that by having your sixth grade son compare letters and symbols on a page to see if what's on the left is the same as on the right. You have to use people with knowledgeable backgrounds. You have to use all the tools available to you to identify what you're comparing. Then, when you identify what you're comparing, then you do the manual comparison, looking for substantial similarities in the non-source code parts.

And the Courts are clear, including Gates Rubber, that non-literal elements of software are copyrightable, and non-literal elements of books and written materials can

be copyrightable and protectable. The facts are not, but the organization or the sequence of facts or how they are arranged can be protectable. And that is the part of this process of comparison that is very time-consuming. Your Honor, may I approach the screen?

THE COURT: Yes.

This is from UNIX. That is from Linux. These code segments were not picked up by hardware -- or, I'm sorry, by software, by comparison. This I determined manually. You see some differences. Right here you see a semicolon, semicolons all the way down. On the left you see comas, but with the comas you have this INT only once. With the semicolons, you have the INT in every line. You have the same words here, the same sequence of those same words.

Now, words are arbitrary. Programmers can pick and use any words they want. They could have called that catnip, but they picked that. Well, whether or not the software picked that up as being identical, that's verbatim. The Deseret Jacobson case would say that even though there are changes in the text, that's verbatim copying because what the semicolon means is you repeat the INT. What the comma means is you don't repeat it. It just keeps on repeating because of that coma, so it's like you copy something and you put in dittos. Or it's like,

instead of saying -- you have five names and you say Mr. X, Mr. Y, Mr. Z, you say Messrs X, Y, Z. Same thing. They have stolen the expression.

So that is an example of something that had to be manually determined.

Here's an example of something that works beautifully in software comparison. This is out of Linux. That's out of UNIX. It's identical. The software tool picks something like that up in a minute. Now, there's an issue about whether that is -- or IBM has raised an issue as to whether that is protectable, that that may have been given to the public. I've got a slide, and I'll tell you that we're looking into that, and there are a variety of depositions that need to be taken to make that determination. It's not clear.

This is an example, I guess, of something in between. These sets of programs look pretty different. I mean, it's not identical copying. They didn't just substitute a comma, this type of thing. There are three segments of code. The segment in the middle is identical copying. These segments here are very similar. Yes, they stuck in an extra line in it, so a comparitor pool, the MSG pool is not in this piece of code. But you see MSG, MAP, MAX, MMB, MMI, you see all those things that are the same.

Software wouldn't pick that up, but you pick it

up manually. And then you have to understand, what does it mean? I represent to you, and this comes out of the Gupta declaration, that they are substantially similar; not in the copyright infringement sense, substantially similar to computer science people. Just like I can say, without even being computer science, those things are identical, I can say those are pretty darn similar, just a few differences.

So, as we can see, automatic comparison is not feasible. That's what the case that I gave Your Honor said. That's what our declaration says, and that's what those slides show you. It's done manually. That was done. Those slides and the six slides attached to Gupta, they were done in June of this year. They weren't done before April 19. That's why they couldn't have been produced. They were done, generated in response to this motion, and I'm told that it was almost a two man-year effort to analyze code to come up with that.

We seek a road map to help us in this comparison, to help us in the source code side-by-side comparison, because the software comparison tools won't, but to help us in the non-literal elements comparison that you have to extract out of it. Just like you have to extract a plot out of a book or a scene out of a book or a character development out of a book, we have to extract structure, sequence, algorithms, data structures. They have to be

taken out of the book. It's like between the lines or underneath the surface, but it is -- it may be protectable.

Now, what do we want to get this road map and what are we going to do with it? Okay. Picture yourself. I put you in Aurora, New York, and I say, "Drive to Los Angeles the shortest route."

And you say, "Okay. Give me a map."

No map, just do it. But you could get there. You could get to Los Angeles through trial and error. Buy a cheap compass and just head west and, ultimately, by stopping and asking people at service stations or whatever --

THE COURT: Where is Aurora?

MR. FREI: Pardon me?

THE COURT: Where is Aurora?

MR. FREI: I would actually -- in my example, I would tell you where it is, but it's up near -- it's right next to Cornell University, so it's off the beaten path.

THE COURT: It's near Ithaca, New York?

MR. FREI: It's near Ithaca, New York. It is not near any interstate. So, I put you there and say, "Go to Los Angeles the shortest route."

You couldn't do it. You would make a lot of errors. It would take a lot longer. Okay? That's what IBM is telling us to do. They are telling us to compare

this code in the most grossly inefficient and the most time-consuming way that you can imagine, and they won't give us the tools that they have because they say it will take several weeks to get that information to us.

Well, the information is relevant. We've been asking for it for a long time, and we need it to get this comparison done.

Now, what do we want? Well, we want this information to prioritize, focus, target and identify key individuals, such as the programmers, IBM programmers. We asked for that. They gave us 7200 names. Then they gave us 7200 contact addresses, including secretaries. Well, what do we do? We have 40 depositions in the case per side. We have a motion to dismiss that's pending, filed before this summary judgment motion.

We weren't going to go out and hire experts to start analyzing code and start taking all these depositions. One, it couldn't be done in any reasonable time for briefing, but, two, if the counterclaim is stayed or dismissed, it would have been a tremendous waste of time and waste of expense in an already complex case where everyone is working full out on many other issues.

We want to -- let's take, as to the third parties that we need the discovery from, these thousands of Linux contributors. IBM states they agree that it's thousands of

Linux contributors. They say all their contributions are in on the internet, all of their names and everything is on the internet. Well, we said in our renewed motion to compel, which is pending before the Magistrate, that's not the case.

What you have on the internet, oftentimes, are handles of some of these contributors, like Cool Whiz at Yahoo.com. Maybe it's Yahoo.com in Belgium or something. A lot of these people are from all over the world. We can't identify that. There are kernel maintainers, maybe a dozen or so, who have maintained the kernels for Linux through the different releases. Those people know who the key contributors are. We want to get the key contributors, focus on them, identify the key contributions; key as to the quantity of code, key as to the importance of code to Linux, and key as to, based on the knowledge of our people and the knowledge of technical people, what code is likely going to result in some kind of copying or match.

So we get their names. We take their depositions. We seek testimony and documents from these key contributors and kernel maintainers about the contributions. And what do we do with it? Well, we want access. IBM says, "We, IBM, will admit access."

Fine. We wouldn't have had much of a burden of proof. They were a licensee. They had access. They are

not admitting that the 3,000 contributors had access, and the Court knows, from the Gates Rubber case, that the more access you have, the less showing of substantial similarity. So, we want to show access. That helps us. We want to talk to them about the purpose of their contribution and the other ways to do it. These are factors relative to the filtration. If there's only one way to do something, well, we're not going to assert that it's copyrightable. But if there are many, many different ways, then it can be protectable.

We are going to ask them, "Why did you pick the exact same symbols and words? Where did you get that from? Why didn't you use "catnip"? Why did you use these things? We are going to ask them that. We are going to seek to get testimony from them about the non-literal elements. Where did they get the structure from? Where did they get the sequence from? Where did they get the algorithms from? Where did they get the data structures from?

And we are going to seek admissions, and we are going to seek to get these witnesses to say that they had access to the code and they copied it, or they tried to use the essence of it, use the non-literal elements of it. They copied that and obfuscated the source code.

That's very helpful to our case, but we need to know who to go to. Even if we had 200 depositions a side

in this case, we can't depose 3,000 Linux contributors. So that's what we get from the depositions.

Then we go back to the office and the computer science people and the programmers and experts. They then do the manual comparison. They then look at the sequences and part of 4 million lines of code that have been put into issue. Actually there are more than that because IBM's motion and Complaint do not limit Linux to the kernel. It's the whole kit and caboodle, 6 million lines or so, but it's not just the kernel.

So we take that back. We examine it. We pare it up. We get underneath the surface. We get in between the lines, and we then draw conclusions about substantial similarity.

Now let's see what we're going to do with IBM. Okay. IBM contributed AIX and Dynix to Linux. Now they want a declaration that none of that infringed. Well, AIX and Dynix were worked up as a UNIX licensee. They are a flavor of UNIX. And we asked them: "Okay, who are the programmers? Who are the contributors? Who made the contributions because we want to do the same thing with them that we are going to do with the Linux people. We want to get the key programmers. We want to find out what their contributions are."

But, in addition to that, we want to take the

deposition of maybe every IBM programmer on AIX and Dynix: every one of those guys or women who was also a contributor to Linux. So, if you worked on AIX and Dynix and had all the access and knew the ins and outs of UNIX, and you made a contribution of something to Linux, we want to talk to you because we think that would uncover relevant evidence.

Well, they won't give it to us, they haven't given it to us. But we want to talk to these people about the same thing we do with the Linux contributors. We are going to rank them by quantity of source code, by the importance of the source code, by the likelihood that it was derived from Linux. And we're going to want -- we'll get access. We'll get the purpose of the source code segment. We'll inquire about the non-literal elements. We'll seek admissions. We'll inquire about any changes that were made from UNIX to see if they are going to admit that they obfuscated. And then we're going to repeat that for other versions of Linux and AIX as necessary.

Now, version control. One of the tools we have asked for to get this information is version control information. You may have seen the initials CMVC. CMVC is an IBM program, database system, and it contains a lot of information. It contains all the versions of AIX, every version. Mr. Marriott says there are six releases. I'm not going to argue with that. Maybe there were six, maybe

there were more.

But we are also talking about versions, and there were a lot more versions than six releases. The Court knows there has been Windows 95, 98, XP, Windows 2000. Every one of those has had versions of them, many, many versions. They are constantly making changes to these things.

This is an example from SCO's version control system of a part of UNIX, printer error code part of UNIX. It's a short segment of code. I think it's 28 lines of code. The white areas -- that's a white area. White area. The white areas represent the same code. They are identical. The yellow areas represent where there's been a change in the code. And the pink area inside the yellow area shows you what the change is. So, in this particular example, these were changed. These were added. You see they didn't exist over there.

Now, the one on the left is version 1. The right-hand column is version 17. So, version 1 and version 17, boy, if you looked at that -- I mean, I'm looking at it right now, and I see a lot of yellow, a lot of pink and not a lot of white. So, if you are -- as IBM wants to force us to do, you know, look at the last version of something and compare it to the copyright, look at the first and look at the last, well, that's what we're doing right here, the

first one and the 17th one.

And you would look at that, and I would venture to say even a sophisticated programmer would look at that and he would say, "Wow, that's all different."

Well, the fact is that there are actually 16 of the 28 lines of code in the original, version 1, 16 of those 28 lines are in version 17 identical. That's a pretty significant amount. I'm not going to argue now whether that's substantially similar or whatever.

Slide 15, Your Honor, shows you, step-by-step, the comparison of versions. Unfortunately -- what we're doing is comparing version 1, and we're tracking it all the way to the end. Each of those things represent subsequent versions. The changes from version 1.1 to 1.3 -- I think we skipped 1.2. 1.1 to 1.3 are not a whole lot. Again, this whole light area is identical. That represents the changes. Not a whole lot.

I think you could certainly say that if that was the infringing product on the right, it would definitely infringe what's on the left. I mean, They are almost identical except for a couple of lines. But this provides step-by-step for this program, this sequence, every version of it.

Now, that's what we've been asking for for a good long time, and that's what IBM won't give us. And it's

automatically available in their system. My gosh, they have a 272 page marketing manual, portions of which were attached to Mr. Sontag's declaration, that touts how great their version control system is. It can do everything.

And while they are trying to tell the world what their version control system will do, they are trying to strike Mr. Sontag's declaration, the one he filed before Magistrate Wells to tell her what version control would do, and they are trying to strike it in front of you so that we can't tell you what version control will do.

Version control is, in many respects -- and this is all overly simplified -- similar to the red-lining capability that you see in Microsoft Word when you track changes, but it additionally contains the comments, and it contains the whole history. And it will help you connect a trail or draw a trail between the 8,000 files on the left and the 8,000 files on the right so that you don't have to do 64 million comparisons. It will draw a trail, just like it does in this slide.

Now, when you have the trail and you know which two files to compare, you still have to manually compare them, and it may or may not show infringement, but at least you have simplified this task, and IBM has no right, whatsoever, and certainly not under any of the Federal Rules, to require us to do something that would take months

and months, and probably squander most of the financial resources of the company, to do this manually.

And the Court would be waiting and waiting and waiting for us to finish it. And we are not trying to delay this case. I think it's fair to say that if SCO could wake up in the morning and be in front of a jury that day, it would be a very happy day for SCO.

Version control systems, in addition to containing comments of programmers -- comments of programmers tell you why they did something, why they did it a particular way. They may contain admissions. We are entitled to see those. They contain the comments directly linked to a particular change of code. They specify the changes, modifications and comments across the entire history of AIX. And AIX started with UNIX, and it's ended in Linux. It will identify programs for us, something IBM has refused to do.

This is an example of a version control report from SCO's version control system for something on UNIX, and it identifies the programmer, Pascal Hobanks. It tells you what he did. This happened to be that giving the system capability to express results in different languages. If you wanted to express the result in Spanish, you could put it into the catalog. But this is the example of something that we are looking for because if we think

there is substantial similarity or we see that he was the key programmer on a particular sequence that we believe, based on our knowledge and experience, is a likely candidate to investigate, we want to talk to him.

They won't give it to us.

Here's another tool, Your Honor. It's called a bug tracking log. Bugs are constantly being detected in computer software, and they are constantly being fixed, maybe on a daily basis. But this is an example of a bug report that shows that the error control sequence was not checking for errors less than zero. So they said that the code should either declare an error as unassigned or check for it being less than zero. That's what the bug tracking report says. Accompanying that would be a version control log like you just saw that shows exactly what they did to correct that bug.

What the version control systems and the bug tracking log will do will allow us, beginning with UNIX, to track a Dynix or an AIX code segment through its many derivative versions to its ultimate location in Linux. It's the road map that we've been asking for. It's the road map that's clearly relevant. I don't think there's anyone who could say it's not relevant. And all IBM has said is, "Well, they don't need it, and it's going to take us several weeks to get it to them."

Well, they don't say what we need. It's for the Court to determine what we need. We, sure as heck, have said it. Our declarants have said it. And we have said it in virtually every brief we have filed for the last four or five months. We need it. We don't have all day to do this investigation. We want to get it done, and we want to get it done fast, and we want to get to a jury as soon as possible.

THE COURT: What else do you want to tell me?

MR. FREI: The motion to strike. I'm finished on 56(f), Your Honor. If you have any questions about what we're looking for or why we need it?

THE COURT: No. Go ahead on the motion to strike briefly.

MR. FREI: Let me just mention, Your Honor, that this binder that Mr. Marriott gave to everyone was not in the record, was not attached to any declaration. It appears to have just come to us today. There are three declarations that were filed. We were not filing them to create a genuine issue of fact opposing this motion. They do that. They do raise a genuine issue of fact, I think. I think they show infringement. But we were filing them in support of the motion for continuance. And we were filing them, basically, pursuant --

THE COURT: Are you filing them in support of

your 56(f) motion?

MR. FREI: In support of the 56(f) motion, and they were specifically directed to footnote 7 of the Gates case. Footnote 7 of the Gates case -- and, by the way, all of IBM's arguments from their MIT and Princeton experts really aren't relevant because whether or not the elements of code we put in Gupta's declaration are protectable or not is not relevant to our motion.

The abstraction and filtration things were done. They were all done, and what was left was put into the declaration, but they are not relevant because we are relying on this footnote. Footnote 7 says, "We acknowledge that unprotectable elements of a program, even if copied verbatim, cannot serve as the basis for ultimate liability for copyright infringement."

True. We agree with that. However, the copying of even unprotected elements can have a probative value in determining whether the defendants copied the plaintiffs' work. And the Gates case goes on to say that Courts should and the parties should consider the entirety of a program, the entirety of the copying in a program, even if the copying is of something that's unprotectable.

It can be probative of whether protected elements were copied. That is because, in certain situations, it may be more likely that protected elements were copied if

there is evidence of copying among the unprotected elements.

So, Mr. Marriott's efforts to characterize our declarations initially as being in opposition but now being supporting copying, and they shouldn't be considered in opposition, we don't agree. They were submitted to show copying, to show the likelihood that we're not on a fishing expedition, and that we will find copyright infringement. But they actually do show copyright infringement, and we contend they raise a genuine issue of fact about copyright infringement.

One short point. He talked about 2 billion lines of code, and we say 25,000 man-years. How could we possibly -- for just two versions, how could we possibly do 2 billion lines? Well, if we were going to do the manual comparison, hyothetically we couldn't do it. Give us the tools, and I don't care if it's 4 billion lines of code, the tools will help us get to that. So much of this is available on electronic data bases. They would have you think it's all paper and it would fill the courtroom with paper. It's not like that at all.

I want to raise four points on the motion to strike. One is, again, none of these declarations were offered to show infringement. We offered Sontag's declaration to show the enormity of the task that SCO faced

and that I discussed, hopefully demonstrated, that you have to undertake. He said, in his first declaration, that he had personal knowledge. And in the second declaration, in opposition to the motion to strike -- there was a supplemental declaration submitted in opposition to the motion to strike -- he explained why.

I mean, he was up there in New Jersey comparing code. He has used version control systems. He knows what they do. He has used software comparison tools. He knows what they do, and he knows what they did up in New Jersey during the month of June, and he knows what they didn't do in New Jersey from personal observation.

Gupta's declaration was offered not to show infringement -- it does, as I said -- but to show that discovery suggests that we'll find instances of copyright infringement by IBM.

Mr. Harrop's declaration -- I'm thinking maybe now they backed off from trying to strike that because they didn't mention it. Mr. Harrop is one of the counsel for SCO on the case, one of the outside counsel. But his declaration was just submitted to show the procedural history of our efforts to obtain discovery and relying on what the Gupta and Sontag declarations were showing as to the need for it.

Both of these individuals qualify as experts and,

indeed, we had a section in our brief, in our opposition brief, a section that actually indicated that these people qualified as experts. And if the Court were to say they couldn't offer lay opinions, they should be regarded as experts.

Sontag has got 16 years of computer science experience. He's got a degree in computer technology information and management. He was the chief technical officer of a company. He's done these things.

Gupta got an engineering degree 11 years ago and has been working with UNIX ever since. Programmer, developer. He's the Vice-president of Engineering at SCO right now.

I think that the Court has heard enough on the motion to strike. And I was told, while I was preparing, that Mr. Hatch and Mr. James would say everything because they knew that I would put the Court to sleep because I'm an IP lawyer.

THE COURT: Well, I remained very much awake, Mr.Frei.

MR. FREI: I tried not to do that.

THE COURT: Thank you.

MR. FREI: Thank you, Your Honor.

THE COURT: Mr. Marriott.

MR. MARRIOTT: Your Honor, I will be brief. Ten

minutes.

THE COURT: All right.

MR. MARRIOTT: Point 1, Your Honor. SCO offers a lot of reasons why it is these motions should be denied, but note what they do not say. They do not disagree that determining substantial similarity is about comparing Linux to Unix, and they do not disagree that they have had Linux and they have had Unix from far before the beginning of this case.

What Mr. Frei says, Your Honor, in response to the Court's question about, what do you actually need? He says, "We need the road map." And he talks about a road map coming from Aurora, New York to some place in California.

THE COURT: Los Angeles.

MR. MARRIOTT: Los Angeles -- not to diminish Los Angeles -- but from Aurora, New York to Los Angeles, California. Presumably from Linux to Unix. And he tells you that he needs a road map. The road map, however, for which he asks, Your Honor, might as well be the road map for China because he's asking you -- all he ever asked you in the entire speech was not a road map about Linux and not a road map about Unix System 5, but a road map about IBM's AIX and Dynix products.

Substantial similarity isn't about a comparison

between AIX and Dynix and Unix. It's about Unix and Linux. The only road map that matters, Your Honor, is what's in Unix and what's in Linux. And that's the comparison. And you can compare Microsoft Word source code or AIX source code or Dynix source code all you want. It is entirely irrelevant to the question of whether Unix is substantially similar to Linux. And the only road map you heard about might as well be the road map of a different country.

Second point, Your Honor. SCO seeks to explain away the e-mail to which I referred by reference to a 1999 memorandum. Now, Mr. Hatch says that he understands that we have this memorandum. We have it because it was given to us hours before today's hearing. We got it this morning. It should have been produced a long time ago, but IBM is supposedly a party in breach of its discovery obligations.

Your Honor, the memo was dated five years ago. It was written three years before the e-mail which I have showed to Your Honor. It is a draft. It says on its face that it is provided, quote, subject to the further analysis of Mr. Davidson. That's on page 5 of the fax sent to us this morning by Mr. Hatch. On the last page of the document, page 6 of the fax, he says, "I'm awaiting analysis from Mike Davidson on some of these issues since he has a better feel for the history of much of this

company."

Well, Your Honor, Mr. Davidson weighed in, in the e-mail we provided to Your Honor. In that e-mail, he makes abundantly clear in the last two paragraphs what he said when he weighed in. I can't read it for the Court. Your Honor, if you look at the very first paragraph in this memorandum, you will see that the memo which is offered to explain away the e-mail makes exactly the point which we've been making, and I will read this for the Court.

It says, quote, "As you requested, below is a draft of my report on existence of Unix-derived code in Linux. What we tried to do was to determine if there was any material from Unix in Red Hot Links, release 5.2. To make this determination, we used a copy of Red Hot Links, which was purchased from the local Best Buy. We then compared it to multiple copies of Unix. We undertook an investigation about substantial similarity by comparing Linux to Unix and we did it --" not in 25 thousand man-years, not with the supposed road map that you've heard about today, but "with Unix and with Linux."

SCO says, Your Honor, that summary judgment should not be entered because it has filed a motion to compel, fact discovery is not concluded, and the deadline for submitting expert reports hasn't passed. Courts routinely grant summary judgement notwithstanding the

pendency of motions to compel, especially where, as here, the requested discovery has nothing to do with the claim in suit on the motion for summary judgment. And I refer Your Honor to the Public Service decision versus Continental Casualty from the Tenth Circuit, which is cited in our papers.

The mere fact that discovery hasn't concluded is not an impediment to summary judgment. Rule 56 expressly provides, Your Honor, that summary judgment motions may be made within 20 days of the commencement of the action. The fact that the expert deadline has not passed is also not an impediment to summary judgment. Rule 56(f) expressly provides for the submission of summary judgment motions prior to the submission of expert reports.

Expert reports can be helpful, but there is nothing here to be helpful about, Your Honor, because no evidence has been adduced that is supposedly sufficient to bring a genuine issue of material fact. And as Your Honor indicated in his question, there is no reason -- or suggested with his question, there is no reason why SCO could not have submitted expert reports in connection with its opposition papers.

Indeed, Mr. Frei stands here to suggest that if the Court finds that there isn't personal knowledge, the Court might, nevertheless, consider these folks as experts

because, in the case of Mr. Sontag, he was the CFO of a computer company and he has some undergraduate studies in computer since.

These witnesses are not qualified as experts. They shouldn't be treated as experts, and if SCO wanted to submit expert reports in connection with its opposition, it could have done that. It elected not to do that.

THE COURT: What about the issue raised, I think it was by Mr. Hatch, about you didn't raise the ownership of the copyright until your reply?

MR. MARRIOTT: That, Your Honor, is incorrect. If you look at page 25 and 26 of IBM's opening memorandum, we say, "To prevail on a claim of copyright infringement, SCO must prove, one, ownership, two, copying. If SCO cannot adduce evidence sufficient to show both ownership and valid copyright copying of protected components of the work that are original, then IBM is entitled to summary judgment and a declaration of non-infringement."

What we said in our footnote, Your Honor, is that the Court need not decide the ownership question in order to rule for IBM. There are two essential elements of the claim. If they don't satisfy either one of them, they lose. And the footnote says the Court need not address the question of ownership because it need not. If it finds that there is insufficient evidence of substantial

similarity, they lose, unless Your Honor makes a finding that additional discovery, and time is required.

The ownership issue was clearly raised, Your Honor, in our opening papers, and I think our reply is consistent with that.

Mr. Hatch, I believe it is, refers to the Huthwaite decision, Your Honor, saying that that case makes quite clear that expert reports are appropriate and that without expert reports, summary judgment can't been entered. That isn't what that case says. It is true that in that case the Court made reference to the usefulness of expert reports. The Court's discussion about expert reports was dicta, and the Court denied summary judgment in that case because it found evidence sufficient to create a genuine issue of material fact; a very different situation from the situation that we face here, Your Honor.

SCO makes a number of miscellaneous points, Your Honor. It says that Magistrate Judge Wells found that SCO acted in good faith in responding to IBM's discovery requests. Magistrate Judge Wells' commentary with respect to good faith related only to the first order. It was made in the context of her lifting a sui sponte order staying further discovery. She never found that SCO acted in good faith in responding to IBM's 12th and 13th interrogatories, and you never heard anything from SCO this afternoon about

where in the record you will actually find the evidence responsive to the interrogatories that could have possibly formed the basis of a finding by Judge Wells that they acted in good faith in responding.

Mr. Hatch makes reference to the language, which I think of as a disclaimer language, in which they say, "Magistrate Judge Wells, we have provided full and complete and truthful answers based solely on the information that we have available to us."

Well, Your Honor, the information available to SCO, as it relates to this claim, has been available to SCO from the beginning. Linux and Unix. The answers -- the supposed disclaimer that we are only doing the best that we can doesn't hold water when it says it is based upon information in their possession, and both Linux and Unix were in their possession.

Mr. Frei says that the comparisons referenced by IBM, Your Honor, were comparisons done in 1999. It is true that the comparison done by -- referenced in the e-mail was done in 1999. If you look at the book we provided Your Honor, on pages 5 through 7 you will see public statements by SCO making reference to comparisons done well after 1999, done throughout the course of this litigation.

SCO suggests, Your Honor, that the request IBM makes for summary judgment is somehow inconsistent with the

rules. They don't contemplate the entry of summary judgment at this time. The only inconsistency here, Your Honor, is not between IBM's motion and the rules but, instead, between the various positions that SCO has taken in an effort to avoid the very thing Mr. Frei suggests SCO wants, which is to be in front of a Jury.

It says publicly that IBM has infringed its copyrights. It fails to point the Court today to a single place in the record where there is evidence of infringement. It says they have mountains, truck loads and icebergs of evidence. Nowhere has that been referred to today in court. SCO says publicly that it's eager to have its claims resolved, but it wants a stay, apparently an indefinite stay, for purposes of taking additional discovery.

It tells the Red Hat Court that the question of whether Linux infringes Unix is in this Court in order to avoid dismissal of that case. And it tells Your Honor that the claim is not in fact in this case, but it ought to be in the Autozone case.

It says publicly that it has three teams of experts doing a deep dive into the code, comparing it every which way but Tuesday. It tells Your Honor that it has retained experts to do copyright analysis, notwithstanding the public statements about three teams of experts doing

the analysis.

It tells Your Honor it would take 25 thousand man-years just to do the comparison of one, unless it has a road map. And the only road map offered, Your Honor, is a road map that relates only to AIX and Dynix, most of which you heard in SCO's recitation of the discovery that it needs and what it would do with that discovery, that merely conflates SCO's contract claims with its copyright claims.

All that matters here, Your Honor, is whether they can show ownership -- they haven't and they they can't -- or whether they can show substantial similarity, and they haven't and they can't. Thank you, Your Honor.

THE COURT: Thank you, Mr. Marriott.

The motion for partial summary judgment, the 56(f) motion and the motion to strike are submitted and taken under advisement.

Now let's talk for a minute about SCO's expedited motion to enforce the Court's amended scheduling order. You you filed that motion, and you're going to respond when?

MR. MARRIOTT: Your Honor, I don't know, as I stand here, what the date is. I believe we have two weeks to respond, and we intend to respond on time.

THE COURT: Mr. James.

MR. JAMES: Your Honor, I fear you turn the gun

on me for standing up, and I didn't know where Aurora, New York was either.

THE COURT: What did you expect me to do when you stood up? I didn't think you were going out to go to the bathroom. I thought you were coming up to answer questions.

MR. JAMES: I thought you might tell me to sit down, candidly, Your Honor.

THE COURT: Stand up and tell me about this motion.

MR. JAMES: We desperately -- we need some help, Your Honor.

THE COURT: All right. When did you file it?

MR. JAMES: We filed the motion Monday or Tuesday.

THE COURT: Just this week?

MR. JAMES: Of just this week. What happened that prompted that, Your Honor, was that, at IBM's request, our hearing on Tuesday was cancelled, and we needed to take -- we need some emergency help, Judge.

THE COURT: All right. You respond to the motion, this expedited motion, by the end of the day a week from today, all right?

MR. MARRIOTT: Fine, Your Honor.

THE COURT: And then you reply -- how quickly can

you reply, Mr. James?

MR. JAMES: Give us two days.

THE COURT: All right. You will reply by the end of the day a week from Friday. And if I need a hearing, I can get you on the phone, and if I don't need a hearing, I'll just rule. Okay?

MR. MARRIOTT: Thank you, Your Honor.

MR. JAMES: Appreciate that, Judge.

THE COURT: Now, with respect to the -- and if I don't grant it, you're still within plenty of your time of the 30 days you've received on these other two motions, right?

MR. JAMES: Let me make something clear. I have some confusion, and I fear that you may have some confusion. We have actually filed two separate filings. We filed the one filing, the big long one that kind of laid a lot of things out, asking that summary judgment be pushed off until the end of the discovery period.

THE COURT: I'm including that as part of this.

MR. JAMES: We filed the other one saying we desperately need some discovery assistance immediately because if we wait until October 19 for the hearing before Magistrate Wells, and even assuming she orders the discovery we want, and assuming we get it relatively promptly, we're going to be so far into the discovery

schedule we have a major problem. And the last thing we wanted to hear, Judge, was someone saying, "Why was this not brought to the Court's attention sooner?"

THE COURT: I understand. Respond to both of those motions. You filed them both on Monday?

MR. JAMES: One was filed last week.

THE COURT: That motion will be on this same time table that I gave you. Now, I have to tell you preliminarily, I'm not of a mind to interfere with what Judge Wells is doing, but if what she does or doesn't do or when she does or when she doesn't do something impacts the case, the timing and so on, then we'll have to talk about it. Obviously that's a possibility, and we'll talk about it.

Mr. Marriott, do you want to say something?

MR. MARRIOTT: Just to agree that that schedule is fine, Your Honor.

THE COURT: All right. So respond, then, to both of these motions they have filed; one last week and one Monday, by a week from today. You will reply to both of them by a week from Friday. And then I'll do what I do.

MR. JAMES: Thank you.

THE COURT: Thank you all. We'll be in recess.

(Whereupon the proceedings were concluded.)

REPORTER'S CERTIFICATE

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

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

That as such Reporter I attended the hearing of the foregoing matter on September 15, 2004, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting, and the foregoing pages numbered 1 through 126 constitute a full, true and correct record of the proceedings transcribed.

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

And hereby set my hand and seal this 20th. day of September, 2004.

REBECCA JANKE, CSR, RMR