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SALT LAKE CITY, UTAH, FRIDAY, OCTOBER 7, 2005

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THE COURT: Good morning, ladies and gentlemen.  
And needless to say, I'm shorter here than I am in my own  
courtroom, but we'll make do.

We're here this morning in the matter of the SCO  
Group, Inc., vs. International Business Machines Corporation.

Although I do have the names and know the names of most of  
you, I would ask that counsel who are at counsel table to,  
please, identify themselves and all others who may be acting  
in that capacity.

MR. JAMES: Your Honor, good morning. Mark James  
from Hatch, James & Dodge. With me is Ted Normand from Boies,  
Schiller & Flexner, along with Stuart Singer and also Sashi  
Bach here with us, as well.

THE COURT: Thank you.

Mr. Marriott?

MR. MARRIOTT: Good morning. David Marriott and,  
of course, Todd Shaughnessy and Peter Ligh and Amy Sorenson  
and Herman H-O-Y-H. Good morning, Your Honor.

THE COURT: Good morning.

Ladies and gentlemen, I'd like to begin by  
addressing SCO's renewed motion to compel, which is listed as  
docket Number 366. In this particular motion, SCO seeks from  
IBM all documents from its executives and board of directors

1 that mention or relate in any way to Linux; and, two,  
2 witnesses for deposition who can speak to the full scope of  
3 the topics SCO has noticed.

4 In this Court's order from January 18th of 2005,  
5 the Court postponed -- I think that should be '04, the Court  
6 postponed the decision regarding the production of documents  
7 from top level management pending full briefing by the  
8 parties.

9 Unfortunately, there was a docketing error  
10 misinterpreting the Court's order deeming SCO's order granted  
11 in part and denied in part. Notwithstanding this error, there  
12 has been much discovery provided since the first of this year,  
13 and Judge Kimball has heard arguments concerning the  
14 deposition of Samuel Palmisano, IBM's CEO.

15 Given the possibility that some discovery provided  
16 by IBM may address SCO's concerns in its renewed motion, I  
17 would like SCO to review its original motion and file with the  
18 Court a new motion removing those items it previously sought  
19 which may have been provided by IBM in the intervening time.  
20 And I would like SCO to file this new motion by Friday,  
21 October 21st. IBM then can file in the opposition, and SCO  
22 would reply. And then we will hear that motion along with  
23 IBM's motion to compel production of documents on SCO's  
24 privileged log later this year. And I would anticipate that  
25 that would be set like the second week of December.

1                   This should help clear up the record and prevent  
2 any potential wasted resources by hearing issues which may now  
3 be moot.

4                   Does anyone have any opposition to handling that  
5 particular motion in that way?

6                   MR. NORMAND: Your Honor, Ted Normand for SCO. We  
7 don't object, although we obviously would like to have the  
8 motion heard as soon as possible.

9                   THE COURT: Well, we will do that as soon as you've  
10 had your opportunity to refile it and for IBM to respond.

11                   Mr. Shaughnessy?

12                   MR. SHAUGHNESSY: No objection, Your Honor.

13                   THE COURT: All right. We can do that -- well,  
14 let's set that at the conclusion of this hearing. But my  
15 desire would be to set it in perhaps the second week of  
16 December.

17                   Next, I would like to turn to SCO's expedited  
18 motion for leave to take additional depositions, which is  
19 found at docket Number 508. I'd like first to hear any  
20 objections that IBM may have. Or do you want -- go ahead and  
21 argue it first since it's your motion, and then they'll  
22 respond.

23                   MR. SINGER: Your Honor, I don't know if the Court  
24 is set on approaching it that way. If it was left to us, we  
25 would prefer to argue the Linux related motion which we think

1 broadly relates to issues including depositions.

2 THE COURT: We can do that. If you want to, then  
3 we'll start with that motion and allow you to argue it, and  
4 then we'll go on to the other one.

5 MR. SINGER: Thank you.

6 THE COURT: That's fine.

7 MR. SINGER: In connection with that motion, we've  
8 prepared several charts. With the Court's permission, I would  
9 provide copies to the Court.

10 Your Honor, and I am Stuart Singer on behalf of the  
11 SCO Group. I appreciate the opportunity to address the Court  
12 this morning on this issue.

13 The motion here goes to the very heart of documents  
14 that are relevant to this case. Our motion concerns the  
15 failure of IBM to produce documents related to its Linux  
16 contributions that have not been produced despite agreements  
17 to do so and despite two orders of this Court that we believe  
18 covers this.

19 THE COURT: Mr. Singer, let me stop you real  
20 quickly and supplement the record by indicating this so that  
21 you know. I have read the submissions of both SCO and IBM. I  
22 have read the affidavit of Mr. Shaughnessy. I have read the  
23 transcript of the original of the orders -- or the hearing  
24 that resulted in the orders, and I have read each of the  
25 orders themselves.

1 MR. SINGER: Thank you, Your Honor. I will bear  
2 that in mind in my argument.

3 We made this motion because what we had seen from  
4 IBM did not equate to what clearly must have been present for  
5 a project of this scope in producing contributions to Linux.  
6 And we filed a motion, which the Court is aware, and I won't  
7 go over specifics, some of which have been marked confidential  
8 by IBM, but there were a number of items which it was clear  
9 you would expect to have in there that were not, source code  
10 files, in fact, had appeared to have been removed from the  
11 CMVC database that related to Linux database, of course,  
12 previously ordered produced. One of the issues in the case  
13 concerns the JFS, file system technology, which we believe has  
14 been inappropriately provided to Linux, and there were  
15 documents relating to that.

16 There are also the fact that documents which used  
17 to be on a public website no longer are there because that  
18 website has been closed down, and other issues which have been  
19 identified in the bullet points from Pages 8, 9, 10 of our  
20 additional motion.

21 The response to that motion from IBM including  
22 specifically the declaration of Daniel Frei, who was the  
23 senior executive in charge of Linus Technology Center, made  
24 clear that these areas of concern were just the tip of the  
25 iceberg and that IBM has essentially produced very little at



1 all in compliance with what we believe there was agreement to  
2 do so and this Court's repeated orders to do so. And that  
3 we're dealing here with the failure to produce any of the  
4 nonpublic or certainly all of the nonpublic Linux related  
5 information concerning programmer notes, concerning drafts of  
6 code that they submitted, concerning work plans, all the type  
7 of information that is generated up to the point where  
8 contribution is then publicly made to the Linux community.

9 IBM does not deny this. In fact, they state that  
10 in Frei's declaration that they have not gathered that,  
11 reviewed it or produced it, and that it might amount to  
12 hundreds of thousands of documents. They say instead that  
13 that was not called for, despite it clearly being in the  
14 center of this case. The case is about whether the  
15 contributions of Linux technology of IBM violates those  
16 proprietary rights. And then they say it would be too  
17 burdensome to provide it. With the Court's approval, I would  
18 like to address those two issues.

19 First one. The documents were requested going back  
20 to June 2003 in at least three of the initial requests in the  
21 first request for production. Request Number 11 called for  
22 all the contributions themselves which were made not limited  
23 to source code, binary code, to open source development lab,  
24 Linus, any other entity.

25 And then there was request 35 and 42. 35 called

1 for all documents concerning, and concerning is broadly  
2 defined, any contribution to Linux. 42 was all documents  
3 concerning Linux contributions to development, specifically to  
4 2.4 and 2.5 versions of the Linux Kernel. These weren't just  
5 for code, these were for documents concerning their  
6 contributions.

7 IBM initially objected. And then in the course of  
8 the meet and confer process, which was carried out in writing,  
9 IBM moved back off of its initial objections and indicated  
10 that it would make substantial production with respect to  
11 areas 35 and 42.

12 In a letter dated from IBM's counsel on  
13 September 15th, 2003, IBM indicated that with request  
14 Number 11 that IBM has undertaken to collect documents from  
15 various members of the Linus Technology Center, the LTC, who  
16 are responsible for work relating to open source contributions  
17 to Linux. And in addition, they are collecting materials from  
18 the Open Source Steering Committee, the group within IBM  
19 responsible for approving and reviewing open source projects,  
20 and that:

21 We intend to produce nonprivileged documents  
22 identified in these files that relate to IBM open source  
23 contributions to Linux.

24 In response Number 35, they again say:

25 We are undertaking to produce from the files

1 of Linus Technology Center and the OSSC personnel  
2 nonprivileged documents that relate to IBM's open  
3 source contributions to Linux.

4 They didn't say they were just going to produce the  
5 code contributions. They didn't say that what they were  
6 arguing about was whether or not they should have to look at  
7 the whole company and to open source beyond Linux, but they  
8 said for Linux, we were looking at the Linus Technology Center  
9 and that they would produce the documents that related to  
10 their open source contributions.

11 Your Honor, this was reiterated in subsequent  
12 correspondence in October of 2003 where IBM indicated that  
13 this work was ongoing. With respect to request Number 11,  
14 they said:

15 We have attempted to conduct a reasonable  
16 search for documents that relate to IBM's open  
17 source contributions. The vast majority are made  
18 through the LTC. Some were through this OSSC.  
19 And they stated, our searches have included  
20 individuals in both of these groups as well as  
21 other potential sources of documents relating to  
22 IBM's contributions to Linux.

23 IBM went on to say that:

24 We are not limiting our searches to any  
25 particular geographic area. Indeed, they have

1 already included individuals residing in  
2 Beaverton, Oregon, which is the headquarters for  
3 Linus Technology Center; Austin, Texas, and a  
4 variety of other IBM locations.

5 We learn now from Mr. Frei's declaration that, in  
6 fact, they have not searched and gathered from these  
7 locations, the Linus Technology Center, the documents that  
8 would relate to Linux contributions. They say that these  
9 efforts are ongoing.

10 Given these assurances, it is understandable that  
11 the intentional motions to compel related to aspects of  
12 discovery which IBM said they would not provide. There was  
13 the issue in which the Court is aware of whether public  
14 contributions that are already out there needed to be  
15 provided, and there was an issue that was focussed on what is  
16 in the files and individuals outside the Linus Technology  
17 Center including senior executives, like Mr. Palmisano and  
18 Mr. Wladawasky-Berger. And the Court after briefing held a  
19 hearing on that in February of 2004, and it rendered an order  
20 on March 3rd, 2004, on SCO's motion to compel.

21 In that motion -- or in that order, there are two  
22 relevant paragraphs. Paragraph Roman Number II.2 dealt with  
23 the issue of Linux contributions themselves. There the Court  
24 indicated that the ones which were public SCO should use its  
25 best efforts to obtain through public sources. The

1 contributions that were nonpublic IBM is ordered to provide.

2 But then the Court went on to deal with the issues  
3 of documents beyond the code contributions themselves, and  
4 that is in Paragraph 3 of the Court's order. And there are  
5 three occasions in IBM's opposition to the current motion,  
6 Your Honor, where they quote this order. In none of those  
7 three occasions do they ever mention Paragraph 3. Paragraph 3  
8 begins by confirming in what we believe sweeping terms that  
9 IBM has to produce documents to the heart of the case coming  
10 out of the Linux project. The Court said:

11 IBM is to provide documents and materials  
12 generated by and in possession of employees that  
13 have been and that are currently involved in the  
14 Linux project.

15 THE COURT: Mr. Singer, don't you see Paragraph 3  
16 as an expansion of what is ordered in Paragraph 2?

17 MR. SINGER: Well, we think it goes beyond  
18 Paragraph 2, certainly, and that it goes beyond that to the  
19 extent that Paragraph 2 is the Linux contributions themselves  
20 that are going out to the public. And then Paragraph 3 is  
21 dealing with documents that IBM has that are broader than that  
22 that relate to that process of contribution.

23 We think there's no legitimate basis on which in  
24 the Linus Technology Center, which is the heart of the Linux  
25 project, an employee can do a rough draft of code and that

1 doesn't fall within 3. Or that if you have a work plan or a  
2 programming note, not privy to the public, but generated there  
3 in the course of that contribution, a document that might be  
4 exchanged between developers that say, let's use the Dynix  
5 technology in making this contribution. All of that would be  
6 documents generated by people in the Linux project and in the  
7 possession of employees. And we think it follows from what  
8 the Court says here that:

9           The Court finds these materials are relevant  
10           because they may contain information regarding the use  
11           or alleged misuse of source code by IBM in its  
12           contributions to Linux.

13           Now, the fight at that time was focussed on the  
14           senior executives, people outside the Linus Technology Center.  
15           And the Court made clear that the scope mentioned includes  
16           senior executives, includes Mr. Palmisano and  
17           Wladawasky-Berger in another document that had been  
18           specifically been dealt with. But those are terms not of  
19           limitation on a principle obligation, but an example of what  
20           is included within the scope of production. And certainly if  
21           the executive materials are relevant because they may contain  
22           information regarding the alleged misuse of source code, the  
23           very documents being used every day in the Linus Technology  
24           Center to create the contributions, their notes, their rough  
25           drafts, their work plans definitely fall within this scope.

1                   So we think it's clear that those materials both,  
2 quote, related to the Linux contributions so IBM had committed  
3 by agreement to produce them, and also that they were the  
4 subject of Paragraph II.3 of the Court's order.

5                   Now, what did IBM do in response to that? They  
6 assured the Court that full production had been made. If IBM  
7 was uncertain as to the scope of that obligation, they had the  
8 ability to ask for clarification. They had the ability to  
9 provide qualifications in the declaration that they filed  
10 requiring compliance. We believe this Court asked for such  
11 declarations precisely to avoid this type of issue coming up  
12 later on.

13                   THE COURT: Do you acknowledge that SCO has the  
14 same obligation if it is unsure as to the meaning of an order?

15                   MR. SINGER: Yes. We think that a party has an  
16 obligation to comply in good faith and if you are uncertain,  
17 it has a duty to seek clarification from the Court to disclose  
18 limitations on what they are producing.

19                   And that IBM did not do so in this case. That even  
20 if there was an argument, which we don't think there is, and  
21 somehow the Court, if they read this thought, well, we only  
22 have to produce documents from the files of our senior  
23 executives, not the very people at the heart of the project in  
24 the Linux Technology Center, they could have asked the Court  
25 to clarify Paragraph 3. They didn't do so. They could have

1 stated in their declaration of compliance in Paragraph 5, we  
2 produced the senior executive documents, but we take the  
3 position that somehow that doesn't extend to the documents in  
4 the Linux Technology Center that relate to these  
5 contributions. They did neither.

6 THE COURT: Then let me indicate to you that I'm  
7 going to want you to address what appears to be SCO's failure  
8 to clarify or ask for clarification on issues related to the  
9 Linux contributions. In my review of the transcript of the  
10 initial hearing, I read it closely and find no mention made by  
11 Mr. McBride of any of the new requests you are now saying are  
12 covered by the order. So be prepared to address that.

13 MR. SINGER: Yes. If I'm -- I mean, our position  
14 with respect to our current motion is we're not saying that in  
15 the February hearing or in the hearing on AIX and Dynix  
16 contributions that the issue was these Linux materials. Our  
17 position is, we believe that IBM had said they would produce  
18 this.

19 THE COURT: But the order does not address that,  
20 and it does not address it because it was not raised at the  
21 time of the hearing.

22 MR. SINGER: I understand, Your Honor. Our  
23 position is it was not raised with the Court at the time of  
24 the hearing expressly because of the assurance in the letters  
25 which we have shown you that are resolving document Request 35



1 and 42 and others saying that IBM will search the files of the  
2 Linus Technology Center, and IBM will produce documents that,  
3 quote, relate to its Linux contributions.

4 THE COURT: Well, that's why I go back to what the  
5 responsibility of each side is, to seek court clarification  
6 when something is unclear.

7 MR. SINGER: If we believe that IBM -- or let me  
8 put it this way, Your Honor. If we thought IBM was not  
9 producing documents at the heart of the case despite saying,  
10 we produced documents that relate to Linux contributions, that  
11 certainly would have been expressly raised. We believe it is  
12 very hard for IBM to take the position that they're taking  
13 here, that despite the language of these orders, despite an  
14 order we'll get to in a moment that deals with the production  
15 of the programmer notes, the history, the revisions in AIX, in  
16 Dynix, that the Court could possibly admit that even more  
17 central documents relating directly to the Linux contributions  
18 themselves did not have to be produced.

19 In this assurance on April 2004, IBM simply said  
20 that they undertook a reasonable search for and has produced  
21 all nonprivileged, responsive documents including those from  
22 the files of Mr. Palmisano and Mr. Wladawasky-Berger, which  
23 is, of course, the subject of the other motion which has now  
24 been deferred at this time, but this includes all the section  
25 of 2.3 of the order.

1           After this, the discovery fight focused on the  
2 issue of AIX and Dynix code because that, IBM said, they were  
3 not going to produce the revision control information for,  
4 CMVC database, RCS database. They weren't going to respond  
5 specifically to interrogatory Number 5, all for specific  
6 identification of contributions made in programmers who made  
7 those with respect to AIX to Dynix and to Linux.

8           As the Court is well aware, there was extensive  
9 briefing on this issue, and there was argument, following  
10 which in January of this year, the Court entered its order  
11 which said that because of the contract theory, the broad  
12 scope of discovery, IBM needs to produce that information.  
13 The Court ordered it produced. The Court ordered that  
14 programming information, related documents from files of 3,000  
15 IBM programmers who contributed to AIX and Dynix be produced.

16           IBM filed a motion for reconsideration from that.  
17 And they said that is too burdensome. And the Court's  
18 response to that said, well, for the present time, it will  
19 defer, not remove that obligation from the 3,000 employees who  
20 made the most contributions to the AIX and Dynix, but to defer  
21 that, and only as a first step require compliance for 100  
22 individuals who made the most contributions.

23           In the course of discussions leading to that motion  
24 for reconsideration, statements by IBM to us indicated that  
25 they were not interpreting that to include as well Linux

1 information had not previously been produced. And so in our  
2 opposition to IBM's motion for reconsideration, that was  
3 expressly addressed to the Court at that time.

4 And it's indicated that in many instances, there's  
5 been a development process which runs from IBM or Sequent  
6 programmers immersed in SCO's proprietary UNIX code between  
7 the selection of AIX and Dynix material for Linux and the  
8 actual contributions to Linux. SCO requires access to that  
9 development history including both code and related  
10 documentation for exactly the same reason this Court has held  
11 that:

12 SCO needed access to the material evidencing the  
13 developers and development process of Dynix and AIX  
14 themselves.

15 IBM did not respond directly to this other than to  
16 say, we're not obligated to produce information that's public.  
17 We're just obligated to produce information that's nonpublic,  
18 and this should not be ordered.

19 The nonpublic information that they were  
20 withholding they never stated in that response includes all  
21 the materials relating to that development process.

22 The Court did not limit in any way IBM's  
23 obligation. The Court in its order dated April 19, 2005 -- I  
24 should say the Court did not limit these obligations relating  
25 to Linux. The Court, as I've mentioned and as the Court is

1 aware limited the obligations for the time being on the number  
2 of AIX and Dynix files that it needed to review.

3           However, with respect to Linux, the Court's order  
4 had no limitation and, we think, made it as clear as it could  
5 be that IBM was required to produce all the nonpublic Linux  
6 contribution information that it had not previously produced.  
7 The Court, this is not our emphasis in underscoring where it  
8 says, "all nonpublic Linux contribution information," that's  
9 the Court's emphasis.

10           Now, we believe that the face of these two orders  
11 and IBM's earlier agreement to produce this information that  
12 IBM has willfully failed to comply. How can IBM take the  
13 position that an internal work plan as to how they're going to  
14 make a certain contribution is not a document that, quote,  
15 relates to that contribution? How can IBM fairly take the  
16 position that a document such as that when it's generated in  
17 the Linus Technology Center is not within the scope of  
18 documents that are generated by employees in the Linux  
19 project? How is that not part of nonpublic Linux contribution  
20 information? This is not limited just to the contributions,  
21 but the information. It goes to the very core, we submit,  
22 Your Honor, of the documents in this case.

23           But even beyond the plain language of the Court's  
24 order, we don't believe that the position that IBM apparently  
25 is taking can make any sense and be understood as having a

1 rooting in this. First of all, IBM has taken the position  
2 that all or virtually all of their contributions to Linux are  
3 publicly made. That being the case, if the Court's order were  
4 construed as just dealing with contributions themselves,  
5 they're virtually a nullity because if contributions  
6 themselves are public, that we agree, the publicly accessible  
7 information we get publicly. If the Court's orders mean  
8 anything, they mean that the nonpublic information that  
9 surrounds the public contributions are to be produced.

10 Furthermore, IBM has to know that the Court in its  
11 reasoning and its order saying that AIX and Dynix development  
12 history is relevant and needs to be produced could not  
13 possibly intend to exclude Linux development history,  
14 documents relating to the Linux contributions which are even  
15 more at the core and the center of the case that concerns  
16 whether those contributions were made in violation of our  
17 proprietary rights.

18 THE COURT: But, Mr. Singer, I again ask you if in  
19 the discussions with IBM you are not receiving these, then why  
20 didn't SCO accept the obligation which you appear to accept to  
21 ask for clarification?

22 MR. SINGER: Well, Your Honor, as IBM says in its  
23 opposition papers, they produced some of the documents. They  
24 produced they say tens of thousands of documents that are  
25 responsive to this. We don't know how they selected those.

1 We don't know why they produced tens of thousands of documents  
2 if they believed they had no obligation or why if they  
3 produced that many they didn't produce all of them. So we are  
4 receiving along the way certain information.

5 We did raise these issues with IBM, we submit, when  
6 we pushed them on item Number 35 back in 2003, and they say,  
7 we are producing these. We are going through the Linus  
8 Technology Center. We are producing the files that relate to  
9 these contributions.

10 We did push them again when in connection with this  
11 motion for reconsideration, and in this spring they made the  
12 argument that they were not required to detail their Linux  
13 contributions. We said, we want to make clear that the  
14 Court's order included the Linux contributions. And they  
15 refused to do that. We then raised that with the Court, as  
16 I've just indicated, in our memorandum dated February 28th,  
17 2005. And we believe that any uncertainty in IBM's mind was  
18 then clarified by the Court's order that said, all nonpublic  
19 information was to be produced. So we believe we have reacted  
20 to that.

21 What they have done meanwhile is they never told us  
22 they never did what they said they would do and search the  
23 files of Linus Technology Center and produce related  
24 information. They have presented declarations that said that  
25 they produced everything when they now say they haven't even

1 searched for that material.

2 IBM is the party that knows what's in their files.  
3 We can draw some inferences from what they are producing to  
4 us, but we don't know that full scope. IBM at all times knows  
5 exactly what is in their files, and they know exactly what  
6 they have produced and what they have not produced.

7 Furthermore, Your Honor, there is another statement  
8 by IBM that bears on this. In their responsive brief which  
9 they submitted to this Court on this very motion, IBM stated  
10 that they should not be required to do this because it would  
11 be difficult if not impossible to separate out the  
12 contributions from the development history information.

13 And if the Court accepts that, I ask, well, what  
14 basis, then, has IBM even been able to confirm to the Court  
15 that it's complied with the order to produce nonpublic  
16 contribution information if they haven't at least gathered the  
17 development information and reviewed that, which they said  
18 they haven't done? They have been making judgments,  
19 apparently, that none of this information is under these court  
20 orders, when, according to Mr. Frei's declaration, they  
21 haven't gone about gathering it from the field, reviewing it  
22 and making any determinations. You could have documents in  
23 the hands of Linus Technology Center employees that  
24 specifically say, we are looking to incorporate here  
25 technology from Dynix, a derivative product of UNIX System V,

1 in the Linux because it will work better, or admissions of  
2 that type. And IBM not only would haven't produced it, but  
3 based on the Frei declaration, they would not have even  
4 conducted the necessary and thorough search to provide it.

5 The other point IBM makes, Your Honor, is they  
6 argue that the Linux information would be too burdensome at  
7 this point to produce. And it was in that connection that  
8 Mr. Frei's declaration is submitted. We believe the short  
9 answer to that is IBM said they would do that search of Linus  
10 Technology Center in September of 2003 and produce all  
11 documents related to the Linux contributions. So that is  
12 something they said they would do over approximately two years  
13 ago but they have not done.

14 And further, we think that a statement by IBM of  
15 the burden of reviewing files of 300 approximate number of  
16 developers is not something which can be viewed as inordinate  
17 and burdensome under any case. It is hard to understand that  
18 they would be defending this case in the first place without  
19 having gathered and reviewed the information that directly  
20 relates to how the Linux contributions were prepared and made.  
21 Yet, they have not done so.

22 THE COURT: You required them to defend against  
23 this case by filing suit against them.

24 MR. SINGER: That's right. Our point is that these  
25 documents, Your Honor, go right to the heart of that suit.



1 For them to say they have never gathered and reviewed the  
2 documents that show how Linux development has occurred, the  
3 rough drafts, the internal work plans, programming notes, that  
4 all of that you would think would be the first thing that IBM  
5 would look to along with the contributions themselves.

6 IBM can gather information from 300 individuals  
7 very easily. They can start by sending an e-mail to those 300  
8 individuals which says, send us the development information,  
9 all the documents that, in fact, do relate to their Linux  
10 contributions.

11 We assume that IBM has taken the necessary and  
12 appropriate steps to preserve that information upon the  
13 commencement of this suit. We submit that that information  
14 should be produced in a manner they should work with us that  
15 requires the least adjustment, if any, to the discovery  
16 schedule in place. For example, we have a number of  
17 depositions of programmers coming up, and they should give us  
18 an advance of those programmers' depositions the files  
19 indicating what it is those programmers were working on.

20 Instead, we have a situation where they're saying,  
21 you take blindly these depositions of the programmers. You  
22 can ask them what work they did in a deposition, but you  
23 shouldn't get the benefit of the files of their desk top or  
24 their server which would indicate what work they did in  
25 preparing the contribution.

1                   Clearly that material is very relevant and is at  
2 the heart of this case. And even if it were not the subject  
3 of these earlier orders and the earlier agreement by IBM, it  
4 should be produced.

5                   IBM said that 300 people are spread throughout 10  
6 countries. They don't indicate how many of those, in fact,  
7 work at the headquarters in Beaverton or in Austin, Texas.  
8 But no matter how many places there are, in this day and age,  
9 e-mail goes out, and documents come back in from whatever  
10 locations that IBM has engaged in.

11                   When we asked Dan Frei in his deposition had he  
12 turned over everything, his response in his deposition whether  
13 he complied with the document request, the file request, he  
14 said, I turned over everything. Clearly that's not the case  
15 in so far that he has in his possession documents that relate  
16 to the contributions made to Linux.

17                   Your Honor, one further argument. To the extent  
18 that IBM is taking the position that this was not, in fact,  
19 called for by Request 35 and Request 42 among others, that is  
20 inconsistent with their recently received responses to our  
21 Seventh request for production. IBM once it became clear this  
22 summer that they have not produced a lot of information  
23 because we weren't seeing it regarding Linux development, some  
24 examples of which are in our motion, we sent out a Seventh  
25 request for production. We tried to deal with it with as

1 great specificity as we could as opposed to general categories  
2 of documents relating to Linux contributions, documents  
3 relating to 2.4, 2.7 development, we sent out a Seventh  
4 request of production that had scores of specific requests.  
5 All documents concerning contributions to specific Linux  
6 projects, development work, listing specific projects,  
7 development work on the contributions to the 2.7 Kernel.  
8 Documents relating to the development trees. These are just a  
9 few examples.

10 In response to those requests and many other  
11 similar requests, IBM stated that these were duplicative of  
12 SCO's earlier document requests, including request Number 11  
13 and 35. And we submit that suggests, you know very well that  
14 SCO 35 which asked for all documents concerning Linux  
15 contribution included the very thing that they have not  
16 produced despite their agreement to produce all documents  
17 relating to Linux.

18 They should have produced this a long time ago,  
19 Your Honor. We submit that they have an order to produce it  
20 forthwith. And we submit further if the Court agrees with us  
21 respectfully that their action has not been appropriate in  
22 this regard, and the Court should consider sanctions, as well.

23 THE COURT: Thank you, Mr. Singer.

24 MR. SINGER: Your Honor, this was not in the book.  
25 It's a smaller photocopy of this particular chart. It is

1 available.

2 MR. MARRIOTT: Good morning, Your Honor. David  
3 Marriott for IBM.

4 THE COURT: Good morning.

5 MR. MARRIOTT: If I may, I'll just take this down.

6 THE COURT: Sure.

7 MR. MARRIOTT: Your Honor, SCO's motion is premised  
8 on the proposition that IBM has by way of Mr. Shaugnessy's  
9 declaration and its interaction with counsel in this case and  
10 the Court effectively misled the Court with respect to the  
11 scope of IBM's production pursuant to the Court orders. And I  
12 want to be perfectly clear from the outset that that is  
13 absolutely false. We have endeavored, Your Honor, throughout  
14 the course of this litigation to conduct ourselves according  
15 to the highest of standards of professional conduct, and I  
16 believe respectfully, Your Honor, that we have. And we've  
17 endeavored to comply with Your Honor's orders in so far as  
18 we've understood them as best we could and in all respects.  
19 And, in fact, Your Honor, in some instances we have, I think  
20 it can fairly be said, gone above and beyond what Your Honor  
21 has ordered.

22 Mr. Singer mentioned in the Court's requirement  
23 that IBM search for files from 100 developers of AIX and Dynix  
24 code. IBM searched for and to the extent it found, Your  
25 Honor, produced documents from 150 AIX and Dynix developers.

1 In fairness, Your Honor, I think that our approach to  
2 discovery has gone above and beyond that, I hope in the few  
3 minutes that I have to demonstrate that to Your Honor.

4 At the risk understating the point, Your Honor,  
5 SCO's present motion is to us nothing short of astonishing.  
6 In a nutshell, Your Honor, it argues that we agreed from the  
7 beginning of the case to effectively produce every document in  
8 the company relating to Linux, despite the fact that they've  
9 never asked for it. They argue that Your Honor ordered us to  
10 produce every document in the company relating to Linux,  
11 despite the fact that they didn't move for and apparently we'd  
12 already agreed to do it. And then they argue, Your Honor,  
13 that in effect, we thumbed our nose at the Court's order. We  
14 said that we produced everything that we said we would  
15 produce, and then, in fact, we did not, despite the fact that  
16 later they're apparently saying in Mr. Frei's declaration  
17 exactly what we did do.

18 Your Honor, early in this litigation, SCO made what  
19 I think can fairly be characterized as a grandiose public  
20 statements about the scope of its case and the breadth and the  
21 depth of its evidence. In his February 8 order, Judge Kimball  
22 said, quote:

23 Viewed against the backdrop of SCO's plethora of  
24 public statements concerning IBM's and others  
25 infringement SCO's purported copyrights to the UNIX

1 software, it is astonishing that SCO is not offering  
2 any competent evidence to create a disputed fact.

3 Your Honor, in so far as SCO distorts the record on  
4 this motion and faults IBM for not complying, which I believe  
5 I can show Your Honor to be revisionist versions of Your  
6 Honor's orders, its approach here as I would submit in  
7 Judge Kimball's words, nothing less than astonishing.

8 I would like, if I may, to make three points. The  
9 first of those points is contrary to what Mr. Singer says, IBM  
10 did not at any point agree to provide, as SCO suggests, every  
11 document in the IBM company relating to Linux or even every  
12 document relating to IBM's Linux contributions or the  
13 development of Linux. SCO propounded, Your Honor, a very  
14 small set of discovery request earlier in this case relating  
15 to Linux.

16 And if I may borrow your charts, counsel.

17 MR. SINGER: Sure.

18 MR. MARRIOTT: I think, Your Honor, that SCO says  
19 it well in its own chart. In document request Number 11, in  
20 document request Number 5:

21 Seek documents relating to contributions to Linux.  
22 Contributions to the open source development lab, Linus  
23 Torvald, Red Hat.

24 From the beginning of the case, their requests were  
25 focused on Linux contributions. Requests don't ask for

1 documents relating to the development of Linux, and they don't  
2 ask for every document in the company that relates in any way  
3 to Linux.

4 That notwithstanding, Your Honor, when we received  
5 these requests we objected to them. And we objected to them  
6 because we found that even as they related only to  
7 contributions, they were overbroad and unduly burdensome and  
8 would require the production of materials not reasonably  
9 calculated to lead to admissible evidence. And we set out our  
10 objections in our responses and objections to SCO's requests.

11 And if I may approach, Your Honor, we have a binder  
12 which I hope -- may I -- which I hope will be of some  
13 assistance to the Court. It's in part oriented toward the  
14 other motion that has now been put off, Your Honor, but some  
15 of the materials here may be useful, and I'll come to them as  
16 they do.

17 The point is, Your Honor, in response to the SCO  
18 requests, IBM propounded objections because the requests in  
19 our mind were broad. For example, Your Honor, as we made  
20 clear to SCO from the beginning, IBM's contributions, as  
21 anyone's contributions, to Linux are public. Linux is a  
22 publicly developing operating system. The contributions  
23 themselves are by definition in the public domain.

24 There is one sort of wrinkle, Your Honor, and in  
25 one sense in which a contribution which I think isn't a

1 contribution might be said not to be in the public domain. If  
2 a person attempts to make a contribution of code to Linux, it  
3 sends an e-mail, for example, to Linus Torvalds. Mr. Torvalds  
4 looks at the e-mail and decides the contribution is of no real  
5 value, and it doesn't make it into Linux. That I would  
6 characterize as an unsuccessful Linux contribution that didn't  
7 make it into Linux. Most successful contributions, Your  
8 Honor, do make it into the public domain because a person  
9 generally contributes to Linux by offering up a contribution  
10 on its public website for the world to see those, for the  
11 world to evaluate whether the code makes sense to include it  
12 or not, and then Linux itself is actually developed in the  
13 public domain over the Internet.

14 So there is a very small set of documents, Your  
15 Honor, that one would call nonpublic contributions. To the  
16 extent IBM made contributions through some indirect means,  
17 nonpublic means, and they didn't make it into Linux, which  
18 would make them public, we looked for those documents pursuant  
19 to Your Honor's order, and we produced it. And to the extent  
20 that any in the future are made, that they don't make it into  
21 the public domain system because someone within IBM sends it  
22 to Linus Torvalds, we will search for them, and if he rejects  
23 it and it doesn't make it into the Linux Kernel, we will make  
24 those documents available to SCO.

25 Now, Your Honor, let me just pause for a minute and



1 drop the Court a footnote. Though IBM objected to SCO's  
2 requests with respect to producing Linux contributions because  
3 we thought for the reasons I said, that they were overbroad  
4 and burdensome, we did not refuse altogether to search for  
5 documents. Your Honor will remember that at the beginning of  
6 the case the allegations of the complaint left, we thought us  
7 unsure as to what this case was about. And that's what  
8 precipitated the set of motion practice about figuring out how  
9 we would receive the discovery. And Your Honor set up  
10 protocol, as I think of it, by which SCO would identify the  
11 code at issue in the case. Once identified, IBM would then  
12 provide discovery with respect to that. That is as we  
13 understand it has been the protocol in the case.

14 So the footnote is we have provided substantial  
15 discovery relating to those very requests. They didn't just  
16 find out that we somehow had not, and I will show Your Honor  
17 that to be the case. And I will come back to the particulars  
18 of what we produced, if I may, shortly, Your Honor.

19 But the point is we never indicated that we would  
20 provide, as they suggest in their papers though they back off  
21 it a little here this morning, every piece of paper in the  
22 company relating either to Linux or even the development of  
23 Linux. We indicated that we would undertake a reasonable  
24 search for responsive documents based on the allegations of  
25 the complaint as we understood them. And the letters that

1 Mr. Shaugnessy that you have displayed here say nothing more  
2 than that. IBM will undertake a reasonable search. We did  
3 that, and we produced a substantial number of documents, Your  
4 Honor.

5 We produced -- just to give Your Honor an example,  
6 we produced documents from 70 or so custodians, whose  
7 documents related essentially only to Linux. And to the  
8 extent those custodians had in their files of documents  
9 related to Linux, those documents if responsive to these  
10 requests were produced. They amount, Your Honor, not to tens  
11 of thousands of pages of papers, as Mr. Singer suggests, but  
12 they're hundreds of thousands of pages of paper.

13 And with every production, Your Honor, in this  
14 case, we have given SCO a log identifying whose documents we  
15 were producing and the number of pages of documents being  
16 produced. Pursuant to interrogatories early in the case, they  
17 asked who the players were, who were making contributions.  
18 You've heard different numbers of 7,000 and hundreds of  
19 developers being mentioned. They knew exactly what we were  
20 doing, Your Honor, all along because the log is a record of  
21 exactly whose files we produced it from. So the suggestion  
22 that somehow we promised to do a reasonable search and then  
23 reneged on that only from their position to give them nothing  
24 which they just found out, is frankly not true.

25 Back to the first point after that long footnote,

1 Your Honor. We did not agree to give them every document in  
2 the company relating to Linux. We simply did not. The  
3 parties met and conferred over a course of days for a total of  
4 several hours about these original requests, Your Honor. None  
5 of the lawyers sitting at this table were involved in any of  
6 those negotiations. Mr. Shaughnessy was, and Mr. Ligh was.  
7 And they tell me that they made perfectly clear to SCO that we  
8 were not turning IBM upside down to produce pieces of paper  
9 from every single person in the company that might have a  
10 document related to Linux.

11 We also made clear, despite what Mr. Singer  
12 suggests, Your Honor, throughout the case in our papers that  
13 we were not doing that. Not just the production logs, but we  
14 made it abundantly clear in this litigation what we were  
15 doing.

16 And, Your Honor, the suggestion here that we agreed  
17 to do this sometime ago is a suggestion that comes for the  
18 very first time in a litigation two and a half years old in a  
19 reply brief. That reply brief is in stark opposition to what  
20 SCO said in its moving papers on the very same subject. And I  
21 point Your Honor to Page 5 of their opening brief in which  
22 they say, quotes:

23 IBM has persistently denied SCO this discovery.

24 And that's absolutely right. We have persistently  
25 declined to turn the company upside down to provide every

1 scrap of paper that might relate to Linux. Your Honor, Linux  
2 is a pervasive thing. It is like saying to the computer  
3 company, give us every document that relates to computers.  
4 The notion that they asked for that and we would agree to that  
5 is frankly absurd.

6 My second point, Your Honor, is that contrary to  
7 what counsel for SCO suggests, we do not believe that Your  
8 Honor's orders required IBM to produce documents in any way,  
9 shape or form relating to Linux from all of the people in IBM  
10 as their papers suggest, although again this morning they back  
11 off of that, we're now talking about hundreds of people. Just  
12 so there's no doubt, Your Honor, in describing the Court's  
13 orders, I do not presume to speak for you or tell you what you  
14 intended. I'm comfortable that Your Honor will tell us what  
15 these words in your mind meant, and we will all live by it.  
16 But what I do want to communicate is what we understood the  
17 orders to mean, and what we understood them to mean, Your  
18 Honor, not in our fanciful imaginations, but from the language  
19 used by the Court and from the context in which the Court used  
20 that language.

21 Chronology, Your Honor, and context here are  
22 important. They're important because these orders did not  
23 issue against a blank slate. They issued against a set of  
24 discovery disputes and prior hearings and prior orders. And  
25 without going into all the detail, I want to tell Your Honor a

1 little bit about that. Well, it takes more time than I would  
2 like. I think it's important to our understanding of the  
3 these orders.

4 The first order, Your Honor, that SCO suggests in  
5 its papers and here again today that IBM has violated  
6 throughout the course of discovery is the Court's March 3,  
7 2004, order.

8 And again if I may borrow this chart. May I  
9 counsel?

10 MR. SINGER: Certainly.

11 MR. MARRIOTT: As I suggested, Your Honor, you will  
12 recall that at the beginning of this litigation, there was a  
13 dispute among the parties as to how discovery should proceed.  
14 And in IBM's view, the SCO complaint failed to disclose with  
15 requisite particularity what the case was about such that we  
16 were left perplexed as to how precisely we were to go about  
17 producing documents relating to a subject like Linux like  
18 computers without knowing more specifically what the case was  
19 about. And we asked Your Honor to require them to provide  
20 some details.

21 About the same time that we moved, they made a  
22 competing motion to compel, which is the motion we're  
23 effectively here on in a renewed fashion today. Your Honor  
24 said at the outset that you were going to hold their request  
25 for production in abeyance. You said, I want you to go first,

1 SCO, and tell IBM what's going on here and to state sua sponte  
2 all their discovery until they provide the information. That  
3 was in December.

4 We came back to the Court in February. Your Honor  
5 asked me whether I thought SCO had complied. And I said that  
6 was difficult to say for certain. That was a judgment Your  
7 Honor should make. You subsequently made that judgment in  
8 your order from March 3rd and lifted the stay and required  
9 some discovery of SCO because Your Honor found, I believe in  
10 effect, in the order that there was still more that could be  
11 provided. And your order, Your Honor, ordered IBM to  
12 undertake certain things.

13 It's important in understanding I think what the  
14 Court's order means to reflect back on what SCO asked for. If  
15 you look again at SCO's request, Your Honor, Mr. Singer put on  
16 here 11, 35, 42. I believe, Your Honor, that the only  
17 requests at issue in the motion to compel were 11 and 35. And  
18 what was argued then by myself and Mr. Heigh on behalf of SCO  
19 at that hearing was that IBM should be required to provide all  
20 of its contributions to Linux. Not surprisingly because  
21 that's what the requests are actually about. And we argued,  
22 Your Honor, that that didn't make sense because the  
23 contributions were by definition public, and they could go get  
24 them for themselves on the Internet.

25 In Your Honor's words, Your Honor said that SCO

1 should endeavor as best it could to get what publicly was  
2 available concerning IBM's Linux contributions, and to the  
3 extent there was nothing that might not be public, for  
4 example, a failed contribution that didn't make its way to the  
5 public where it had failed, IBM should provide that. And as I  
6 said at the outset, Your Honor, that we have done.

7 Now, also at this hearing, though not raised in the  
8 papers, not squarely before the Court, counsel for SCO,  
9 Mr. Heigh, made essentially two additional arguments. First  
10 he said in effect, we're concerned that IBM is omitting  
11 documents from the files of senior executives. That was  
12 untrue, Your Honor, but that was his concern at the time.  
13 Second argument that Mr. Heigh made was that IBM, according to  
14 a public report, had in the late fall of 1999 undertaken a  
15 project to decide what its Linux strategy would be and figure  
16 out whether it would embrace Linux. Mr. Heigh waived around  
17 the article, and the Court later referred to in its order.  
18 Mr. Heigh said in effect, this is important. We need to have  
19 this document. They haven't produced it to us.

20 In Your Honor's words, you among other things begin  
21 in Paragraph 2 by reiterating that IBM is required to produce  
22 those contributions which are not public. You then go on in  
23 Paragraph 2, Your Honor, I believe in response to Mr. Heigh's  
24 argument, in the first two sentences to essentially say, as I  
25 read that, that IBM shouldn't omit documents from executives.

1 IBM is to provide documents and materials generated  
2 by and in the possession of employees that have been and  
3 are currently involved in the Linux project. IBM is to  
4 include materials and documents from executives  
5 including Sam Palmisano and Irving Wladawasky-Berger.

6 That to me was saying, IBM, do not exclude in your  
7 production of documents from your high level executives, which  
8 again, we weren't doing, but the concern was expressed, and I  
9 believe Your Honor addressed it in that order.

10 The Court then goes on I believe in the following  
11 sentence to address Mr. Heigh's request for information  
12 concerning the decision made by IBM in '99 to embrace Linux.  
13 And Your Honor specifically asked IBM to include that document  
14 and the materials related to that document. And you quote  
15 from it there by referring to IBM's ambitious Linux strategy.  
16 And that decision -- the article itself is here, Your Honor,  
17 on the first page. It says:

18 Less than two months later, a few days before  
19 Christmas, IBM had fashioned and Louie Gerstner, Jr.,  
20 the chairman, had approved an ambitious Linux strategy.

21 That is what I believe Your Honor is referring to  
22 in your order, the decision at that point in time by IBM to do  
23 something which was then not traditional and embrace an open  
24 source project like Linux.

25 We understood Your Honor's order to say, don't omit



1 to the extent they have documents responsive to these  
2 requests, documents from your high level executives. We  
3 weren't doing that. We'd first begun searching for  
4 Mr. Wladawasky-Berger's files, Your Honor, I believe in  
5 August of '03, well before this motion to compel which came  
6 before the Court.

7 In the last portion of the order here, Your Honor  
8 says:

9 The Court finds these materials relevant because  
10 they may contain information regarding the use or  
11 alleged use of source code of IBM in its  
12 contributions.

13 To us, Your Honor, what that meant is IBM  
14 undertakes the '99 and adopts it. And there's a consideration  
15 then of whether we shouldn't adopt it because it may be code  
16 in Linux which properly shouldn't be there.

17 What that order does not say anywhere so far as I  
18 can tell, Your Honor, is that IBM is required to produce every  
19 document in the company relating to Linux, every document in  
20 the company relating to the development of Linux, or even  
21 anything about IBM's Linux contributions.

22 The Court in Paragraph 2 immediately before says:  
23 IBM need not produce its Linux contributions in so  
24 far as they are publicly available.

25 SCO's position, Your Honor, that the language in

1 Paragraph 3 swept broadly to require the production of  
2 everything related to Linux or everything related to the  
3 development of Linux is impossible to reconcile with  
4 Paragraph 2, under which Your Honor said quite plainly we are  
5 not required to produce every document in Linux. If their  
6 interpretation that this is right, Paragraph 2 would be  
7 meaningless.

8           Moreover, the footnote, which is not -- it is up  
9 there. The footnote makes specific reference again to  
10 Mr. Heigh's pitch to the Court that we ought not be omitting  
11 documents related to -- from the files of executives, and we  
12 ought to be looking for documents related to that strategy.

13           We did that, Your Honor. Not for a minute did we  
14 consider that the Court was by that provision saying, forget  
15 the protocol of the months past, forget that SCO's to go first  
16 and tell us what's at issue and IBM with respect to what's  
17 been disclosed come forward and give us a little bit, give us  
18 discovery as to that, or we are going to go from broad to  
19 narrow until we reach a point where we have an issue we might  
20 actually try.

21           Never for a minute did we think that was completely  
22 out the window, because now SCO had, never having asked for  
23 it, never having moved on it, an order that said, IBM, produce  
24 everything in the company that's related to the Linux. And  
25 that, Your Honor, is how they read this clause.

1           Such materials -- produce such materials from Linux  
2           strategy or provide documents in the Linux project.

3           Which presumably they read to mean Linux. Produce  
4           any materials related to Linux.

5           Your Honor, not only would that reading entirely  
6           make irrelevant Paragraph 2 of Your Honor's order and not only  
7           would it totally gut the protocol which I understood the Court  
8           to put into place, but it would have been impossible to do.  
9           IBM is a company of 320,000 people. That's more people than  
10          there are in the city of Salt Lake City. The notion that we  
11          were going to somehow without bounds, which they're trying to  
12          now put to read this to say, search for files from  
13          everywhere -- and by the way, searching for files by last  
14          check did not in their view amount to simply sending an  
15          e-mail. Not to argue the motion Mr. Shaughnessy intends to  
16          argue, Your Honor, but you remember that we've been faulted  
17          for affidavits which have all sorts of apparent deficiencies  
18          according to them. Those affidavits were generated following  
19          a very careful and comprehensive search of people's files, not  
20          by sending an e-mail. Do you think for a minute if we just  
21          sent an e-mail they would be content with that production? I  
22          would submit to you, Your Honor, they wouldn't.

23          The way you collect documents as a general matter  
24          is to identify the people whose files deserve a search, to  
25          undertake, to communicate to them what the nature of the

1 documents we're looking for, in many cases interview them, to  
2 collect the documents which result from that and appear that  
3 they may be responsive, to carefully review them for privilege  
4 and for responsiveness, to segregate out the privileged  
5 documents, to take those documents, and if they are responsive  
6 put them on a log, to prepare the other documents for  
7 production, and to have CDs cut and produce them. It is not a  
8 trivial process.

9           According to SCO, Your Honor, though I don't  
10 believe the Court's order actually says how much time we have  
11 to do what's ordered here, according to the SCO letter sent to  
12 us following this order, they expect a compliance in 45 days.  
13 So they're now telling you we were supposed to go to the files  
14 of everybody or just take the argument that is being advanced  
15 today, to 300, and we were supposed to search the files in a  
16 meaningful way of 300 people and produce all of the documents  
17 that related in any way to Linux, and we were supposed to do  
18 it in 45 days. Your Honor, it strains credulity to think that  
19 that's what we reasonably could have understood this order to  
20 mean.

21           Let me just add, Your Honor, let there be no doubt  
22 what we understood this order to mean. When we got it, we  
23 sent a letter to SCO, and we said to them, this is the way we  
24 understand Paragraph 3. We understand Paragraph 3 to require  
25 us to search the files of the executives, and we understand it

1 to be calling for documents relating to what Your Honor says  
2 in the order, the IBM documents.

3 They responded. They expressed some concern, and  
4 these letters are in the book, which I provided to the Court.  
5 They responded. And in their response, Deiter Goodstone,  
6 another lawyer for SCO, expresses some concern that perhaps  
7 IBM is trying to say that it's only going to search in the  
8 files of its executives for documents relating to that. And  
9 we responded and said, no. We understand that this particular  
10 provision to be responsive to Mr. Heigh to be saying, make the  
11 documents related to the decision from the files available and  
12 don't omit the files of executives. But we understand your  
13 other requests of SCO. We are not omitting from our  
14 production documents which otherwise might be responsive  
15 merely because they don't relate to that document.

16 And again, we haven't done that. We have produced  
17 files from 216 custodians. By contrast SCO has produced 65.  
18 We have produced documents in the order of millions of pages  
19 of paper. At least hundreds of thousands of them, I'm told  
20 roughly 700,000, relate to Linux and Linux development and the  
21 like.

22 Your Honor, we have done the best we can do with  
23 what we have from them with respect to what we are supposed  
24 to -- with respect to what this case is about. And I will  
25 remind you, that with respect to what in Linux they have

1 rights to, you remember we asked and propounded in  
2 Interrogatory 13. Your Honor twice ordered them to respond to  
3 it. We still don't have what we believe is an adequate  
4 response. That's the interrogatory in which they say, here  
5 are the contributions that are a problem. We own them.  
6 Here's our right to them. Here's how you violated it. We  
7 still don't have the answer to that. Yet, they say, under  
8 Your Honor's order, the trivial discovery we did do. Yet, in  
9 their view, they now have an order which conveniently they're  
10 interpreting to say, forget all of that. Give it all to them.  
11 We now have carte blanche for every piece of paper in the  
12 company. And if you don't produce it, they suggest today, we  
13 will contend that you improperly failed to retain responsive  
14 documents because you didn't produce every document in the  
15 company, which is what Mr. Singer's reference, I believe, was  
16 about.

17           The bottom line, Your Honor, is in our judgment,  
18 one cannot reasonably read these orders as requiring the  
19 production of every document in the company related to Linux  
20 or even every document related to the development of Linux.  
21 There are hundreds of people within IBM's Linus Technology  
22 Center, 300 or so developers. We produced documents from at  
23 least 50 of those developers and 70 people overall that we  
24 believed to have information relating to the development of  
25 Linux. That alone is more than the entire set of the

1 custodians from whom SCO has produced documents in the case.

2 Let me, if I may, Your Honor, just move briefly to  
3 the last of the Court's order, which is alleged that IBM  
4 violated. That is the April 19 order. As Mr. Singer has  
5 properly said, that order arose out of a dispute among the  
6 parties with respect to AIX, and in particular, whether IBM  
7 should be required to produce all of the development history  
8 for those UNIX products, not for Linux. And as Your Honor  
9 knows, we took the position that we shouldn't have to. Your  
10 Honor disagreed with us and ordered us to do it, and we did.

11 In the context of that order, we understood some of  
12 the Court's language to perhaps suggest that we were supposed  
13 to search the files of 3,000. That concerned us. We raised  
14 that with counsel for SCO, who rather than saying, well, we  
15 understand that's not what we suspect the Court meant, but  
16 what's in it for us? Rather than say that, rather than  
17 express the alarm that now has been suggested was expressed  
18 about our saying that we were not going to also produce Linux  
19 because the order has nothing to do with that, so declined, we  
20 raised in our opening brief this issue. SCO responded in its  
21 reply in its opposition, and it was further addressed in our  
22 reply.

23 In Your Honor's order, what the Court did, as I  
24 understand it, and in the orders in the booklet that we  
25 provided to the Court, Your Honor basically said, I reiterate

1 what I said before. IBM produce its nonpublic Linux  
2 contributions. And Your Honor went on to say, because here we  
3 were talking about an interrogatory that IBM should make sure  
4 that if there were people who made these contributions whose  
5 identity isn't abundantly clear, you should identify those  
6 people and provide contact information. And we did that.

7 The word "information," Your Honor, was then  
8 introduced into the equation. And SCO then seized upon the  
9 use of the word "information" in that order to say, ah-hah,  
10 the Court's not just requiring the production of Linux  
11 contributions, it's saying contribution information. And what  
12 that must mean is IBM has to produce everything in the company  
13 relating to Linux or at a minimum, the development of Linux.

14 And again, Your Honor, we would submit that the  
15 Court's order, which we thought was clearly reiterating what  
16 had been done before, if it intended to require IBM to produce  
17 documents from the files of hundreds if not thousands of  
18 people related to Linux, it would have said so, especially  
19 when in context Your Honor was saying in that order, for now  
20 just produce documents from 100.

21 Yet, their position is, you're saying it  
22 simultaneously, produce from just 100 from AIX and Dynix,  
23 which we've now had lots of oral argument on, motions and  
24 other documents squarely been focused on. That is limited to  
25 100, but they contend we were simultaneously nearly



1       subsequential ordered to produce everything under the sun,  
2       again, they say, relating to Linux. And I respectfully  
3       submit, Your Honor, that that interpretation does not survive  
4       scrutiny.

5                 The last point, Your Honor, and I will sit down, is  
6       simply that independent of the Court's order, Your Honor,  
7       which, again, we don't -- we've never read and don't believe  
8       require the production of the kind that is suggested by SCO,  
9       we don't respectfully believe there is any reason to require  
10      the production of this information. Again, the Court's  
11      protocol was quite clear. SCO produces. IBM then goes from  
12      there. We still don't have a detailed response to our  
13      argument to Article 13.

14                What we have produced rather than saying, forget  
15      it. We're giving you nothing because we don't have a response  
16      to your Article 13, we have gone out in so far as we can  
17      determine is a bound for a reasonable search and produced  
18      files from -- we've produced documents from the files of  
19      people in Linus Technology Center. And respectfully, they  
20      aren't just figuring this out. They deposed some of these  
21      people. They have the logs that say it. There is no mystery  
22      about it.

23                Your Honor, in addition, we do believe -- and I  
24      won't burden the Court with this point, these arguments have  
25      been made before, and I think they stand true today -- there's

1 no reason for the production now given the protocol Your Honor  
2 has set out for this information. We have produced the  
3 contributions that are available. To the extent there were  
4 nonpublic things that really didn't qualify as contributions  
5 but were failed effort, they have been made available. We  
6 have produced, you know, the equivalent of billions of lines  
7 and literally hundreds of millions of lines of AIX and Dynix  
8 code, all of the development information from that  
9 information.

10 What you don't see, Your Honor, in anything before  
11 the Court today is any use of that information. What you  
12 don't see is SCO saying, you know, they produced all of this.  
13 Here's now what we know. We can define and focus the issues.

14 We have produced millions of pages of paper that  
15 apparently are of absolutely no value to SCO. At a minimum,  
16 they are not moving this towards a solution. The closer we  
17 get to the close of the case, the more questions we have, the  
18 more discovery apparently is needed. And we'll deal with I  
19 suppose further, Your Honor, with a request for depositions.

20 Finally, it would be an enormous burden to produce  
21 these materials. We have produced in the case today as I said  
22 from 200-and-I-believe-16 custodians. SCO has produced 65.  
23 That has taken two and a half years. Now as if it's done in  
24 weeks, counsel for SCO suggests that we should be required in  
25 the briefs they say everyone in the company, which one can't

1 believe they really mean. They say 100 people within the  
2 Linus Technology Center. That is not a small undertaking. It  
3 would be an expensive and all, frankly, Your Honor, for  
4 essentially no gain because they have already all that is  
5 required.

6 Thank you, Your Honor.

7 THE COURT: Thank you, Mr. Marriott.

8 Mr. Singer, I'll give you 10 minutes if you want to  
9 respond.

10 MR. SINGER: Thank you.

11 First, Your Honor, these requests are not directed  
12 to everything in the company. The particular focus of this  
13 that we are asking the Court to rule either has already been  
14 required or should be required forthwith are the documents  
15 created by the Linus Technology Center that have not been  
16 produced to date, that are nonpublic and they relate to IBM  
17 contributions that have actually been made to the outside  
18 world.

19 Now, to the extent there are documents that are in  
20 the public domain, that's not included. To the extent there  
21 was work on dead ends that didn't actually result in  
22 contributions, that's not included. To the extent that it  
23 includes people outside the Linus Technology Center, that one  
24 can debate about, but there should be no debate about within  
25 the Linus Technology Center or the Open Source Steering

1 Committee, those two groups, because that's what they said  
2 they would review going all the way back to the beginning of  
3 the case.

4           The second point I would like to make, Your Honor,  
5 is that the Linux development that occurs in the public does  
6 not obviate the need for this information. There's no  
7 question that a lot of Linux development does occur in public.  
8 There is also no question that IBM has not just out of thin  
9 air created these contributions and then presented them to the  
10 public or produced to the public all the underlying memos,  
11 e-mails, drafts, work plans that go into the creation of those  
12 contributions. That's what we're talking about. But if the  
13 contribution is relevant, if we're deposing a programmer about  
14 the contribution and what they relied on in making that  
15 contribution, so clearly relevant and fell within the scope of  
16 these orders and their earlier agreement to get those files  
17 from those several hundred people in the center.

18           Now, on that Mr. Marriott says, well, we have given  
19 you information from 50 developers, to which I say, how were  
20 they selected? If they didn't have this obligation at all,  
21 how did they pick 50 developers? What did they select from  
22 those 50 developer files to give us and not give us?

23           Mr. Frei's declaration simply says in sweeping  
24 terms that, we would have to go to hundreds of developers and  
25 produce all of their information. And he suggests none of

1 that has already been done. Has than been done completely for  
2 50 developers? Why them not the other Linus Technology Center  
3 developers? In September of 2003, Your Honor, they did not  
4 make such a distinction.

5 Now, I'd like to briefly respond on each of the  
6 particular orders of things that we have not previously  
7 covered. First of all, there is the issue of the request.  
8 The request Number 11 dealt with the actual code, the  
9 contributions. Request Number 35 and 42 go beyond that.  
10 35 talks about documents concerning those contributions, as  
11 does 42. That is broader than the contributions themselves.

12 Mr. Marriott did not respond to the fact that if  
13 this request in the Court's subsequent order only means  
14 contributions themselves and the contributions are made  
15 public, then all of this is essentially a nullity. It has to  
16 be nonpublic information. And for those contributions, what  
17 IBM said they would do would be review the documents in the  
18 Linus Technology Center and that they would produce the  
19 documents that relate to those contributions. That was clear  
20 in the September 15th and in the October letters. We had the  
21 right to rely on what IBM's counsel said in that regard. Not  
22 that they were searching the whole company, not that they were  
23 giving us every document, but that they were going to the  
24 Linus Technology Center and the Open Source Committee and that  
25 they were producing documents that related to the actual

1 contributions that they had made, not to every open source  
2 project, but to Linux. And no protocol ever trumped that  
3 obligation.

4 Now, with respect to the February 4th hearing,  
5 we've acknowledged the focus of that hearing was on the issues  
6 of public versus nonpublic code and executive files. We do  
7 not believe this was an issue. The Court's order, however,  
8 went beyond that. We believe, I mean, the Court will know  
9 what it meant by its order. We're only dealing with the plain  
10 language of that order. And the plain language of that order  
11 is broader than simply the executives. That includes  
12 materials from the executives but not limited. And to the  
13 extent the Court is telling IBM that information may be  
14 included which shows the misuse of source code by IBM and its  
15 contributions to Linux, what's more clearly is at the center  
16 of that the people at the Linus Technology Center itself.  
17 Maybe IBM right now its reasonable argument if it needed to  
18 search people throughout the company outside the Linus  
19 Technology Center, but how can they make the argument with  
20 respect to the people inside of the Linus Technology Center  
21 whose job is to come up with those contributions and when  
22 we're talking about the actual contributions that they made  
23 from that center to the public?

24 And then there's the issue of the January 18th  
25 order that deals with AIX and Dynix. We have heard no

1 explanation as to how IBM could reasonably believe that the  
2 Court could find relevant and require the production of AIX  
3 and Dynix programmer's notes, source, drafts, work papers and  
4 the like, but that that is not included with respect to Linux  
5 itself.

6 THE COURT: Because hasn't Mr. McBride argued  
7 throughout that it related to AIX and Dynix? He did not  
8 broaden the argument.

9 MR. SINGER: Your Honor, our argument -- accepting  
10 that Mr. McBride did not broaden that argument, we submit that  
11 they -- given the fact that they knew they had said they  
12 reviewed the Linus Technology Center and produced related  
13 documents and knowing that if the Court says this range of  
14 documents at AIX and Dynix is relevant, how could -- we submit  
15 that IBM could not reasonably believe that the Linux was not  
16 included.

17 But we did raise that before the Court in  
18 opposition to the motion for reconsideration this spring. And  
19 IBM at that point only talked about the nonpublic versus  
20 public issue. The Court's order at that time says, all,  
21 nonpublic Linux contribution information. Again, we're  
22 dealing just with the language of that. To us, "all" means  
23 all, and the information means any code itself, especially  
24 when the code they say has all publicly been contributed.

25 The Court also noted below that the production is

1 to be specific in nature including any code contributed that  
2 is otherwise not publicly known.

3 Your Honor, the Court will know what it intended,  
4 and we can go by these orders. The argument we submit is that  
5 this was within the scope of what was agreed to be produced as  
6 reflected in the objections to the Seventh request where IBM  
7 said, what you're asking for now is included in the scope of  
8 Request 35. They can't have it both ways. They can't say,  
9 you didn't request this, it's not related to Linux  
10 contribution, and then say, we are duplicating an earlier  
11 request.

12 So in our view, Your Honor, the Court should either  
13 find that this information was called for or should clearly  
14 find it's relevant. There's no serious argument that it's not  
15 relevant. It goes to the very core of what these programmers  
16 are doing. We should not be required to depose a programmer  
17 about his contribution -- his or her contributions to Linux  
18 without having the file from that programmer which shows the  
19 notes, the e-mails, the work plans used to create that  
20 contribution.

21 With respect to the burden, we do not believe that  
22 300 people at the core of the project, 50 of whom apparently  
23 have already gathered some undefined set of material from  
24 Linux is unreasonable for IBM to be ordered to provide. That  
25 is at the very core of this case.



1                   Now, with respect to material that has been  
2 produced, Judge Kimball ordered us by October 24th to provide  
3 our interim disclosures of the technology and supplement that  
4 with the final disclosure in December. We are working on that  
5 and. We intend to fully comply with the order, which is the  
6 current order we understand we are operating under with  
7 respect to those mentioned by identification.

8                   THE COURT: Does that encompass interrogatory  
9 Number 13?

10                   MR. SINGER: It would encompass supplementing  
11 interrogatories to SCO which have asked for information  
12 relating to the nature of what we believe has been  
13 misappropriated. I don't have 13 in front of me, Your Honor,  
14 if that's such the interrogatory that would include that.

15                   Thank you, Your Honor.

16                   THE COURT: Thank you.

17                   MR. MARRIOTT: May I make a suggestion, Your Honor,  
18 without any further argument? Again -- well, with further  
19 argument. We really do believe these materials are  
20 irrelevant. As I said, we've produced files from the  
21 documents of 216, and a significant number of them are Linux  
22 distributors. What I heard Mr. Singer saying is what he  
23 really wants is to have the documents for the developers he's  
24 going to depose.

25                   We are agreeable, Your Honor, if SCO wants to give

1 us a list of the 20 developers that they think they've got to  
2 depose and they want to give us a fair opportunity to meet  
3 with these people and to collect the documents and if we could  
4 put this to rest, we will go to -- they choose the people,  
5 because I don't want them to complain that we chose the wrong  
6 people later on, they know who the people are. They know who  
7 they want to depose. They told the Court recently in an order  
8 they had a pretty good sense of what they were going to do by  
9 way of deposition. We will go to the files of those 20  
10 people, and to the extent documents are there that haven't  
11 been produced from whomever they select, we will provide them.

12 Thank you, Your Honor.

13 THE COURT: Thank you. Counsel, I'm ready to rule  
14 with regard to this in general terms.

15 The Court finds that based upon what's before me,  
16 the memorandums, the review of the transcripts, the  
17 affidavits, the correspondence, I find from that as well as  
18 from the argument of counsel that IBM did not agree as argued  
19 by SCO to provide the information related to Linux.

20 Further, I find that the issue of discovery as SCO  
21 now argues should be included in the order as it relates to  
22 Linux was not raised before the Court. It was not understood  
23 by the Court as part of the request. It was not contemplated  
24 in the orders that have been prepared by the Court. And IBM  
25 has appropriately interpreted the Court's orders. And that I

1 find specifically that SCO's interpretation of the orders  
2 takes out of context the Court's what I believe to be clear  
3 meaning.

4 And I also find that Mr. Shaugnessy's affidavits  
5 are sufficiently in compliance with the requirements of the  
6 Court to explain those efforts made and those documents not  
7 produced.

8 So I find that IBM has, in fact, complied with the  
9 orders of the Court, and I would deny except as has been now  
10 acknowledged will be provided SCO's motion to compel.

11 I also want to address this issue with regard to  
12 SCO's compliance with -- it is Interrogatory Number 13, isn't  
13 it, about the source code? Now, that's why I asked you the  
14 question, Mr. Singer, why has that not been complied with?

15 MR. SINGER: Your Honor, we understand the Court's  
16 order that set forth the two specific dates, one interim and  
17 one final, to be dates by which we are to supply specific  
18 information about what technology has been misappropriated and  
19 to update the responses to interrogatories, and we fully  
20 intend to do so by those dates. We are working on that. We  
21 have not reached a final determination here, but we believe  
22 that the order gives us until October 24th to comply with that  
23 request.

24 THE COURT: Any comment on that, Mr. Marriott?

25 MR. MARRIOTT: No, Your Honor.

1 THE COURT: All right. Then that will be required.  
2 All right. We have the other matter that relates  
3 to the depositions that we need to address.

4 MR. SINGER: May I approach?

5 THE COURT: Certainly.

6 MR. SINGER: Your Honor --

7 THE COURT: I'm reminded by Mr. Willey that there's  
8 been discussion about the dismissal of the patent claims and  
9 that that may affect this question of depositions. So if you  
10 would address that, please.

11 MR. SINGER: I will, Your Honor.

12 Your Honor, this is our motion seeking an  
13 additional 25 depositions beyond the existing 40 that both  
14 parties have in the existing order.

15 As of the present time, SCO has taken 18  
16 depositions and has noticed 14 additional depositions, which  
17 when completed would bring that to 32 of the 40. IBM for its  
18 part has currently taken 16 depositions and has noticed 17  
19 additional depositions be taken, which would bring that to 33.

20 We are raising this motion now rather than waiting  
21 until the 40 depositions are exhausted because it's necessary  
22 to plan our discovery schedule with that in mind what that  
23 total will be. This is a complex case with many issues, and  
24 even with IBM's dropping of patent claims that could have been  
25 dropped a long time ago before a lot of work was done because

1 clearly their reason for dropping it as they say SCO didn't  
2 have many sales there is the information that they would have.  
3 But be that as it may, they decided this week to withdraw  
4 these claims.

5 Your Honor, that does not eliminate the need for  
6 additional depositions. The chart that I've given you that  
7 lists in five columns different individuals is taken from  
8 IBM's response to an interrogatory where they sought to  
9 identify those witnesses as having knowledge of various  
10 subjects. This list I believe which we've reproduced here  
11 excludes individuals that have already been deposed, and it  
12 shows that IBM's own response to interrogatories, there's  
13 about 80 names on this list, there are numerous individuals,  
14 go well beyond the 40 that IBM itself has identified as having  
15 material information on these topics.

16 The patent claims amounts to about nine of that  
17 list of 80. There are many issues in this case beyond patent  
18 claims. And while that reduces the need somewhat, it does not  
19 really get to the core of the fact that every issue has been  
20 contested by IBM. They have produced declarations from  
21 individuals going back to the source code, licenses, when they  
22 were entered into in 1985. We have taken depositions of those  
23 declarants. There's issues regarding copyright ownership that  
24 involves people not only at IBM but people at Novell. There  
25 are issues regarding the Linux development, the AIX

1 development. In a case of this scope, a request for 65  
2 depositions we submit is not unreasonable. This is not a case  
3 where IBM has just taken 10 depositions and they said, how can  
4 we need more than 40? They will be at 33, and we will be at  
5 32 after we complete just the depositions that are currently  
6 noticed.

7 In addition to this information, Your Honor, we  
8 have produced two other lists here which is work taken from  
9 discovery the Courts previously have ordered as well as other  
10 work to try to identify individuals who are programmers who  
11 have made contributions to Linux and at the same time  
12 previously worked on Dynix and have knowledge of a derivative  
13 product which is within the scope of our protected technology.  
14 That list of 16 identifies individuals, which while there's  
15 some overlap on these lists, but for the most part goes beyond  
16 it.

17 Then there were other individuals which are listed  
18 in the list of 20 which are individuals who have experience in  
19 AIX or more generally in Dynix and who have made Linux  
20 contributions of particular types of this in the third column.

21 We think the initial motion gives a particular  
22 sufficient basis for why we need more depositions, and it  
23 certainly if that did not in supplemental information shows  
24 why it would be appropriate for the Court to expand to 60 or  
25 65 the number of depositions which party should take.

1                   We are not asking for any modification of the  
2                   discovery deadlines. There are numerous lawyers involved on  
3                   both sides of this case, and we have months remaining within  
4                   those deadlines to take this discovery. It can be done within  
5                   the existing scope of discovery provided by the current  
6                   schedule.

7                   IBM in its response, Your Honor, says that if we  
8                   get additional depositions, then for every additional  
9                   deposition we get they should be allowed a second day to take  
10                  a deposition of one of SCO's witnesses. And we don't see how  
11                  that at all follows. If they needed more time to depose one  
12                  of our witnesses beyond the seven hours provided, and the  
13                  current order says each side can designate two witnesses that  
14                  can be deposed for two days, but if they needed more time than  
15                  seven hours, they should ask for it on its own right. If they  
16                  don't need it, the mere fact that we need to depose more than  
17                  40 witnesses does not give them the right to take a longer  
18                  deposition than they need of our witnesses. Those two are not  
19                  going to follow, and we assume that IBM doesn't intend to  
20                  simply harrass our witnesses by deposing them for two days if  
21                  one day would suffice. If they need two days, they should  
22                  make that request on it own basis.

23                  But, Your Honor, we do need these additional  
24                  depositions. Even with the witnesses that are currently  
25                  listed, we are at 32 out of 40. There are many other

1 ,witnesses who have material knowledge of this, and we suggest  
2 it is an appropriate modification of the order.

3 THE COURT: Thank you, Mr. Singer.

4 MR. MARRIOTT: Thank you, Your Honor. I will be  
5 brief. The rules -- I will really try to be brief.

6 The rules presumptively, Your Honor, give the  
7 parties each 10 depositions. We agreed early in the case this  
8 is a case in which more will probably be required. We came to  
9 the agreement of 40. And from our perspective, there is no  
10 reason why 40 shouldn't suffice. In earlier papers before the  
11 Court, SCO told Judge Kimball that on the patent side of the  
12 case it requires as much as 65 depositions on patent issues.  
13 In its moving papers here, Your Honor, SCO suggests this  
14 morning it's now nine witnesses.

15 And as of yesterday, Your Honor, IBM for reasons  
16 set out in the paper -- in our opposition papers withdrew IBM  
17 patent claims. With the patent claims gone, Your Honor, it's  
18 hard to see a need for any more depositions. Indeed, arguably  
19 less depositions are required. We aren't proposing to the  
20 Court to lower the limit of depositions. There seems to be no  
21 additional basis for that. That showing hasn't been made  
22 here. There is no reason for us to have any more than 40 in  
23 this case. That is an extraordinary number, four times the  
24 presumptive limit.

25 As to the idea, Your Honor, that the number of



1 depositions that are proposed can be conducted on the current  
2 schedule, I think that's simply at odds with the party's  
3 experience in the case. By our count, SCO has taken 16  
4 depositions of its allotted 40, not 18. Over the course of  
5 the case, Your Honor, the parties have taken on average a  
6 deposition a month. In the busiest of months, there were 10  
7 depositions. Under the SCO proposal, as we say in our  
8 opposition papers, it would be necessary to have 25  
9 depositions a month in the four months that remain. And  
10 that's assuming that IBM reserves 10 for defensive discovery  
11 and SCO reserves five for defensive discovery. So the notion  
12 I think as a practical matter that a request for 65  
13 depositions a side for a total of 130 depositions when the  
14 rules presumptively allow 20, I think it's unrealistic to  
15 think that's not going to have a negative impact on the  
16 schedule in the case.

17           SCO has suggested in the piece of paper provided,  
18 Your Honor, that there are 20 persons who are, it seems  
19 apparent, important to their presentation. He proposes to  
20 depose those 20 and it's perhaps from these 20 that would  
21 extend -- the documents haven't been provided, ask to be  
22 provided in discovery. But I don't believe there is any need  
23 for additional depositions.

24           We do propose in our suggestion that if the Court  
25 is inclined to give anything, in fairness IBM should be

1 allowed additional days with existing SCO witnesses rather  
2 than just additional deposition. That's not why we're trying  
3 to have extra -- things in an uneven way, but rather because  
4 as SCO says in its papers, there are a lot more IBM people to  
5 depose than SCO people. There are fewer SCO people who have  
6 more information which will take longer to develop. And for  
7 that reason, we request the motion be denied. Thank you.

8 MR. SINGER: Very briefly, Your Honor. The 40  
9 depositions per side figures were arrived at before any  
10 counterclaims were asserted by IBM. They asserted at least  
11 10. The withdrawal of three patent counterclaims does not  
12 deal with the fact that they've asserted additional  
13 counterclaims dealing with copyright and other things which  
14 expanded beyond the original 40. We believe we've made a  
15 specific showing, and the material will be provided as to why  
16 we need additional depositions.

17 The fact that a lot of depositions haven't been  
18 taken in the front end reflects the normal course of  
19 litigation if you're wanting to review the documents before  
20 you take the depositions. And most of those documents are  
21 documents that have been produced within the last several  
22 months. There is no reason why the Court should not extend  
23 the number of depositions since we are not extending the time  
24 in which the depositions should be complete.

25 THE COURT: I am going to increase the number of

1 allowable depositions by 10 as to each side with this  
2 requirement, that they are to be completed within the allotted  
3 cut-off day. To the extent that they cannot be, they must be  
4 foregone because we will not entertain any motion for an  
5 extension of time to complete depositions.

6           Additionally, Mr. Marriott, I'm going to deny your  
7 request for additional time with them and hold both sides to  
8 the seven-hour requirement.

9           All right. Now, is there anything further of a  
10 substantive nature that we need to address?

11           MR. MARRIOTT: None here, Your Honor.

12           MR. SINGER: None here, Your Honor.

13           THE COURT: All right. I think we need to talk  
14 about the dates.

15           Mr. Marriott, with regard to the -- or  
16 Mr. Shaugnessy, whoever's going to deal with this, with regard  
17 to the 20 developers whose information you're going to  
18 provide, how much time do you reasonably need to provide that?

19           MR. MARRIOTT: I think if we had 60 days, Your  
20 Honor, we could do that. And if it is the people who are on  
21 the list that we already have, it would be useful to know that  
22 now because we could begin immediately on that.

23           MR. SINGER: Well, we'll need to look at the list  
24 and see which 20, since that's the number which is provided,  
25 the ones that are most significant.

1 THE COURT: What is the cut-off date for  
2 depositions?

3 MR. SINGER: Currently it is January 27th of 2006.  
4 I should say, there are two dates. There's January 27th,  
5 2006, for general fact discovery; there's an additional period  
6 that runs to I believe March 17th for discovery relating to  
7 each party's defenses. I think it's a little unclear to us,  
8 Judge, what is encompassed and limiting to that period between  
9 January 27th and March 17th.

10 THE COURT: All right. I'm going to just require  
11 you to set your depositions for the people that may be  
12 affected by this information before the cut-off deadline but  
13 after IBM has been required to comply. And it will be 60 days  
14 from today.

15 MR. MARRIOTT: If we can do it faster, Your Honor,  
16 we will. I just want to make sure we don't promise a date we  
17 can't deliver.

18 THE COURT: Now, additionally with regard to the  
19 requirement that SCO renew the motion that is still pending,  
20 let's set a date for that in December. And I'd say the second  
21 week of December. Is there any conflict there?

22 MR. SINGER: None here.

23 MR. SHAUGHNESSY: I don't think so, Your Honor.

24 THE COURT: Ms. Pehrson?

25 (Discussion held off the record.)

1 THE COURT: We'll hear any outstanding motions,  
2 then, including -- does IBM have a motion to compel that's  
3 outstanding?

4 MR. MARRIOTT: We do, Your Honor. We have the  
5 privilege of --

6 THE COURT: We'll hear that, as well.

7 MR. NORMAND: Your Honor, Ed Normand for SCO.

8 Is it possible to do it later than the second week  
9 in December?

10 (Discussion held off the record amongst court personnel.)

11 THE COURT: I'm reminded that I'm on the criminal  
12 rotation calendar the week of the 5th and the following week.  
13 So we're going to need to set it the week of the 19th.  
14 Obviously people have plans around there. So let's set it  
15 either on the 19th or 20th. Is that a problem?

16 MR. SINGER: No, Your Honor.

17 MR. SHAUGHNESSY: That's fine.

18 THE COURT: How about the 20th, then? Tuesday, the  
19 20th, at 10 o'clock?

20 MR. NORMAND: That's fine, Your Honor.

21 MR. SINGER: That's fine.

22 THE COURT: All right. We're going to verify that.  
23 We can access our calendar here.

24 MR. SINGER: Your Honor, may I raise one additional  
25 issue with respect to --

1 THE COURT: Just a second. Does it relate to --  
2 MR. SINGER: It relates to the point before this,  
3 not the setting of the dates.

4 (Time lapse.)

5 THE CLERK: That hearing will be set for  
6 December 20th at 10:00 a.m.

7 And that will be in what courtroom?

8 THE COURT: Our courtroom is just so small it's  
9 hard to accommodate counsel, much less all of this. So we'll  
10 leave a note upstairs. We'll make certain you know which  
11 courtroom. We may possibly use this courtroom or  
12 Judge Campbell's courtroom.

13 Mr. Singer?

14 MR. SINGER: Your Honor, there's one issue as we  
15 think about the interaction of these different dates. If we  
16 produce, just immediately produce the list of 20 developers  
17 and they produce development information and that takes 60  
18 days for IBM to produce, we're already somewhere deep probably  
19 into December. That both leaves until January 27th, a limited  
20 period of time for those depositions, and we also have the  
21 interim order -- or not the interim order, but the final date  
22 for disclosure of technology that is in December. We would  
23 request that IBM seek to produce this information on a rolling  
24 basis so that we can set some of these depositions earlier,  
25 and that perhaps that would not require a full 60 days for

1 complete production.  
2 MR. MARRIOTT: We're happy to try to do that, Your  
3 Honor.  
4 THE COURT: All right. We'll include that,  
5 Mr. Singer, in the order.  
6 Counsel, may I see one counsel from each side at  
7 the bench for just a moment, please, or two? It doesn't  
8 matter.  
9 (Discussion held off the record at the bench.)  
10 THE COURT: At the bench, I've asked counsel for  
11 IBM to prepare the order in this matter, or these matters, and  
12 that proposed order will be reviewed as to form by SCO and  
13 presented to me probably on Wednesday or no later than  
14 Wednesday of next week for signature.  
15 All right. Is there anything else we need to  
16 address with regard to any matters this morning?  
17 MR. MARRIOTT: None here, Your Honor.  
18 THE COURT: All right.  
19 MR. SINGER: No, Your Honor.  
20 THE COURT: All right. Thank you. We'll be in  
21 recess.  
22 (Whereupon, the court proceedings were concluded.)  
23 \* \* \* \* \*  
24  
25