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

COPY

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THE SCO GROUP,)
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)
)
Plaintiff,)
)
vs.) Case 2:03-CV-294
)
)
INTERNATIONAL BUSINESS MACHINES)
CORPORATION,)
)
Defendant/Counterclaim-Plaintiff)
_____)

BEFORE THE MAGISTRATE BROOK WELLS

DECEMBER 20, 2005

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

Reported by: KELLY BROWN, HICKEN CSR, RPR, RMR

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A P P E A R A N C E S

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1 SALT LAKE CITY, UTAH, DECEMBER 20, 2005

2 * * * * *

3 THE COURT: Good morning, ladies and gentlemen.
4 We're here this morning to address two outstanding motions.
5 The first one would be SCO's renewed motion -- well, that
6 would be the second one -- SCO's renewed motion to compel
7 discovery. The first one we'll address is IBM's motion to
8 compel production of documents from SCO's privileged log.

9 Counsel, if I could ask you to make appearances for
10 the record, please.

11 MR. MARRIOTT: Good morning, Your Honor.
12 David Marriott for IBM.

13 MR. SHAUGHNESSY: Todd Shaughnessy for IBM.

14 MR. NORMAND: Good morning, Your Honor.
15 Ted Normand for SCO.

16 MR. HATCH: Brent Hatch for SCO.

17 THE COURT: All right. We will begin with IBM's
18 motion to compel production of documents. I have reviewed all
19 of the submissions including the transcript of the case that
20 was presented by Judge Boyce some years ago and would
21 specifically ask that that be addressed.

22 All right. Mr. Marriott?

23 MR. MARRIOTT: Thank you, Your Honor.

24 Good morning, Your Honor. SCO has withheld from
25 production in this litigation somewhere in the order of 1,000

1 documents from the files of AT&T, Novell and the Santa Cruz
2 Operation, Inc. The documents are, so far as we can tell,
3 Your Honor, plainly relevant to the issues in the case based
4 on descriptions of them in SCO's privileged log. And, indeed,
5 I would submit that SCO has acknowledged the relevance by even
6 listing them on the log.

7 To properly withhold the documents as privileged,
8 SCO bears the burden to show the documents are, in fact,
9 privileged. It contends that the documents here are
10 privileged because SCO and it contends its predecessors
11 acquired certain Unix assets from one another with which the
12 documents in question were apparently associated. And
13 according to SCO, the transfers of assets from one of these
14 entities to another represented the transfer of an entire line
15 of business. In SCO's view, that justifies the privilege
16 passing from one entity to the next.

17 Respectfully, Your Honor, we think that is
18 incorrect, that the privilege did not pass in each of the two
19 transactions that matter here, and that for that reason, that
20 any privilege that may have existed with respect to those
21 documents, which, of course, we haven't seen and can't
22 evaluate the privilege of, would in any event have been
23 waived. And for that reason, we would ask Your Honor to
24 compel the production of the documents.

25 I would like to, if I may, in the few minutes that

1 I have to make just a couple of points. First point, Your
2 Honor, addresses the issue that Your Honor flags the one which
3 you would like us to address, and that is Judge Boyce's
4 decision. In our view, Your Honor, the rule here is that the
5 privilege passes where there is a sale of assets from one
6 entity to another where control passes with the assets. And
7 if it is a mere asset sale even if those assets represented a
8 line of business, as SCO contends is the case here, the
9 privilege doesn't pass.

10 Now, in its papers, SCO criticizes the cases cited
11 by IBM as not standing for the proposition that the privilege
12 does not pass in an asset sale. What SCO omits, however, Your
13 Honor, is reference to the decision by Magistrate Judge Boyce
14 which squarely addressed the issue presented here.

15 In that case, Caldera, which was the predecessor in
16 interest here of -- the predecessor, rather, of SCO asserted
17 that it was entitled to claim privilege with respect to a
18 collection of documents which apparently transferred from
19 Novell to Caldera in an asset sale. And SCO argued that the
20 documents in that case were entitled to the protections of the
21 privilege because they argue, quote, there was a fully
22 operational business division, close quote, that passed from
23 Novell to Caldera.

24 In fact, Your Honor, Caldera in that case made a
25 much stronger presentation as to why the privilege should

1 attach than does the SCO Group here, because in the case in
2 front of Judge Boyce, it was argued that Novell and Caldera
3 had a continuing joint interest in defense of the IP that was
4 apparently involved in that transaction.

5 Notwithstanding that additional fact, which is not
6 present here, and notwithstanding the argument that the assets
7 that transferred in the Novell-Caldera situation were an
8 independent line of business, Magistrate Judge Boyce rejected
9 precisely the argument that is made here. And he did so at
10 Pages 18 and 19 of the transcript, which we provided to the
11 Court as Exhibit 1 to the Shaughnessy declaration. And I
12 think, though I understand Your Honor's looked at it, that it
13 bears examination. Magistrate Judge Boyce says:

14 I do not think I really need argument on the
15 attorney-client privilege matter. I've done a lot
16 of work on that, and I'm satisfied that the claim
17 of attorney-client privilege is not valid. When
18 Novell documents were turned over to Caldera, that
19 destroyed the privilege. Caldera is not the
20 alter-ego or successor in interest in the legal
21 context of those materials. The analogies to the
22 Supreme Court's decision with regard to its
23 successor in interest such as a trustee in
24 bankruptcy are an imperfect analogy. That case
25 simply does not apply. It's a simple waiver

1 situation. You have separate entities, and one
2 entity hands over to the other all the technology
3 and information and materials covered by
4 attorney-client privilege. Without some type of
5 additional protection, that privilege is gone. So
6 the motion to compel will be granted with regard
7 to those documents.

8 Now, when Judge Boyce finishes ruling, counsel for
9 Caldera then acknowledges, Your Honor, that, in fact, they
10 made the determination that they were going to concede the
11 issue in that case. Subsequently, Novell attempted to
12 intervene in the case and assert a privilege of its own, and
13 Judge Boyce there re-affirmed his decision here. He said that
14 the only interest that Caldera had with respect to the
15 documents at issue in that subsequent matter was to preclude
16 discovery.

17 And that frankly, we submit, Your Honor, is the
18 only interest that SCO had here. As I think we indicate in
19 our reply papers, SCO offered to produce the documents to us
20 in this litigation so long as we did not -- we agreed not to
21 argue that there was a subject matter waiver, which, of
22 course, we can't do without actually seeing the document and
23 know what we might be talking about.

24 None of the cases that are cited by SCO as
25 authority for a rule different from the rule adopted by

1 Magistrate Judge Boyce are applicable here. Three of them
2 were attorney disqualification basis in which there was no
3 issue about whether certain documents should be produced
4 because there had been a waiver. Two of the cases are cases
5 in which the assertion of privilege was rejected, and at least
6 two of the other cases are cases in which -- that arose in the
7 context of bankruptcy and turned in significant part on
8 bankruptcy consideration, which, of course, Judge Boyce in his
9 decision expressly distinguishes from the case here.

10 So we think, Your Honor, for that reason alone,
11 that is to say, that the rule is simply not as SCO suggests,
12 Your Honor ought to grant IBM's motion and require the
13 production of these documents.

14 Now, even if the rule were as SCO suggests, we
15 think also that Your Honor should require the production of
16 the documents. SCO contends that the document privilege
17 passes because an entire business, the Unix business, as they
18 call it, passed from AT&T to Novell, from Novell to Santa
19 Cruz, from Santa Cruz to Caldera. And that, Your Honor, is
20 not a proposition as to which we think they can sustain their
21 burden of proof.

22 Let me, if I may, focus just on two of the
23 transactions that I think matter here. First is the Novell
24 transaction, that is, the transaction in which Novell
25 transferred certain Unix assets to the Santa Cruz Operation,

1 Inc. That transaction, Judge, was governed by an asset
2 purchase agreement dated September 19th, 1995. That agreement
3 had two schedules. One of the schedules listed the exhibits
4 which were included in the transaction, that is, that was
5 passed from Novell to Santa Cruz; and the other schedule
6 listed those assets which did not pass.

7 And I refer Your Honor in particular to Exhibit 4
8 to the Sorenson declaration which was submitted in connection
9 with our motion. That is Schedule 1.1B of the asset purchase
10 agreement between Novell and Santa Cruz. The assets listed
11 here are those which were excluded from the transaction. And
12 listed here, Your Honor, are Novell code contained in
13 UnixWare 2.01. Netware Unix Client. UnixWare TSA. All
14 copyrights and trademarks except for the trademarks in
15 UnixWare. And we dropped the footnote and come back to the
16 copyright question. All patents, all accounts receivable to
17 rights or payments concerning the assets arising prior to the
18 closing date. And then finally, all rights, title and
19 interest in the SVR-X or System V royalties less a 5-percent
20 administration fee.

21 Let me just say two things further about this, Your
22 Honor, one with respect to copyrights and the other with
23 respect to the licensing distributing. There's a dispute as
24 to whether or not Caldera or SCO here or Novell owns the Unix
25 copyrights which are at issue both in this case and in SCO's

1 litigation with Novell. What I think is undisputed, Your
2 Honor, is that Schedule 1.1B of the asset purchase agreement
3 excluded from the transaction copyrights.

4 Now, as I understand SCO's argument, they contend
5 that a subsequent amendment to this agreement, an Amendment 2,
6 transferred the copyrights to them. We don't think that's
7 right, Your Honor. But assuming for the sake of this
8 discussion that it is, that transfer occurred a year or so
9 after this transaction. So whatever privilege that was
10 associated with the documents at the time waived and can't be
11 resuscitated or resurrected by the execution of an amendment a
12 year down the line relating to copyrights.

13 But you can put the copyright question completely
14 aside, Your Honor, because entirely independent of that
15 question, and this is undisputed, Schedule 1.1B makes
16 perfectly clearly that Novell did not transfer the portion of
17 its business that concerned revenues from SVR-X royalties. In
18 other words, Novell retained 95 percent of the royalties --
19 actually retained 100, and it remitted back a 5-percent
20 administration fee to SCO. It simply cannot be that one can
21 say that Novell transferred its entire Unix business to
22 Santa Cruz when Novell retained 95 percent of the royalty
23 stream related to that business.

24 Now, let me say this just briefly with respect to
25 the other transaction, which is the Santa Cruz-Caldera

1 transaction. Similarly there, Your Honor, the agreement that
2 governs that relationship makes clear and SCO's securities
3 filings make clear that it did not acquire from the Santa Cruz
4 Operation, Inc., all of the assets or control of Santa Cruz.
5 Santa Cruz continued to exist subsequent to the transaction.
6 It renamed itself Tarantella and had subsequently been bought
7 by Sun, but it continued to exist.

8 Moreover, Santa Cruz did not sell anything other
9 than assets from two divisions, so far as we can tell, to
10 Caldera. It sold some but not all of the assets of its
11 professional services division, and it sold some but not all
12 of the assets of its server software division. It appears,
13 Your Honor, from the documents which have been produced to us
14 that Santa Cruz did not transfer even all of its Unix assets
15 or at least assets related to the Unix assets.

16 Now, let me endeavor to correct what I think may be
17 an error in IBM's reply papers. In our reply papers, we
18 indicated that it appeared from the documents which had been
19 produced to us that Santa Cruz had not transferred to Caldera
20 the open server products, which was the Santa Cruz Unix
21 product. That's what the documents that were provided to the
22 Court, which were provided to us indicate.

23 Last evening when preparing for this argument, we
24 came upon, Your Honor, a securities filing of Santa Cruz
25 and/or SCO which seems to indicate that the open server

1 product itself was, in fact, transferred in and around about
2 the same time period. That notwithstanding an error for which
3 if it is, in fact, an error, we apologize, is nevertheless
4 immaterial to the resolution of this motion because the
5 important point is that even if SCO's own rule is right,
6 what's clear is that not all of these assets of the two
7 divisions of Santa Cruz that transferred, transferred just
8 some. Even if it's substantially all, not all of the assets
9 transferred. That the documents make clear, and that's where
10 the subsequent amendment changes, even if the open server
11 transferred to SCO as it contends that they did.

12 But the truth is, Your Honor, there is really no
13 such thing to outline as the Unix business as SCO describes in
14 its papers. AT&T had a different Unix business from Novell.
15 Novell had different Unix businesses from Santa Cruz, and
16 Santa Cruz has a different Unix business than does SCO. In
17 fact, so far as we can tell from SCO's public filings, SCO
18 does not maintain the two separate divisions that Santa Cruz
19 did with respect to Unix. It doesn't appear to have a server
20 software division, and it doesn't appear to have a
21 professional server division, at least by those names.

22 In any event, Your Honor, I think it's fair to say
23 that the Unix business that SCO runs today is nothing like the
24 Unix businesses that its predecessors ran.

25 Now, the final point I'd like to make in this

1 connection, Your Honor, is that the declaration on which SCO
2 relies in support of its position in this case, that of
3 Mr. Broderick, is simply not sufficient to carry its burden of
4 proof, and that's true for at least two reasons. The first
5 reason is that it fails to dispute the facts critical to the
6 motion. It does not establish, Mr. Broderick does not purport
7 to say that control transferred from Novell to Santa Cruz or
8 from Santa Cruz to Caldera. Mr. Broderick does nothing other
9 than assets, although he considers them to be entirely
10 business assets transferred.

11 He does not dispute, also, Your Honor, that not all
12 of the assets of Novell transferred to Santa Cruz or that all
13 the assets of Santa Cruz transferred to Caldera. He
14 acknowledges in his deposition that Novell retained a piece of
15 that business.

16 And second, Mr. Broderick's declaration falls short
17 in any event because it is in critical respect lacking in
18 foundation full of testimony as to which Mr. Broderick is not
19 a competent witness, and it's contradicted by SCO's SEC
20 filings and Mr. Broderick's deposition. For example,
21 Mr. Broderick speaks in his declaration about the transactions
22 involved here, but acknowledged in his deposition that he
23 wasn't personally involved in the transactions. He speaks for
24 other state of minds, employees of AT&T and USL and Novell to
25 what they understood, and, of course, can't state for the mind

1 of others. He is not a lawyer, does not pretend to be a
2 lawyer, and yet in his declaration he speaks about what
3 transferred, a legal question; what didn't transfer, a legal
4 question; and speaks to the form of these various
5 transactions. For those reasons, Your Honor, we respectfully
6 submit that Mr. Broderick's declaration doesn't carry the day.

7 In summary, IBM's motion should be granted. At
8 issue are 1,000 documents which should have been produced some
9 time ago. Whatever privilege may attach to those documents no
10 longer attaches today. It was waived. It was waived under
11 the rule articulated by Magistrate Judge Boyce, which we think
12 flows out of other precedent. And for that reason, Your Honor
13 should follow Magistrate Judge Boyce and grant IBM's motion.

14 THE COURT: Mr. Marriott, let me ask you one thing.

15 MR. MARRIOTT: Sure.

16 THE COURT: And this would be a question posed to
17 both sides.

18 How does my ruling today affect the required
19 infringement disclosures due on the 22nd?

20 MR. MARRIOTT: Well, that's a very difficult
21 question for me to answer, Your Honor, because I haven't seen
22 the documents. That said, I don't imagine that it should
23 impact it much. It shouldn't impact SCO's disclosures at all
24 because, of course, SCO has the documents. And without seeing
25 them, I can't say for certain whether it affects IBM's

1 disclosures as to the material, which we contend was misused.
2 But I don't have any reason as I stand here to think it
3 necessarily would without seeing the documents, as I said.

4 THE COURT: All right. Thank you.

5 MR. MARRIOTT: Thank you, Your Honor.

6 MR. NORMAND: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. NORMAND: May it please the Court, on the issue
9 of the relevance or not of the documents over which we claim
10 privilege to the December 22nd submission, I don't have the
11 documents committed to memory, but I don't think it bears on
12 that submission in any way.

13 THE COURT: Thank you.

14 MR. NORMAND: And I'll address Your Honor's
15 particular focus on Judge Boyce's oral ruling in context of my
16 larger efforts to respond to Mr. Marriott's points. The two
17 themes are, one, the particular facts at issue before Judge
18 Boyce including the very important fact that Novell retained a
19 contingent interest, i.e., was cooperating in the continued
20 operation of the business essentially. That is not the fact
21 that supports IBM's argument. That is a fact that hurts IBM's
22 argument. It suggests that Novell had not really committed
23 the transfer of the business where it retained that interest.
24 Second, I think Your Honor would concede it is a little risky
25 to put too much weight on an oral ruling. I don't think it's

1 entirely fair what Judge --

2 THE COURT: You didn't know Judge Boyce.

3 MR. NORMAND: I've been told by our local counsel
4 that he was prone to do that. But he did mention specifically
5 in the ruling the legal context. And I think it's important
6 that he himself acknowledged that he was making this ruling in
7 particular legal context. And in addition to the difference
8 in facts, we think the law has evolved to some extent in the
9 last seven or eight years since that ruling. And that's where
10 I would like to start with my arguments, Your Honor.

11 The most recent decisions under the relevant case
12 law show that the question is whether the practical
13 consequences of the transactions at issue are that SCO is a
14 successor to the Unix business. The question is one of
15 control, not a question of the percentages of assets
16 transferred, as Mr. Marriott has sought to frame the question.
17 And second, as I mentioned, Your Honor, both the transaction
18 documents here and the facts that we've submitted in support
19 of our opposition show that SCO maintains control over the
20 relevant part of the Unix business.

21 So the first point is the most recent case law,
22 Your Honor. And I won't go into this too much detail because
23 I know you've said you've seen the briefs. But let me
24 highlight the two cases in particular, if I could.

25 First case from last year, 2004, the most recent

1 case to address this issue is the Soverain case, in which
2 Soverain retained three patents, and the business appended to
3 those patents and continued to operate the business with the
4 same personnel and with the same engineering support, very
5 similar to what SCO has done. The Court in that case rejected
6 the bright-line rule that:

7 The mere transfer of assets does not transfer the
8 privilege and found that the rule does not apply equally
9 to the myriad ways to control of the corporation that
10 changed hands. If the practical consequences of the
11 transaction results in the transfer of control of the
12 business in continuation of the business under new
13 management, I'm reading from the opinion, of course,
14 then the authority or privilege will follow. And the
15 relevant facts include whether the successor continued
16 to operate the business at issue and whether the same
17 personnel continued to support the business.

18 And I think the evidence supports that, as I will
19 get into a little bit more detail.

20 The second case, the Eastern District of
21 Pennsylvania in 1999, the Graco case. In that case, Graco
22 acquired a play yard business from a company called Century
23 Products. And Graco argued that the attorneys who had
24 represented Century Products could not be averse to Graco in
25 litigation at issue relating to the patents for the play yard

1 business.

2 Mr. Marriott suggests that a case like this is
3 irrelevant because it doesn't involve the production of
4 documents. But at issue in that case as here is whether the
5 privilege applies to the successor or the predecessor company.
6 It's the very same issue necessarily decided in litigation.

7 The Court in Graco held that:

8 The relevant question is whether the assets
9 purchased while not all of the predecessor's assets were
10 those pertaining to the subject matter of the claimed
11 privilege.

12 Which is what we're claiming, privilege over that
13 Unix business that we control.

14 It does not matter -- and this is from the
15 Court's language -- how much or what percentage of the
16 assets were transferred.

17 In addition, Your Honor, we don't believe that any
18 court has actually reached a different holding than the ones
19 in Soverain and Graco, and that includes Judge Boyce's oral
20 ruling, given the context in which he made that ruling. IBM
21 cites cases holding that upon a change in management of a
22 corporation, privilege transfers, but those cases don't say
23 that's the only way the privilege can transfer.

24 In the Grand Jury that IBM cites, for example, from
25 the Eastern District of Virginia, this is 1990, prior to the

1 two opinions in which we place most of the weight of our
2 argument, the Court said:

3 A transfer of assets without more is not
4 sufficient to effect a transfer of the privilege.

5 IBM omits the "without more" language from its
6 brief. I think the subsequent cases make clear what the
7 "more" is; i.e., if there is a transfer of assets in a
8 concomitant transfer of control over the business and assets
9 at issue, then the privilege travels with the assets in the
10 business --

11 THE COURT: But it doesn't say that. None of the
12 opinions say that.

13 MR. NORMAND: No. I agree that the opinions don't
14 say. We're citing to the Eastern District case, and this is
15 what we think "more" is. Our position is that the case law
16 has evolved, though, to reflect that the case as last year
17 myriad ways in which the transfer can occur.

18 THE COURT: So are you suggesting, then, that given
19 the fact that these are somewhat the same parties, that had
20 Judge Boyce had the benefit of these newer rulings, his ruling
21 would have been different?

22 MR. NORMAND: Well, I think my first position, Your
23 Honor, would be it's not entirely clear what law Judge Boyce
24 is relying on in his oral ruling and what the interpretation
25 of that law was. I think the short answer to your question

1 is, I think Judge Boyce would have found these relevant, and I
2 think Judge Boyce would also recognize the difference in facts
3 between the case before him in which Novell had retained a
4 contingent interest in which there was no reasonable argument
5 in his view that Novell had disassociated itself from the
6 business transfer; whereas here, there is a disassociation,
7 and there is -- you know, SCO and its predecessors have been
8 the ones with control of the assets in the business at issue.

9 So my second main point, Your Honor, is that the
10 transaction documents and the evidence we have submitted
11 support our argument about SCO being the entity that controls
12 the Unix business related to the privilege that we claim.
13 I'll go through this briefly because we summarized the
14 highlights of the transactions in our brief that you've read.
15 But let me re-visit them very quickly.

16 With respect to the APA, which Mr. Marriott
17 mentioned, Recital A of the APA describes the transfer of
18 business as follows:

19 The business of developing a line of software
20 products currently known as Unix and UnixWare, the
21 sale of binary and source code licenses to various
22 versions of Unix and UnixWare, the support of such
23 products, and the sale of other products which are
24 directly related to Unix and UnixWare.

25 And then the APA says right at the beginning:

1 All of the Novell's right, title and interest
2 in and to the assets and properties of seller
3 relating to the business as transferred.

4 And the document actually says, I think in the
5 preamble, it is the intent of the parties to transfer all of
6 the business.

7 With respect to Santa Cruz' divestment of its Unix
8 business, its divestment was so complete that it actually
9 changed its name to the name of the only division that it
10 retained following the transfer of assets. That is
11 Tarantella.

12 Under the agreement issue between Santa Cruz and
13 Caldera, the transfer of the following assets:

14 All rights and ownership of Unix and UnixWare
15 including all intellectual property rights appurtenant
16 thereto.

17 As Mr. Marriott conceded, IBM was incorrect about
18 open server. Open server was transferred. And I submit, Your
19 Honor, that the fact that IBM has interpreted the document
20 doesn't point out how detailed the documents are, in that it
21 places focus on the question as framed in the most recent
22 cases that the question as a practical consequence of the
23 transfer.

24 And let me re-emphasize because Your Honor has
25 asked about Judge Boyce's ruling the difference of facts.

1 Whereas, Santa Cruz transferred to Caldera in 2001 over
2 90 percent of Santa Cruz' business and all of Unix business
3 with some exceptions, Caldera acquired from Novell about
4 \$400,000 worth of Novell's multi-million dollar business.
5 We're talking about a much different transaction. And again,
6 Your Honor, Novell never retained any interest.

7 THE COURT: But there was a 10 percent that wasn't
8 transferred.

9 MR. NORMAND: That's correct, Your Honor. And to
10 be clear, our position is that we are asserting privilege over
11 that portion of the Unix business, which is virtually all of
12 the Unix business that has been transferred. Our position is
13 that Unix business that we control and our predecessors have
14 controlled through the line of succession, any documents
15 relating to that aspect of the Unix business that virtually
16 all of the Unix business, that is privileged. That is our
17 position, and that is what we think the most recent case law
18 supports.

19 Let me turn briefly to Judge Boyce's actual ruling,
20 oral ruling. The main language in his ruling is this:

21 When the Novell documents were turned over to
22 Caldera, that destroyed the privilege. Caldera is
23 not the alter-ego or successor in interest in the
24 legal context of those materials.

25 And I think there is ambiguity in that language. I

1 think if nothing else, it reflects Judge Boyce's decision is
2 based on the particular context and the particular documents
3 in front of him, and those facts are different than the facts
4 here.

5 In short, Your Honor, under those cases we believe
6 that it is undisputed that as a practical matter, SCO owns and
7 operates the Unix business as predecessors in interest. IBM
8 has taken issue with Mr. Broderick's affidavit, which I will
9 highlight for Your Honor. Mr. Broderick said in relevant
10 part:

11 In each instance -- that is, in the instance
12 of each transfer -- the company selling the Unix
13 technology also transferred control of the
14 commercial enterprise that developed, marketed
15 and licensed that technology. In each instance,
16 the makeup and operation of the Unix business
17 continued as constituted through and after each
18 transition.

19 IBM does not take issue with that portion of his
20 testimony, nor do they take issue with the following portions
21 of his testimony:

22 In each instance, the transfer of the Unix
23 business included office space, leaseholds,
24 furniture and equipment. In each instance, the
25 transfer of the Unix business also included all or

1 many of the people who managed and operated the
2 business, including senior-level managers,
3 engineers, sales people, support staff and other
4 employees. It also included customer, supplier
5 and vendor relationships.

6 These facts are all different than the Novell
7 action that Judge Boyce addressed.

8 Through and after each transaction -- this is
9 Mr. Broderick -- my colleagues and I almost
10 universally kept doing the same work with the same
11 people from the same offices and buildings,
12 developing and delivering the same Unix products
13 and services to the same customers.

14 THE COURT: But he later admits in his deposition
15 that he himself didn't remain an employee for the entirety of
16 the period.

17 MR. NORMAND: That's correct, Your Honor, he
18 didn't. But he did remain an employee through the asset
19 transactions at issue.

20 THE COURT: And he also uses, doesn't he, I just
21 want to make sure that I have your opinion on this, he uses
22 modifiers when he makes those statements. He says, we all
23 know its universe. He doesn't make fully declarative
24 propositions or statements there. He reserves something.

25 MR. NORMAND: I think that's right, Your Honor.

1 And our position, again to be clear with Your Honor, is both
2 with respect to the formal transaction documents and with
3 respect to the operation of the business, there clearly are in
4 the transaction documents some assets reserved. There are
5 excluded asset sections. We can't take issue with that. We
6 do take issue on the APA front, that the copyrights weren't
7 transferred. As Mr. Marriott has said, that is actually an
8 issue and is subject of another litigation and actually an
9 issue which Judge Kimball has already denied IBM's motion for
10 summary judgment. That is an issue of fact.

11 But there's no question that some assets were
12 reserved, and there is no question that, as Mr. Broderick
13 concedes, he can't say that absolutely every person remained,
14 because when there's a transaction or a transfer of assets,
15 some people leave. Not everyone stays.

16 I don't think we have to meet that standard,
17 though, Your Honor, because if that were the standard, I think
18 you'd see in the cases some attribution of that being
19 particularly relevant that says unless everybody remained from
20 the successor corporation, the privilege can't possibly
21 transfer. And I think the Graco case and the Soverain case
22 don't set forth that kind of standard.

23 Mr. Broderick concludes that:

24 In each instance, after each transaction,
25 neither the seller nor its employees remained

1 involved in managing or operating the business.

2 That's in stark contrast -- IBM does not dispute
3 that statement, and that fact is in stark contrast with what
4 happened with the facts before Judge Boyce when Novell had
5 maintained its contingent interest and as a functional matter,
6 was continuing to help prosecute the litigation involving the
7 assets transfer.

8 I'll have to take a look at the note that's been
9 handed to me, Your Honor, but that's all I have now. Thank
10 you.

11 MR. MARRIOTT: Just very briefly, Your Honor.
12 Mr. Normand suggests the fact that Caldera argued in the case
13 in front of Judge Boyce that Novell had some continuing
14 interest cuts against the finding that Judge Boyce's decision
15 somehow applies here, and I would submit just the opposite is
16 true.

17 The law here, Your Honor, also has not evolved in
18 our view in the way that Mr. Normand suggests. He refers Your
19 Honor to three decisions, two cited by SCO and one cited by
20 IBM, Mr. Normand takes to distinguish. The Soverain case, the
21 first of the cases that Mr. Normand mentions, was a
22 bankruptcy-related case. Judge Boyce expressly dealt with the
23 bankruptcy context. It is also not a case from the district.
24 And neither is the Graco case, which Mr. Normand cites, which
25 is an attorney disqualification case. And, yes, there was

1 privilege issues involved in the case. What was not at issue
2 in the case were questions whether the passage of certain
3 documents constituted a waiver of privileges to those
4 documents.

5 Moreover, the Graco case, which SCO cites, is
6 distinguished by one of their other cases, the Pilates case, a
7 case cited by SCO which rejects the finding of privilege in
8 that case.

9 Mr. Normand refers to the Grand Jury case cited by
10 IBM and suggests that we mis-cite that case, Your Honor,
11 because we omitted words "without more" from the footnote and
12 suggests that somehow that language support SCO's position.

13 I would refer Your Honor to that portion of the
14 Grand Jury case and to the immediately proceeding sentence,
15 which is omitted form the SCO cite. The footnote says:

16 A transfer of assets without more is not
17 sufficient to effect a transfer of the privileges.
18 Control of the entity possessing the privileges
19 must also pass for the privilege to pass.

20 The "without more," Your Honor, if it has any
21 meaning is that meaning which is informed by the immediate
22 preceding sentence where reference is made to the Supreme
23 Court's decision in Weintraub. And there the Court of the
24 Grand Jury says, quote:

25 The principal in Weintraub, therefore, is that

1 emotional waiving a corporation's privileges is an
2 incident of control of the corporation, close
3 quote.

4 So the "without more" reference as we read that
5 language is the reference to the issue of there being a
6 passage about this plus control. And that, therefore, we
7 think doesn't support the distinction that SCO seeks there to
8 make.

9 Mr. Normand makes reference as a factual matter to
10 Exhibit 1.1A of the Novell asset purchase agreement.
11 Exhibit 1.1A is subject to 1.1B, which is that exhibit which
12 expressly carves out what things which do not pass. And
13 again, 95 percent of the revenue stream from Novell did not
14 pass in that transaction.

15 The SCO position here, Your Honor, is the
16 equivalent of saying that the privilege necessarily attaches
17 to assets. And that whenever an asset is passed, the
18 privilege attaches to that. And if you look at their
19 opposition papers at Page 8, you'll see where they make
20 reference to the privilege that passes to what they call legal
21 and economic interests. The Supreme Court decision in
22 Weintraub, in cases repeatedly, Your Honor, have held that the
23 privilege attaches to, in a corporate context, to the
24 corporation, not to the corporation's economic interests or
25 assets.

1 And for that reason we think also, Your Honor,
2 based solely on Judge Boyce's decision and solely on the
3 simple legal question on whether the privilege passes, Your
4 Honor can and should find for IBM. Thank you.

5 THE COURT: Thank you, Mr. Marriott.

6 Anything further, Mr. Normand?

7 MR. NORMAND: Just to clarify one point, Your
8 Honor. In the interest of time, we've set forth both of our
9 arguments in our briefs and my initial presentation. If I
10 wasn't clear as to the Tarantella transaction, I wanted to
11 clarify that.

12 The Tarantella division was a completely different
13 division from the Unix division that was transferred. And the
14 name Tarantella was retained to reflect the fact that that
15 different business was now the focus of the newly named
16 Tarantella business. That was the 90 percent of the assets
17 transferred in that transaction were the Unix assets. The
18 approximately 10 percent that were retained had nothing to do
19 with Unix, and I don't think IBM argues otherwise. And I'm
20 sorry if I was unclear on that point.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 I'm prepared to rule on this matter at this time.

24 First, I find that the Novell to Santa Cruz
25 transaction did not transfer the entirety of the business, nor

1 did the Santa Cruz to Caldera transaction. I further find
2 that the Broderick affidavit is insufficient in and of itself
3 as well as is contrary to statements made during the course of
4 Mr. Broderick's deposition; and that, therefore, SCO does not
5 carry its burden, then adopt the reasoning that was stated by
6 Judge Boyce at the time of the Caldera matter and would
7 deny -- or grant IBM's motion to produce those documents. I
8 believe that the privilege was waived.

9 All right. Is there any question about that?
10 Anybody have any questions or clarifications as to that
11 portion of the ruling?

12 MR. MARRIOTT: I do not, Your Honor.

13 MR. NORMAND: I do not, Your Honor.

14 THE COURT: All right. Let's go on to the second
15 motion, and that relates to SCO's renewed motion to compel
16 discovery.

17 Now, let me indicate something at the beginning
18 that I think may serve or I hope will serve to focus your
19 arguments. SCO's interpretation of my previous order in this
20 matter was correct, and I think that IBM has read perhaps that
21 order too narrowly. And it was my intention that SCO be
22 allowed to withdraw the motion that was pending at the time
23 related to the documents that were requested from IBM's upper
24 management and to refile that motion or renew it based upon
25 what had been delivered to them in the interim.

1 So I don't think we need to argue about the meaning
2 of the order. What we need to talk about now is what it is
3 that is requested and what is allowable. All right?

4 MR. NORMAND: Thank you, Your Honor. For my own
5 purposes, you were clarifying your October order from this
6 year; is that right?

7 THE COURT: That's correct.

8 MR. NORMAND: In which case, Your Honor, I'm going
9 to focus on the March 2004 order.

10 Frankly, Your Honor, we've walked through the
11 precise chronology that was relevant in our reply brief, and
12 that reply brief sets forth our efforts to take a step back to
13 walk the Court through how we think we got to where we are,
14 and it sets forth our principal arguments. And to the extent
15 that the argument carries any weight with Your Honor, I want
16 to go quickly through the highlights.

17 Our motion concerns what we interpret to be what
18 Your Honor intended in the March 2004 order. Because Your
19 Honor knows what it intended better than either of the parties
20 do, I won't focus on that. Let me describe this.

21 In February of 2004, it is SCO's position that
22 counsel for SCO raised the argument that included within the
23 scope of SCO's document requests ought to be IBM's senior
24 executives. We interpret the Court's March 2004 order to
25 agree with that proposition, to state that IBM is to include

1 among the documents responsive to SCO's document requests,
2 which IBM itself has described as broad relating to Linux,
3 that IBM ought to include in the files that are responsive to
4 those document requests the files of the senior executives.
5 We interpret the Court's March 2004 order to set forth as an
6 example documents that would bear on IBM's decision to embrace
7 Linux as set forth in a particular *New York Times* article.
8 And I think that's the point of departure between IBM and
9 ourselves.

10 We understand IBM to interpret the March 2004 to
11 say, senior executives like Paul Palmisano and
12 Mr. Wladawsky-Berger should produce any documents from their
13 file that specifically relate to that decision in time to
14 embrace Linux or specifically relate to that decision as set
15 forth in the article that Your Honor cited in the March 2004
16 order.

17 Again, we think Your Honor meant something a little
18 bit broader, which is, any document requests that SCO has
19 served as to which documents in the files of Palmisano,
20 Wladawsky-Berger or any other senior executive that are
21 responsive, those are to be produced, as well.

22 THE COURT: Let me end this concern now. SCO's
23 interpretation of that is correct.

24 MR. NORMAND: In which case, Your Honor, the only
25 question is a bit of a metaphysical one, which is, we can't

1 know, we don't know and don't claim to know whether
2 Mr. Palmisano has X-number of e-mails or X-number of documents
3 that are in his files that are responsive. But we draw what
4 we think are reasonable inferences from the following pieces
5 of information. One, we have found an e-mail publicly
6 available from Mr. Palmisano in which he described to IBM's
7 employees IBM's decision to move towards Linux. And that
8 e-mail was not in the production and from what we can tell is
9 not listed as part of the six or seven Palmisano documents
10 over which IBM claims a privilege. In contrast, Your Honor,
11 as an aside, we've produced over 3,000 e-mails in which
12 Mr. McBride, SCO's CEO, is the recipient or sender. So we
13 infer from the fact that we did find an e-mail linked to Linux
14 in Mr. Palmisano's e-mail files that there must be more.

15 Mr. Wladawsky-Berger said in his deposition, yes, I
16 have sent and received e-mails regarding Linux, and I believe
17 he said regarding Mr. Palmisano, in particular. And
18 Steven Mills, another IBM senior executive and vice-president,
19 also said, I sent and received e-mails regarding Linux, and I
20 received e-mails from Mr. Palmisano.

21 And so for all of those reasons and just as a
22 practical business matter, given that Linux is a multi-million
23 dollar business and IBM's investment business is
24 multi-million dollar, we infer that there must be more
25 responsive documents.

1 As a last thought, Your Honor, Your Honor addressed
2 this issue last year. We interpreted Your Honor's order last
3 year to require senior executives at issue and IBM's board of
4 directors to offer us an explanation for why there was an
5 absence of documents in the production. That's how we
6 interpreted Your Honor's order.

7 THE COURT: Weren't there affidavits provided?

8 MR. NORMAND: They were. And I don't want to focus
9 on the issue at length, but they were fairly cursory, and they
10 said essentially, we've opened our files to the attorneys,
11 which is not an improper practice. That is how production
12 occurs. But my only point is those affidavits provided us no
13 more basis for arguing that there must be or must not be
14 responsive documents. So in the absence of any discussion to
15 that effect in those documents, I can see that all we can say
16 is we infer that there must be more responsive documents.

17 THE COURT: But based upon my clarification,
18 doesn't that change the posture? And we'll ask Mr. Marriott
19 to address that.

20 MR. NORMAND: I agree, Your Honor. It does change.
21 And perhaps I was unclear. Perhaps I also assumed something I
22 shouldn't. But I think what Mr. Marriott should be asked to
23 address is whether there are more responsive documents, given
24 Your Honor's clarification.

25 THE COURT: We're saying the same thing.

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MR. NORMAND: Thank you, Your Honor.

MR. SHAUGHNESSY: Actually I'll be addressing this motion.

THE COURT: Mr. Shaughnessy?

MR. SHAUGHNESSY: Your Honor, very briefly, the shortest, simplest response to this motion is that we can't produce something that we can't find. Now, when Your Honor talked about your March 2004 order, what I understood you to be saying, what we have always understood you to be saying in that order is that we are to include in our search for the documents that SCO requested from us IBM's executives.

We've done that. That's exactly what we've done. We did that long ago. We understood that's what the order required, and that's the reason that we did it.

Now, what I understand SCO to be arguing today is actually different than that. What I understand SCO to be arguing today is that the March 4th order required something beyond that, that the March 4th order required us to produce documents that SCO had never requested. We did not read the March 4th order as requiring us to produce something that SCO had never asked for. And yet, I think at the end of the day, that's what SCO's position is.

We have, Your Honor, undertaken a reasonable search for documents. We have produced all of the documents that we were able to identify based on that reasonable search. We

1 have been asked by SCO to update that search. We have
2 likewise asked SCO to update that search. We expect that that
3 process will yield additional documents which will be
4 produced, and those will be produced consistent with when SCO
5 is required to produce. But the bottom line is, Your Honor,
6 we have undertaken a reasonable search. We have endeavored to
7 locate those documents.

8 THE COURT: Did you attempt to locate the entirety
9 of the documents or the documents that SCO believes you
10 limited your search to?

11 MR. SHAUGHNESSY: Let me -- maybe I can address it
12 this way, Your Honor. May I approach?

13 THE COURT: Sure.

14 MR. SHAUGHNESSY: This is a notebook I think along
15 the lines of what we handed out at the last hearing. And the
16 easiest thing to do I think is kind of walk through what we're
17 talking about. Maybe before I do that, I ought to just make
18 clear exactly what it is before the Court. We are talking
19 about documents from three custodians: Sam Palmisano, Irving
20 Wladawsky-Berger, IBM's board of directors.

21 THE COURT: Correct.

22 MR. SHAUGHNESSY: There are various suggestions in
23 the briefs about senior executives and executives involved in
24 the Linux. But as we understand the motion before the Court,
25 it's limited to documents from those three custodians. And

1 just a word about each of them.

2 Mr. Wladawsky-Berger is an executive of IBM in the
3 1999-2000 time frame. He had some responsibility for Linux
4 activities. He has since moved on to a new position in the
5 company in which he does not have Linux responsibilities.

6 We submitted a declaration in response to the
7 Court's request regarding Mr. Wladawsky-Berger's efforts to
8 locate documents responsive to the document request.

9 Mr. Wladawsky-Berger was deposed at length about documents
10 that have been produced. He was deposed at length about
11 e-mails and other documents in which he was copied. And there
12 was no discussion by SCO at that time that the production from
13 him was inadequate. At least there was no follow-up after
14 that deposition to suggest the production was inadequate.

15 The second individual is Sam Palmisano. He is
16 currently the chief executive officer and chairman of the
17 board of IBM. In the 1999-2000 time frame, he was ahead of
18 IBM Software Group. He has changed positions, as I understand
19 it, two times since that occurred.

20 And the last group that we're talking about is
21 IBM's board, and just a word about IBM's board. As I'm sure
22 the Court is aware, IBM's board is composed of individuals
23 largely with the exception of one who don't work for IBM.
24 These are people who are, for example, the chairman and CEO of
25 American Express and the chairman and CEO of United Parcel

1 Service. These people have day jobs. They don't full-time
2 sit on IBM's board and do nothing else.

3 IBM has a file or has a series of files in which we
4 maintain copies of the materials that are provided to the
5 board. Those are the sets of files that we searched. We did
6 not search the files of American Express, and we did not
7 search the files of UPS, and we did not go to these individual
8 board members' homes and search their computers, nor do we
9 believe that we should in any event be required to do that.

10 Mr. Bonzani in his declaration outlined the efforts
11 to search those files and locate documents. And, you know,
12 one other word I ought to mention on the board, SCO keeps
13 talking about how implausible it is to them that there would
14 be so few documents from IBM's board. And I simply don't
15 understand that position. I mean, SCO has not identified any
16 transactions relating to IBM's Unix business that would have
17 required board approval or any particular issue that would
18 have out of necessity have gone to IBM's board. So,
19 therefore, it is not the least bit surprising that IBM's board
20 would not have tremendous volume of information relating to
21 Linux activities.

22 Getting back to Your Honor's question, what did we
23 look for? In the very first brief that was filed on this
24 motion, SCO identified four document requests, and only four
25 document requests, that it contends that IBM should have

1 searched for in producing these documents. And on the first
2 page of the handout I've just given to you, those are the
3 requests that SCO identified. Requests 35 and 42 from their
4 June 24th, 2003, document requests, and 56 and 53 from their
5 December 4, 2003, document requests. These according to SCO
6 are the operating document requests which we should have
7 reviewed and looked at in collecting documents from these
8 three custodians.

9 Now, request Numbers 35 to 42 asks for documents
10 concerning contributions for Linux or open source made by IBM
11 or Sequent, and documents concerning IBM's contribution to
12 development of the 2.4 and 2.5 Linux Kernel.

13 None of the custodians, Your Honor, that we were
14 talking about here are computer programmers. None of the
15 custodians we're talking about here supervised or even
16 supervised supervisors of people who make Linux contributions.
17 It should come as no surprise to the Court or to SCO that
18 Mr. Palmisano's files don't have postings to source force
19 which contain Linux contributions. Having said that, if there
20 were Linux contributions or documents relating to Linux
21 contributions that were in the filings that we collected, we
22 produced them.

23 The second document request they point to, all
24 business plans for Linux. IBM has business plans for Linux.
25 Those are not documents that any of these three custodians

1 maintain. They were maintained by someone else within the
2 company. We went to that person. We made a reasonable search
3 for IBM's Linux business plans, and we produced those
4 documents. To the extent there were Linux business plans in
5 any of these three custodian files, we produced them. We
6 collected them, and we produced them.

7 And finally, Your Honor, they're left with request
8 Number 53, and this really is the only request that
9 specifically targeted any of these three custodians. And it
10 asks for documents concerning IBM's decision to adopt, embrace
11 or otherwise promote Linux, including but not limited to the
12 following, and then it identifies documents in the possession
13 of Mr. Palmisano, Mr. Wladawsky-Berger and others,
14 presentations made to the board and documents from the board
15 of directors meetings.

16 Those are the document requests, the documents that
17 SCO asked us to look for. Those are the documents, Your
18 Honor, that we looked for. And to the extent we found
19 documents that were responsive to those requests, we produced
20 those documents.

21 Now, it's important to note that request Number 53
22 pertains to IBM's decision to adopt, embrace or otherwise
23 promote Linux. As has been widely reported, including in the
24 *New York Times* article that Your Honor is familiar with, that
25 decision was made in the 1999-2000 time frame. Documents

1 relating to that would be in the 1999-2000 time frame. Those
2 are the documents in specific that we looked for. If there
3 happen to be documents later than that that were responsive to
4 this topic, we searched for them and we endeavored to produce
5 them.

6 Now, I don't think that there is a disagreement,
7 and I apologize if the Court misunderstood our brief. We
8 understood that SCO was to do what it has done, which is that
9 it was to withdraw its motion and it was to refile its motion
10 if it determined that it was necessary. And I don't mean to
11 suggest that SCO has done anything improper in that regard.

12 Likewise, we assumed that the Court's March 3,
13 2004, order, which is Page 3 of the document that you've got
14 in front of us, was intended, as I said earlier, to make sure
15 that IBM was not excluding from its search senior executives,
16 including Mr. Palmisano and Mr. Wladawsky-Berger, which we
17 were not doing, but which the Court made clear we should not
18 be doing. We did not understand that the Court's March 3,
19 2004, order was an effort by the Court to write a discovery
20 request for SCO. We did not mean -- in litigation normally,
21 the parties send their discovery requests to one and another.
22 And when there is a fight about them, the judge decides how to
23 rule. Normally the judge doesn't endeavor to write a document
24 request for one of the parties.

25 We did not understand Your Honor to have done that

1 here. We don't believe the Court did that here, and yet
2 that's really what SCO's argument is. I mean, it's telling
3 Your Honor that there's a reference in the very, very first
4 brief filed in connection, we're now on our third motion to
5 compel on this issue. But the opening brief that they filed
6 on the first renewed motion to compel way back in July of
7 2004, that's where we have an articulation by SCO, here are
8 the documents, here are the document requests that we served
9 and the ones you should have responded to.

10 Since that time and through the two successive
11 motions that have followed, we have heard nothing about those
12 document requests and what it was they said we should have
13 responded to. Instead, all we've heard about is the Court's
14 various orders, efforts by SCO to suggest that this Court was
15 endeavoring somehow to require IBM to produce documents that
16 the Court -- that SCO never requested that we provide.

17 Now, to ensure that there was no doubt about what
18 it was that we were required to do with respect to the
19 March 3, 2004, order, and so that it was perfectly clear to
20 SCO what we were doing with respect to that order, we sent
21 them letters. And copies of those letters are included in the
22 binder I've just given you at Tab B. And I won't read through
23 them, except to say this. We made it perfectly clear that
24 what we were doing and what we understood we were required to
25 do was to do a reasonable search of these executives' files

1 for documents concerning the projects to develop IBM's Linux
2 strategy as reported in the *New York Times*, consistent with
3 the Court's order, consistent with document request Number 53,
4 which we just talked about.

5 We also made it perfectly clear to them that we
6 were not limiting our search to just that, that we were also
7 looking for and would produce documents that were responsive
8 to SCO's other document requests. We never, Your Honor, said
9 that we would look for every single document that may
10 contained the word "Linux." We never agreed that we would
11 look for every single document in the files that contains the
12 word "Linux" for at least three basic reasons. Number one,
13 SCO's never made that request and never even came close to
14 making that request; number two, the Court, as we understood
15 the Court's order, did not require us to do that; and number
16 three, it would be a ridiculous undertaking.

17 What SCO is suggesting we are obligated to do is
18 sit down and with Mr. Palmisano's files, presumably starting
19 in his file cabinet at A, and read the entire content of every
20 single piece of paper in every single file looking for the
21 word "Linux." And if the word "Linux" appears, we have to
22 produce the document. That, Your Honor, is absurd. That is
23 not a reasonable search for documents.

24 THE COURT: Mr. Shaughnessy, going back, though, to
25 your statement that they never have requested this or that

1 extensive of search, looking at 53:

2 All documents concerning IBM's decision to
3 adopt, embrace or otherwise promote Linux including
4 but not limited to the following, all such documents
5 in the possession of the three entities.

6 MR. SHAUGHNESSY: That's correct. And let me make
7 clear what I'm saying, Your Honor. What we understood we were
8 required to do was to search for and produce, make a
9 reasonable search and produce, documents concerning IBM's
10 decision to adopt, embrace or otherwise promote Linux,
11 including but not limited to reading that entire paragraph.

12 That's the search that we undertook. That's the
13 very search that we undertook. What they're asking this Court
14 to do now in connection with this current motion is something
15 very different than this. What they're asking the Court to do
16 now in connection with this current motion is to go back to
17 these files and to read every single one and to produce every
18 single document that may have the word "Linux" in it.

19 THE COURT: All right. But what you're saying is
20 that is their request. Now, that is a fairly broad request.

21 MR. SHAUGHNESSY: It's an enormously broad request,
22 I think.

23 THE COURT: Yes, it is a broad request. And it
24 was, as I want to make clear, my intention that the order was
25 meant to encompass that request. I thought that that was

1 clear. And I believe that their interpretation, and yours is
2 not that far off, is what I'm getting at. If, in fact, you
3 are saying and your affidavits support a search of the broad
4 nature that you have just described it, then I'm going to hear
5 more from SCO as to what they think was not produced.

6 MR. SHAUGHNESSY: And that, Your Honor, is the
7 search we undertook. That's precisely the search we
8 undertook. A reasonable search. We did not, Your Honor, sit
9 down, nor I submit did SCO, I mean, if Mr. Normand stands up
10 and tells you otherwise, I'll be shocked. But I can't imagine
11 that SCO sat down in Mr. McBride's files and sat down with A
12 and read every single piece of paper in every single file that
13 Mr. McBride has to produce documents. That's not the way it's
14 done. I'm absolutely confident that's not the way that SCO
15 did it. That's not the way we do it, and that's not what the
16 rules require. What the rules require you to do is make a
17 reasonable search.

18 You may recall Mr. Singer at the last hearing we
19 had before Your Honor, Mr. Singer's view was that a reasonable
20 search for documents means send somebody an e-mail and tell
21 them to send the documents. That's not what we did. We don't
22 think that's a reasonable search. Certainly that's a far
23 extreme of a reasonable search. That's not what we did. We
24 detailed in these affidavits that IBM attorneys met with the
25 people involved, they explained to them what documents were

1 required to be produced, anything that might remotely fall
2 within those categories was copied. And then IBM's lawyers
3 sat down and reviewed all of the documents that were copied to
4 determine if they were responsive to these requests within the
5 scope of what Your Honor just said.

6 THE COURT: Let me ask what may appear to be a
7 simplistic question. But the 10-page report, that has been
8 produced.

9 MR. SHAUGHNESSY: Absolutely. I'm actually told
10 it's not a 10-page report. I'm told it's something other than
11 10 pages. The report has been produced. The documents
12 concerning that report has been produced. The e-mails that
13 were exchanged between the various parties relating to that
14 report has been produced. Anything that we have been able to
15 locate after a reasonable search relating to that 10-page
16 report have been produced.

17 Now, SCO filed its first renewed motion in July of
18 2004, as Your Honor will recall. And in its reply brief filed
19 on August 26th of 2004, SCO asked for two alternative reliefs.
20 They said, number one, the Court should order IBM to, quote,
21 produce the entire files of Sam Palmisano, Irving
22 Wladawsky-Berger and the board, close quote; or alternative,
23 two, require IBM to provide affidavits from Mr. Palmisano,
24 Mr. Wladawsky-Berger and the board. So they served up to Your
25 Honor an alternative, require them to produce their entire

1 files, or alternatively require IBM to provide affidavits.

2 Your Honor's October 20th, 2004, order, which I've
3 included in the notebook at Tab F, I've cited it all on
4 page 5, declined to require IBM to produce the entire files of
5 Mr. Palmisano, Mr. Wladawsky-Berger and the board and instead
6 require IBM to submit declarations.

7 We submitted declarations. From our point of view,
8 we thought that the issue was resolved. We thought the issue
9 was over. SCO, however, filed its second renewed motion to
10 compel in December of 2004. And in that motion, Your Honor,
11 they make the exact same arguments they made in the first
12 motion. They say they just simply can't believe that there
13 aren't more documents and that IBM's counsel must not be
14 candid with the Court or with counsel. The arguments are the
15 same. And, Your Honor, effectively the relief they seek is
16 exactly the same as the first motion.

17 In the prior motion, they asked the Court to order
18 the production of the entire files of these individuals, and
19 in the current motion they effectively ask for the same thing.
20 They style it a little differently, but they say, we want all
21 documents with the word "Linux." Of course, to get to all
22 documents that contain the word "Linux" you have to look under
23 the entire files. Under SCO's interpretation, someone has to
24 sit down and read every single document and every single file
25 and search for the word "Linux." And if it appears, produce

1 it. So the relief they're requesting in connection with the
2 second renewed motion, which was withdrawn and is now the
3 third renewed motion that you have before you, is exactly the
4 same as the relief that they sought before.

5 It is notable, Your Honor, that they did not pick
6 up on what the Court said in the first order, which is, I'm
7 not going to require IBM to produce the entire files. I'm
8 going to require IBM to submit declarations.

9 I could perhaps understand this motion if this
10 motion were, we don't like the declarations that IBM
11 submitted. The declarations that IBM submitted are in some
12 fashion inadequate.

13 THE COURT: I thought they said that.

14 MR. SHAUGHNESSY: They have. But that's not the
15 relief they're asking. They're not asking you to require us
16 to submit new or different affidavits or declarations. I
17 submit that would be a useless exercise because they've
18 already deposed Wladawsky-Berger. There's no need to submit
19 another declaration from him. They've had an opportunity to
20 ask their questions under oath about his declaration and
21 about the documents that were produced. They're going to
22 depose Mr. Palmisano. They can do the same thing with
23 Mr. Palmisano. And we've agreed to make a 30(b)6 witness
24 available to testify with respect to the collections of the
25 documents from the board.

1 So there's -- I mean, there's a reason they haven't
2 asked for additional affidavits, because they know there's no
3 point in that. But what they've done instead, Your Honor, is
4 they have basically asked for the same thing they had asked
5 before which Your Honor in the October 20th, 2004, order
6 declined to give them. It's the same issue. We submit -- and
7 according to SCO, nothing has changed. According to the
8 papers that SCO has filed, nothing has changed since that
9 point in time. There's nothing new that's happened.

10 So effectively, what they're asking Your Honor to
11 do is to reconsider your October 20th, 2004, order and to
12 require us to do something that the Court declined to require
13 us to do in that order. We don't think that's proper. They
14 have not shown there's been a change in circumstances. They
15 have not shown that the Court's prior order was clearly
16 erroneous, and the Court should deny this motion on that basis
17 alone.

18 Now, I have to say a brief word, Your Honor, about
19 e-mails because they occupy so much of the briefing. We made
20 a reasonable search for e-mails. To the extent that we've
21 been able to locate them, we've produced them. The examples
22 that Mr. Normand mentioned earlier and the examples that are
23 cited in the briefs are examples of the e-mails that would
24 have been sent in the 1999-2000 time frame. Those are the
25 examples of the e-mails they've given to you, which they can't

1 understand why they are not in Mr. Wladawsky-Berger's or
2 Mr. Palmisano's files.

3 That was three years before this lawsuit was filed.
4 Those individuals have changed jobs within the company,
5 sometimes multiple times. It is hardly surprising that
6 Mr. Palmisano and Mr. Wladawsky-Berger would not have e-mails
7 or certainly a large volume of e-mails going back to this
8 period.

9 More important, Your Honor, we have produced
10 numerous e-mails either to or from Mr. Palmisano or
11 Mr. Wladawsky-Berger. In the case of Mr. Palmisano, we
12 produced over 100 e-mails that were either to Mr. Palmisano or
13 from Mr. Palmisano. Now, those are e-mails that were produced
14 from someone's files, but they show Mr. Palmisano of someone
15 who either sent the e-mail or received the e-mail, and there
16 are well over 100 of those.

17 So the question is, why would this person have the
18 e-mail in his files but Mr. Palmisano not? And there are any
19 number of reasonable explanations for that, the most basic of
20 which is this person kept it and Mr. Palmisano didn't, or
21 Mr. Palmisano sent the e-mail, therefore, it left his computer
22 and it went to this person's e-mail box, and therefore, they
23 kept it.

24 This, of course, should come to absolutely no
25 surprise to SCO. We have found in SCO's production literally

1 dozens and dozens of e-mails that were either to or from
2 Mr. McBride that do not appear in his files. Other employees
3 have copies of e-mails either to or from Mr. McBride. They're
4 not in Mr. McBride's files. Presumably, if the shoe were on
5 the other foot, SCO would be standing up here making the exact
6 same argument I'm making to you, which is it is hardly
7 surprising that one person would have an e-mail in their file
8 and the other would not.

9 Now, I'd like to suggest to the Court that the
10 solution to this problem that SCO has presented, which really
11 isn't a problem, is that SCO should do what lawyers in these
12 circumstances normally do, and that is you take a deposition.
13 You ask for documents. You try to get documents. If someone
14 is ordered to produce documents and they tell you they've
15 produced them and we've assured them that we've produced them
16 or we will produce them in connection with their request for
17 supplementing, what a lawyer normally does in those
18 circumstances is you go out and you take a deposition, and you
19 test, well, did you, in fact, produce all of this person's --
20 all of these persons' e-mails or all of this person's
21 documents?

22 SCO has an opportunity to do that. That's what SCO
23 has done in the case of Mr. Wladawsky-Berger. They deposed
24 him. They asked him about his documents. They've asked him
25 about e-mails. Tellingly, Your Honor, we did not get a letter

1 from SCO after his deposition saying, you know, he's
2 identified a whole bunch of documents that you guys didn't
3 produce to us, and we'd like them.

4 They have leave to take Mr. Palmisano's deposition.
5 They're welcome to ask him these asks. As I indicated
6 earlier, we've agreed to put up a witness on the issue of the
7 collection of documents from IBM's board. I respectfully
8 submit, Your Honor, that what the Court should do is permit
9 those depositions to take place and then determine if there is
10 any issue regarding any deficiency in IBM's production of
11 documents from these individuals.

12 If the Court does anything other than that, I fear,
13 reasonably I believe that we will have a fourth renewed motion
14 to compel and a fifth renewed motion to compel and a sixth
15 renewed motion to compel and so on. The Court should simply
16 let SCO do what the rules contemplate SCO doing, and that is
17 take a deposition. Test the strength of my representations
18 that we produced these documents. If you find that something
19 hasn't been produced, write a letter about it.

20 The best example of this, Your Honor, is again this
21 very case. We had some doubts and reservations about whether
22 SCO had produced all of the documents from Mr. McBride's
23 files. We communicated those to SCO. They assured us that
24 they had produced the documents. We took them at their word,
25 and we took Mr. McBride's deposition.

1 During Mr. McBride's deposition, we find that there
2 are potentially dozens of e-mails between Mr. McBride and
3 Microsoft that have not been produced despite having been
4 specifically requested. So after his deposition, we write a
5 letter to counsel and we say, we want those documents.

6 And I'm not accusing counsel of being -- of bad
7 faith or engaging in bad faith in connection to not producing
8 those documents, but that's the way it normally works.
9 Normally if you don't think somebody has produced all of the
10 documents, you take a deposition, and during that deposition
11 you find out that, in fact, the documents haven't been
12 produced, you send a letter.

13 And if they send us a letter after these
14 depositions that indicates that we have not produced all the
15 documents or that there other places that we haven't searched,
16 we'll do that. That's our obligation, Your Honor, and we'll
17 do that.

18 But as I say, if the Court does anything other than
19 stop this motion in its tracks now, I fear that it will never
20 end. Thank you, Your Honor.

21 THE COURT: Thank you, Mr. Shaughnessy.

22 Mr. Normand?

23 MR. NORMAND: Thank you, Your Honor. If we were at
24 war with IBM, I think you would call what Mr. Shaughnessy just
25 did is strafing, including taking issue with competence of

1 counsel and not having requested what he thinks is the obvious
2 solution of his problem.

3 THE COURT: I didn't take it that way.

4 MR. NORMAND: Let me take a step back and try to
5 simplify this, because I think it's simpler than what
6 Mr. Shaughnessy has presented it as.

7 We served document requests, including requests
8 that Mr. Shaughnessy has pointed to. In 2003, one was:

9 All documents concerning any contributions to
10 Linux.

11 No technological limitation. No technical
12 limitation. No limitation in terms of being limited to
13 programmers, it being limited to people who actually made
14 contributions. All documents concerning contributions to
15 Linux. IBM objected on the grounds that it was overly broad.
16 Now they come to the Court and say it's actually quite narrow.

17 The second request is request Number 53, which by
18 the way not only mentioned Mr. Palmisano or
19 Mr. Wladawsky-Berger, but two other IBM senior executives.
20 Specifically:

21 All documents concerning IBM's decision to
22 adopt, embrace or otherwise promote Linux.

23 IBM objected on the grounds that it was overly
24 broad. Now they argue that it's much narrowly.

25 Let me step back further. This motion has been

1 pending in one form or another, as Mr. Shaughnessy concedes,
2 for I think over 20 months. The notion that we haven't
3 pursued these documents diligently or sought to get them is
4 not well taken. And during the course of the pending
5 20 months, we have taken depositions, and we have taken
6 discovery that we think deal directly on our request for
7 relief. Mr. Wladawsky-Berger conceded that there were e-mails
8 to himself and Mr. Palmisano relating to Linux. Mr. Mills
9 said the same thing. We have not yet deposed Mr. Palmisano,
10 but he's scheduled to be deposed on January 11th, and we would
11 like any responsive documents that exist for purposes of the
12 deposition rather than trying to identify the documents during
13 the deposition and then having to come back to the Court and
14 say, we need Mr. Palmisano for more time now that we have
15 responsive documents.

16 Your Honor has interpreted Mr. Shaughnessy to say
17 that, you know, we should have taken the deposition first.
18 Then I think we're all in agreement that it's reasonable for
19 us to try to get the documents first and then take the
20 deposition. We didn't do that with Mr. Wladawsky-Berger
21 because at the time we took his deposition, we thought we were
22 up against the discovery deadline. That's why we took his
23 deposition when we did. Of course, it would have been
24 preferable and I think reasonable to take his deposition with
25 relevant documents in hand.

1 During the course of the discovery during that
2 20 months what we learned is the public documents suggest
3 Mr. Palmisano and Mr. Wladawsky-Berger oversee and made the
4 decision to implement a multi-billion dollar Linux-related
5 business, a business that IBM has said publicly, we're making
6 billions.

7 Now, it's hard to believe that given the scope of
8 the business, whether a formal or informal level the board the
9 directors hasn't been exposed to the decision, hasn't had any
10 say in the decision, hasn't been exposed to the documents
11 relating to the decision. And it's hard to believe that given
12 what I think IBM concedes is its obligation if there are
13 e-mails relating to the litigation and relating to Linux
14 beginning at least in March 2003 that there are not more
15 responsive documents that exist.

16 THE COURT: Aren't you engaging in -- you've
17 indicated that they've questioned the competency of counsel,
18 for lack of a better term, for not doing something. Aren't
19 you doing the same thing by supposing or presuming that there
20 has to be more when they told you there isn't?

21 MR. NORMAND: Yeah. I understand Your Honor's
22 concern. One thing we've been very careful never to do in our
23 briefing, and if I've suggested it, I do not mean to suggest
24 it, is take issue with counsel's good faith execution of their
25 interpretation of the document process. Where we impart is

1 their interpretation of the document requests. I don't doubt
2 that they think they have found all of the responsive
3 documents as they interpret the request. But I think they
4 originally interpret the request to be very broad, and now
5 they interpret them to much narrower.

6 THE COURT: Then why wouldn't the alternative
7 suggested by Mr. Shaughnessy be an effective one, where you go
8 and you depose Mr. Palmisano and you make a determination as
9 to whether or not there are or exist documents that have not
10 been produced to you? Isn't it ultimately or potentially
11 easier to set another deposition date for him than for us to
12 continue on in the kind of ever turning wheel that we've got
13 ourselves on here?

14 MR. NORMAND: I don't think that's unreasonable.
15 But I think I have two main points that I would like to make
16 in that regard, Your Honor. First is with respect to e-mails,
17 I think Mr. Shaughnessy is overstating the difficulty of the
18 search. He challenged, I suppose, myself to come up and
19 explain how we've done searches. One thing we've done with
20 e-mails, which is electronically searchable, is use keywords.
21 So Unix, Linux, those are keywords that we put in. If an
22 e-mail came up including the word "Linux" or "Unix," we looked
23 at the e-mail.

24 THE COURT: But do you dispute what was stated
25 during Mr. McBride's deposition that there were identified a

1 number of e-mails that referred to Linux, but didn't exist in
2 his file?

3 MR. NORMAND: I don't dispute that.

4 THE COURT: All right. Then the keyword search
5 isn't necessarily the answer here, is it?

6 MR. NORMAND: Well, it may not be the complete
7 answer. It is the first of two points I wanted to make. But
8 what I understand Mr. Shaughnessy to say is even with respect
9 to e-mails, at least in the case of SCO that are
10 electronically searchable, they have not undertaken to look
11 for the word "Linux" in their e-mails, whether it's
12 Mr. Palmisano's files or anyone who received an e-mail from
13 Mr. Palmisano's files. They have not taken and looked for
14 that word and then looked at the e-mail and then decide
15 whether it was relevant, which actually is the way we did our
16 production.

17 The second point, Your Honor, if we can agree that
18 we would get Mr. Palmisano back, that there wouldn't be a
19 problem of getting him back technically after the end of our
20 fact discovery period.

21 THE COURT: I can help with that.

22 MR. NORMAND: I understand that, and I appreciate
23 that. And that the subsequent deposition wouldn't count as a
24 second day because we face a limit of 50 depositions, I don't
25 think that's an unreasonable approach.

1 But my main argument is I think there are ways to
2 execute the search that we propose. And to be clear, the
3 reason we propose a search involving the word "Linux,"
4 because, one, we thought it was easily electronically
5 searchable. Typically what a corporation in the position of
6 IBM or SCO will do is load up a lot of documents so that they
7 can search for the responsive ones.

8 If it is truly a burden as Mr. Shaughnessy said
9 because apart from e-mails it can't be electronically
10 searched, then I agree we have a different issue. And
11 maybe the Palmisano approach and the other senior executives
12 is the appropriate approach. But it is not just
13 Mr. Palmisano. We also mentioned in our request Mr. Paul
14 Horn, Mr. Bowen. We didn't intend to depose them. If we
15 could depose them to determine that there are relevant
16 documents and not have the depositions count against the 50,
17 that's the another thing. But we don't want to over reach.
18 Then we take three depositions and argue they don't even count
19 as depositions and we've done that in lieu of a document
20 production that we think could be done in a pretty
21 straight-forward fashion.

22 The relief that we requested was documents related
23 to Linux because, frankly, we don't understand exactly how IBM
24 has implemented its search of documents as it has interpreted
25 the Court's order and our request. We thought the simplest

1 thing was just if it's related to Linux, IBM ought to look at
2 it, and it is almost --

3 THE COURT: But, Mr. Normand, I think I said at the
4 beginning of this litigation that I take what counsel says at
5 face value, and I assume good faith. Now --

6 MR. NORMAND: I agree.

7 THE COURT: -- it's been stated once again that the
8 reasonable search has been conducted, and they produced what
9 is there. There's also indication that you have undertaken a
10 reasonable search that may have come up a little short in some
11 respects that wasn't discovered until Mr. McBride was deposed.

12 So I guess I'm asking you, tell me why I shouldn't
13 adopt the approach as suggested to take this matter under
14 advisement until such time as you have conducted the
15 depositions to determine if an additional deposition day is
16 necessary and there exist documents that have not been
17 provided despite the good faith statements on both sides that
18 they have.

19 MR. NORMAND: Very good, Your Honor.

20 Two points in response. One is, I think what you
21 proposed is reasonable, with the caveat that what we would
22 want to do is depose, not only Mr. Palmisano for the purpose
23 of trying to identify documents, but Mr. Wladawsky-Berger,
24 whom we've already deposed, also Mr. Horn, also Mr. Bowen. Do
25 we need to depose a number of the board of directors, or do

1 need to depose a custodian of the board of directors to talk
2 to him about responsive documents?

3 I'm concerned that as to Mr. Palmisano what Your
4 Honor proposes is very reasonable, but what we would want to
5 do, especially because I think Your Honor has established
6 today that IBM interpreted your March order more narrowly than
7 you intended, given my understanding that that is Your Honor's
8 conclusion, given that what we would want at least do is
9 depose all of those people that I just identified, and we
10 would not want them to count as depositions. And against all
11 of this, we've been concerned that we not be accused by IBM of
12 trying to move back the discovery deadline. We're trying
13 earnestly to meet this late January deadline.

14 With all of those caveats, if Your Honor would
15 agree that we can depose those individual in order to identify
16 responsive documents and that it wouldn't be problem to come
17 back to them after January 27th if necessary, then I don't
18 disagree with Your Honor's proposal. I think that would be
19 workable.

20 THE COURT: Mr. Normand, thank you.

21 MR. NORMAND: Thank you, Your Honor.

22 THE COURT: Mr. Shaughnessy?

23 MR. SHAUGHNESSY: May I speak just briefly to that
24 issue, Your Honor?

25 I told you at the outset that we were dealing on

1 this motion with Mr. Palmisano, Mr. Wladawsky-Berger and the
2 IBM board. That is all we've ever been talking about. Now
3 Mr. Normand would like you to expand that to other
4 individuals. If SCO wishes to depose those individuals, it
5 can certainly depose those individuals. And I don't think,
6 contrary to what Mr. Norman has said, that there is any
7 disagreement between what we understood the March order to
8 require and what the Court has said that it requires. I think
9 we're on the same -- we are on the same sheet, that the
10 standard that we've used in searching for documents. And I
11 believe, Your Honor, that the simplest solution to the problem
12 is to simply do what we on our side have done, and that is if
13 we have questions or doubts about some witnesses, documents or
14 whether they're complete, we asked them in their deposition,
15 and we send a follow-up letter.

16 And, Your Honor, if during Mr. Palmisano's
17 deposition or some other witness' deposition SCO identifies
18 for us documents that we missed that are not privileged and
19 are not responsive, they send us a letter and we produce them.
20 It's just that simple. That's what we do in litigation. I
21 don't play games. If they send us a letter and they
22 legitimately identify something, then we produce it.

23 They took Mr. Wladawsky-Berger's deposition. They
24 asked him about this very issue, and we got no such letter, no
25 indication from them that Mr. Wladawsky-Berger was in any way

1 inadequate or the documents produced from him are in any way
2 inadequate.

3 So I think what the Court should do, respectfully,
4 is deny the motion, allow the deposition to proceed, allow the
5 parties to do what we always do, which is provide documents.
6 And if there is a dispute, if there is a dispute about whether
7 a document wasn't produced and should have been produced, if
8 there's a dispute about whether a witness needs to be brought
9 back because a document was produced after their deposition,
10 that we deal with those disputes when they arise. Hopefully
11 we resolve them among counsel. If we don't, we ask for your
12 assistance.

13 MR. NORMAND: Your Honor, could I speak briefly?

14 THE COURT: Certainly.

15 MR. NORMAND: The proposal as Mr. Shaughnessy has
16 just outlined it confirms that we still have a disagreement as
17 to the scope of what IBM thought for the last two years they
18 had to produce.

19 THE COURT: I'm looking at the March 3rd, 2004,
20 order. It says:

21 IBM is to include materials and documents
22 from executives including Sam Palmisano and
23 Irving Wladawsky-Berger.

24 MR. NORMAND: No one can pronounce it.

25 THE COURT: I certainly cannot. Those are the

1 named individuals, Mr. Normand.

2 MR. NORMAND: I have two responses. One, Your
3 Honor knows better than anyone your interpretation. But you
4 did say, including, meaning that it was a broad request, but
5 it ought to include the senior executives. The other one is
6 Mr. Marriott said in October that he interpreted the
7 March 2004 order to mean that IBM was to include senior
8 executives in its search for documents responsive to our
9 requests. And one of our requests, request Number 53, clearly
10 identifies more than just Mr. Wladawsky-Berger and
11 Mr. Palmisano. Your Honor knows better than I do. I think
12 Your Honor mentioned Mr. Palmisano and Mr. Wladawsky-Berger
13 because they were specifically mentioned during the February
14 hearing.

15 But my point is, I fear that in his request that
16 you deny our motion, Mr. Shaughnessy is glossing over the fact
17 that as I understood it, they have interpreted Your Honor's
18 order in our document requests more narrowly than Your Honor
19 interprets them, and that the plain language we request makes
20 clear that we intended them.

21 So I would be surprised if the net result of the
22 discussion we've had today is that our motion should be
23 denied, because I think that there's been an interpretation of
24 the order and an interpretation of the request, and it's more
25 narrow than what they intended to be.

1 But with those caveats, Your Honor, I fall back to
2 the position about being willing to take these the
3 depositions. We think we are entitled to more than just
4 Mr. Palmisano and Mr. Wladawsky-Berger. And we would like
5 them not to count against the depositions again, the 50 that
6 we face.

7 THE COURT: I'm going to take a short recess on
8 this matter. And if you will all just wait.

9 MR. NORMAND: Thank you, Your Honor.

10 (Recess.)

11 THE COURT: Going back on the record now.

12 I first want to make a finding, and the finding
13 that I want to make is that IBM has acted in good faith in
14 terms of its reasonable search for documents as they relate to
15 Mr. Palmisano and Mr. Wladawsky-Berger. I have looked back
16 over the notation from the February 6, 2004, hearing
17 transcript, wherein SCO's counsel said:

18 We have had specific conversations with
19 Christine Arena at Cravath asking specifically for
20 Mr. Palmisano stuff, for Mr. Wladawsky-Berger,
21 Paul Horn, Nick Bowen, those people's information.

22 That is followed by the March 3rd order in which I
23 say as follows:

24 IBM is to provide documents and materials
25 generated by and in possession of the employees

1 that have been and that are currently involved in
2 the Linux project. IBM is to include materials
3 and documents from executives including, inter
4 alia, Sam Palmisano and Irving Wladawsky-Berger.
5 Such materials and documents are to include any
6 reports, materials or documents from IBM's
7 ambitious Linux strategy.

8 Looking at those two, or the notation from the
9 transcript and the order, I believe that the order should more
10 have explicitly indicated that IBM undertake the search as to
11 Paul Horn and Nick Bowen. And to the extent that those are
12 still requested by SCO, they will be required.

13 Mr. Shaughnessy?

14 MR. SHAUGHNESSY: Maybe I can help, Your Honor. We
15 produced documents from both of those individuals.

16 THE COURT: All right. Have affidavits been
17 provided?

18 MR. SHAUGHNESSY: We have not provided affidavits.

19 THE COURT: All right. Then if they have been
20 provided, then you will be required to produce affidavits
21 indicating the nature of the reasonable search that has been
22 conducted with regard to those two.

23 With that having been said, I suppose that the
24 conclusion is that SCO's motion is granted in part and denied
25 in part in the respect that there will not be further

1 requirements beyond those individuals that are listed in the
2 February 4th request.

3 Now, we need to discuss dates here and also the
4 status of other motions. Let's first look with regard to the
5 other motions. There is a SCO motion to compel discovery
6 which was filed on October the 27th. It appears to me that
7 based upon Judge Kimball's ruling in that matter that that is
8 moot now, Judge Kimball having upheld my initial ruling on
9 that matter.

10 So does anyone disagree with that?

11 MR. NORMAND: No, Your Honor.

12 MR. MARRIOTT: No, Your Honor.

13 THE COURT: All right. And there is also a new
14 motion for protective order that was filed by SCO on
15 December the 14th, and we haven't received the response for
16 that yet.

17 MR. SHAUGHNESSY: You haven't, Your Honor; although
18 we have resolved, I believe, the issue. I prepared an order,
19 which I've given to Mr. Normand. I can provide the order. I
20 guess if he has a problem, he can advise The Court. I don't
21 believe he does.

22 MR. NORMAND: Your Honor, we don't object to the
23 order, with the caveat that I don't think the order suggests
24 otherwise, with the caveat that we're not waiving any claims
25 to work product being privileged with respect to the

1 responsive documents here.

2 THE COURT: All right.

3 MR. SHAUGHNESSY: May I approach, Your Honor?

4 THE COURT: Sure.

5 With regard to the motion to compel production of
6 the documents in the privileged log, how long will it take SCO
7 to respond to that?

8 MR. NORMAND: Well, there are four subpoenas
9 outstanding, Your Honor, one with respect to KB&G. We can
10 produce the documents today or tomorrow.

11 MR. SHAUGHNESSY: She's talking about the -- she's
12 not talking about the subpoenas. She's talking about the
13 production of the privilege log.

14 MR. NORMAND: I'm sorry. I jumped ahead.

15 THE COURT: That's okay.

16 MR. NORMAND: I think there are 1,000 documents. I
17 would think within six or eight business days we can do that.

18 THE COURT: I don't have a calendar here. Why
19 don't we make that -- I don't have a calendar, and with the
20 holidays --

21 MR. MARRIOTT: Would you like my calendar?

22 THE COURT: We have a made-up calendar, a hand-done
23 calendar.

24 I'm going to require that those be produced by the
25 2nd of January -- or the 3rd of January, which is Friday

1 (sic).

2 MR. MARRIOTT: Can I just ask one thing, Your
3 Honor?

4 THE COURT: Sure.

5 MR. MARRIOTT: Mr. Normand has just suggested that
6 he believes the documents are on a disk and could be provided
7 much more quickly. We just ask that if they can be provided
8 more quickly that they do so.

9 THE COURT: Sure. But the outside date would be
10 January 3rd -- wait. The 6th of January, Friday. And if you
11 can do it sooner than that --

12 MR. NORMAND: We will do it sooner than that.

13 THE COURT: -- on disk. All right. Thank you.

14 When, Mr. Shaughnessy, do you anticipate being able
15 to provide the affidavits?

16 MR. SHAUGHNESSY: We can do it by the same time,
17 same date, Your Honor.

18 THE COURT: All right. That will be fine.

19 MR. MARRIOTT: And again there, we would do it
20 sooner if we can.

21 THE COURT: Sure. All right.

22 I have signed the order that's been presented to
23 me. It takes care of the other matter.

24 Is there anything else we need to address this
25 morning?

1 MR. NORMAND: I guess I just want clarification,
2 Your Honor. On the issue we discussed, both counsel and I, at
3 some length, further depositions and using depositions to
4 identify documents, is that a procedure that Your Honor wanted
5 us to explore?

6 THE COURT: That is up to. That's up to counsel
7 how you handle that. And I should have made that part of the
8 order. And I'm going to have Mr. Shaughnessy and Mr. Marriott
9 prepare the order with regard to the privileged log issue and
10 Mr. Normand with regard to the other one, that the
11 depositions, should they be taken, the two additional people
12 that remain for whom the affidavits will be submitted, those
13 two, you may take those depositions, and they would not be
14 counted towards your 50; all right?

15 MR. NORMAND: I think I understand.

16 MR. SHAUGHNESSY: I'm happy, Your Honor, if the
17 Court would prefer, to put it altogether in one order, that we
18 take a stab at it and provide it to Mr. Normand.

19 THE COURT: That's fine.

20 MR. NORMAND: Your Honor, could I take your time
21 with one additional issue that I think is ripe to resolve?

22 THE COURT: Sure.

23 MR. NORMAND: Both parties, of course, are going to
24 be serving requests for admission, as you know, at the end of
25 discovery, March in this case. But we have a bifurcated

1 discovery period in which SCO's discovery for purposes of its
2 affirmative claims would end in late January. SCO has been
3 operating under the belief that if it serves requests for
4 admissions with respect to not only its own claims but its
5 counterclaims in the period up to the end of fact discovery,
6 which I think counsel would agree is typical, near the end of
7 the fact discovery to do our request of admissions.

8 We didn't finish the discussion when Your Honor was
9 in chambers, but I think, and they'll correct me if I'm wrong,
10 I think IBM's position is that SCO would have to serve its
11 requests for admissions relating to its affirmative claims
12 essentially by the end of December because they need to be
13 filed 30 days before the end of our discovery period.

14 That's not my experience with respect to any
15 discovery period, and here where we have the bifurcated
16 discovery period, it's SCO's position that it would be a lot
17 simpler to serve all of its request for admissions at once
18 with respect to both its claims and IBM's counterclaims toward
19 the end of the fact discovery period.

20 THE COURT: So by the end of January?

21 MR. NORMAND: No. The end of fact discovery for
22 all of the claims and counterclaims.

23 THE COURT: Which is when?

24 MR. NORMAND: Mid March, I think.

25 MR. MARRIOTT: March 17th.

1 MR. NORMAND: We would serve them -- if this is
2 IBM's position, we could serve them 30 days before the end of
3 that period. I mean, in my experience, request for admissions
4 aren't even part of discovery. They're often served after
5 discovery. But if IBM wants to see them all 30 days before
6 the end of their discovery period, we'll serve them all by
7 then.

8 MR. MARRIOTT: Your Honor, there are two discovery
9 periods, one that closes on the 27th of January, and what
10 exactly that discovery -- what exactly discovery after that
11 the parties are allowed to take are subject to a separate
12 order by stipulation that Judge Kimball signed.

13 So there are two discovery periods. And our
14 position is to the extent that parties want to serve requests
15 for admission, they should serve their requests for admission
16 so that they could be responded to before the end of each
17 discovery period. And discovery would be allowed and
18 permissible during those periods. So if SCO, for example,
19 wished to serve us related to discovery permissible during the
20 period ending on January 27th, then they should serve RFAs 30
21 days before January 27th for responses by the end of the
22 period. If SCO wants to serve discovery to serve our RFA's
23 relating to the discovery permissible during the period
24 between January 27th and March 17th, then it should serve RFAs
25 30 days before March 17th for responses by March 17th.

1 Otherwise, that will allow discovery that is supposed to be
2 limited to period A and allow that to go into period B. And,
3 therefore, we think the parties ought to do it 30 days before.

4 MR. NORMAND: Two points, Your Honor. One, I don't
5 think it's true that you have to serve the requests for
6 admission within the periods of discovery so that will be
7 responded to before the formal discovery ends. So the very
8 least we would have the end of January to do our requests for
9 admissions with respect to our claims.

10 But more importantly and second, Your Honor, IBM is
11 entitled to take discovery, as Mr. Marriott says, to some
12 scope as set forth in the stipulation, IBM is entitled to take
13 discover through mid March. If we served our RFAs even in
14 late January, we don't need to respond to them before late
15 January. And IBM will receive them at the end of January and
16 can take discovery on them if they'd like in that two-month
17 period. But even that isn't fair because parties don't
18 typically take discovery on requests for admissions. They
19 either deny or they admit that the document is as it
20 appears or as a legal issue as it appears or factual issues as
21 it appears.

22 THE COURT: Are either of you relying on any
23 particular rule?

24 MR. NORMAND: It's bad for me, Your Honor. I don't
25 have cases with me. I know there are cases that say RFAs are

1 not part of discovery. There are other cases that say they
2 are part of discovery. I don't have anything to cite.

3 THE COURT: Is there any rule or procedure that
4 you're relying on?

5 MR. MARRIOTT: Your Honor, I think as to the timing
6 of RFAs is within Your Honor's discretion, and I think
7 practices vary. We would be agreeable to talking with counsel
8 about a scenario under which the RFAs were served prior to the
9 close of each of the fact discovery periods, so long as the
10 RFAs relate to the permissible discovery in that period.

11 Mr. Normand's concern is it does come after his
12 time to respond 30 days before. We're agreeable to that --

13 THE COURT: I'm going to leave that to counsel to
14 work out and submit in a stipulation.

15 MR. NORMAND: Thank you, Your Honor. Just by way
16 of example, I would not expect IBM to have to serve its RFAs
17 on its counterclaims on us by mid February.

18 THE COURT: I understand.

19 MR. NORMAND: I understand it's the end of its
20 discovery period.

21 THE COURT: I understand. You can all work that
22 out and submit it.

23 MR. NORMAND: Thank you.

24 THE COURT: All right. Anything further?

25 MR. MARRIOTT: No, Your Honor.

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THE COURT: We're in recess. Thank you.

MR. NORMAND: Thank you, Your Honor.

(Whereupon, the court proceedings were concluded.)

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1 STATE OF UTAH)

2) ss.

3 COUNTY OF SALT LAKE)

4 I, KELLY BROWN HICKEN, do hereby certify that I am
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of
7 the foregoing matter on December 20, 2005, and thereat
8 reported in Stenotype all of the testimony and proceedings
9 had, and caused said notes to be transcribed into typewriting;
10 and the foregoing pages number from 3 through 75 constitute a
11 full, true and correct report of the same.

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

14 And hereby set my hand and seal, this ___ day of

15 *January* 2005.

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Kelly Brown Hicken
KELLY BROWN HICKEN, CSR, RPR, RMR

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