1   in Linux, and that is a task that the materials we seek are

2   particularly relevant in helping us to finish. Thank you,

3   Your Honor.

4   THE COURT: Thank you. Remind me when the hearing

5   on motion to compel is in front of Judge Wells.

6   MR. NORMAND: Is it October 20th or -- I mean

7   December 21st?

8   MR. SHAUGHNESSY: I think it's next Tuesday.

9   MR. NORMAND: Next week, Your Honor.

10   MR. MARRIOTT: It's on the 20th, Your Honor.

11   THE COURT: 20th? So it's a week from today?

12   MR. NORMAND: Yes.

13   THE COURT: Thank you.

14   MR. NORMAND: Thank you.

15   THE COURT: Mr. Marriott?

16   MR. MARRIOTT: Thank you, Your Honor. Just to be

17 clear in response to Your Honor's question, the hearing that's

18 set for argument next Tuesday is not the motion that's related

19 to this one. Two arguments are set on different motions, not

20 one that bears relationship to the appeal before Your Honor

21 today.

22   THE COURT: Not the motion to compel.

23   MR. MARRIOTT: A motion to compel, but a different

24 motion to compel and the one in which SCO seeks the same

25 relief from Judge Wells that it seeks from Your Honor by way

1   of this motion. That motion has not yet, to my knowledge,

2   been set for argument.

3   THE COURT: Do you agree with that, Mr. Normand?

4   MR. NORMAND: I think that's right.

5   MR. MARRIOTT: Thank you, Your Honor.

6   MR. NORMAND: And one further thought, Your Honor, I

7   think the parties have asked the magistrate court, I think

8   we've asked her to schedule, if she could, the argument on

9   that motion before December 22nd, and I don't think we've

10   heard back from her on that.

11   THE COURT: All right.

12   MR. MARRIOTT: To my knowledge that's not true.

13   THE COURT: Which isn't true?

14   MR. MARRIOTT: That we have asked the magistrate

15   judge to set arguments for SCO's motion.

16   THE COURT: So you disagree with Mr. Normand that

17   you've asked for that?

18   MR. MARRIOTT: Correct, I disagree.

19   MR. NORMAND: Well, I certainly wouldn't have had

20   that conversation with Mr. Marriott, and if I'm incorrect, I

21   apologize, but I would have had a conversation with Mr.

22   Shaughnessy.

23   MR. SHAUGHNESSY: Yeah, my recollection is that at

24   most that would have been something that would have been

25   included in the motion papers, but there has been no separate

1   communication from the magistrate judge setting that

2   particular motion hearing that I'm aware of.

3   THE COURT: All right. Go ahead.

4   MR. MARRIOTT: Thank you, Your Honor. I have three

5   points -- two main points, Your Honor, and then I'd like to

6   respond, if I may, to some of the assertions made by SCO in

7   its reply papers and in its argument today. Before I do that

8   though, I'd like to come, if I might, to a matter which is

9   raised by a question of Your Honor to Mr. Normand and which is

10   absent from discussion in SCO's papers and that's the

11   discussion of the burden that SCO bears on this motion, an

12   issue I think critical to the resolution of the appeal.

13   To prevail, as Mr. Normand I believe suggests, for

14   the first time hearing this argument on this appeal, SCO must

15   establish that Magistrate Judge Wells acted contrary to law

16   and that she committed clear error. And that the Tenth

17   Circuit cases -- Your Honor, what that means, as a practical

18   matter, as I know Your Honor is aware, is that this Court

19   should not interfere with Magistrate Judge Wells'

20   determination unless Your Honor comes to a decision based on

21   what the Tenth Circuit describes as the entire set of

22   evidence, and if Your Honor does so based upon a definite and

23   a firm conviction of mistake. The standard is not that Your

24   Honor might have done it differently, not that Your Honor

25   thinks there might be an error or suspects it. The question

1   is whether Your Honor has a conviction that a mistake was

2   made, and not just a conviction, Your Honor, but a definite

3   and a firm conviction under the cases of the Tenth Circuit.

4   With that backdrop, Your Honor, let me come, if I

5   may, to the first of the points I'd like to make.

6   THE COURT: But if I understood part of his

7   argument, it was that she, at least with respect to some of

8   these matters, she really didn't consider them or rule on

9   them, and with those, there might be a different standard.

10   MR. MARRIOTT: That is certainly SCO's contention,

11   Your Honor. In fact, my first point is that Magistrate Judge

12   Wells considered SCO's request. And as a result, the standard

13   here, Your Honor, is whether or not she committed clear error

14   or whether or not she acted contrary to law and we, of course,

15   respectfully submit that she did not.

16   THE COURT: And you disagree with his suggestion

17   that she might not have considered this or at least part of

18   this?

19   MR. MARRIOTT: I disagree with that, Your Honor.

20   The crux of SCO's contention on this appeal is, as this

21   dialogue suggests, that Magistrate Judge Wells failed to

22   address SCO's argument that IBM should be required to produce

23   all documents related to the development of the claims, and

24   that simply, as I believe, the record demonstrates incorrect.

25   SCO filed a motion to compel, Your Honor, before Magistrate

1   Judge Wells and it filed that motion on December 2nd, 2005,

2   and in the motion it asked Magistrate Judge Wells to require

3   IBM to produce all documents related to the development of

4   Linux, and in support of that motion SCO made two arguments.

5   The first argument was that IBM had violated orders of the

6   court in not producing this information because according to

7   SCO, Magistrate Judge Wells had already ordered IBM several

8   times to produce the information.

9   SCO's argument in the alternative was that

10   irrespective of Magistrate Judge Wells' orders, she should

11   require IBM to produce all documents related to the

12   development of Linux. In response to SCO's motion, which had

13   two prongs, IBM filed a brief in opposition. In our

14   opposition papers, Your Honor, we laid out for the court,

15   Magistrate Judge Wells, that we did not understand her orders

16   to require IBM to have produced the information SCO seeks.

17   And second, we laid out, in even greater detail and greater

18   length, our response to the argument raised by SCO that we

19   should be required in any event to produce all documents

20   related to the development of Linux.

21   And I refer Your Honor to pages 10 through 16 of our

22   opposition papers below, which are devoted to the sole

23   question presented by this appeal, which is whether, as SCO

24   contends, Magistrate Judge Wells overlooked the argument set

25   out in SCO's opening brief and in IBM's opposition papers.

1   SCO filed a reply and that argument was heard. The transcript

2   of that argument, Your Honor, spans 70 pages. At the outset

3   of the argument Magistrate Judge Wells said, for the record,

4   at page 6 of the transcript, that she had considered the

5   parties' submissions, including the briefs submitted by SCO

6   and IBM about whether, irrespective of the court's orders, IBM

7   should be required to produce all information related to the

8   development of Linux.

9   Following Magistrate Judge Wells' indication that

10   she reviewed the submissions of the parties, counsel for SCO

11   argued that IBM should be required to produce the materials at

12   issue on this appeal for two reasons, one, because they were

13   supposedly required by prior orders of the court and, two,

14   because SCO contended they were in any event required. And I

15   refer Your Honor to page 25 of the transcript below. In

16   opposition IBM argued that it had not violated orders of the

17   court, and that in any event, we should not be required to

18   produce the information SCO seeks on this appeal.

19   And with respect to the latter point, I refer Your

20   Honor to pages 48 through 50 of the transcript below, that in

21   reply SCO argued again that IBM should be required in any

22   event to produce the information at issue. SCO refers to this

23   portion of the transcript in its papers and that appears at

24   page 55 by SCO's own description.

25   Following arguments from counsel, Magistrate Judge

1   Wells then said, again for the record, at page 57 of the

2   transcript, that she had considered the parties' arguments.

3   Prominent among those arguments was whether, one, IBM violated

4   the Court's orders and, two, whether independent of the

5   Court's orders, IBM should be required to produce documents

6   from all Linux developers relating to development of Linux.

7   Following that statement, Magistrate Judge Wells

8   ruled from the bench and from the bench she said in substance

9   two things. One, IBM did not misinterpret the Court's orders,

10 and the Court had not previously ordered IBM to produce, as

11 SCO contended, all documents related to the development of

12 Linux. Second, Magistrate Judge Wells denied the motion. She

13 denied SCO's request that IBM be required to produce all

14 documents related to the development of Linux, and I refer

15 Your Honor particularly to page 3 of Magistrate Judge Wells'

16 order.

17   Moreover, Your Honor, at the close of the hearing,

18 Magistrate Judge Wells said, does anyone have any other issues

19 they would like to raise with the Court, in response to which

20 SCO's counsel said at page 70, no. Following the hearing, at

21 the direction of Magistrate Judge Wells, IBM prepared for the

22 Court's signature a form of order, which IBM's counsel

23 discussed with counsel for SCO. The parties disagreed as to

24 one element of that order, an issue not relevant to the

25 present appeal. That issue was then elevated to Magistrate

1   Judge Wells. We held a teleconference, in which Mr.

2   Shaughnessy and Mr. Normand participated, to resolve the

3   disagreement about that issue. Magistrate Judge Wells

4   resolved that issue, again not relevant here, in IBM's favor.

5   But at no point during the meet and confer following the

6   hearing and at no point during the teleconference with

7   Magistrate Judge Wells did SCO ever say that they had an issue

8   with Magistrate Judge Wells' order because she had failed to

9   consider the second of their arguments in connection with

10   their motion to compel.

11   The suggestion here that Magistrate Judge Wells was

12   somehow required to parse the papers of the parties and in her

13   ruling from the bench itemize every single argument refuted

14   is, respectfully, not supported in the case law. I would

15   respectfully submit, Your Honor, that one cannot read the

16   orders of Magistrate Judge Wells below in context and reach

17   any other conclusion than that she fully understood SCO's

18   argument, she said twice on the record that she had considered

19   them, and she's ruled on them immediately after hearing from

20   counsel from SCO and counsel for IBM, and at no point did SCO

21   suggest that somehow an argument of apparently enormous

22   importance was missed by Magistrate Judge Wells, and

23   respectfully, Your Honor, I would submit that just didn't

24   happen.

25   The second point which I'd like to make is that not

1   only did Magistrate Judge Wells consider the issue presented

2   by this appeal, but she properly resolved it. She didn't

3   abuse her discretion. She didn't act contrary to law, and she

4   didn't commit clear error. Magistrate Judge Wells ruled that

5   there should be reasonable limits in effect placed on

6   discovery, and she implemented those limits and she did it

7   properly here. That decision stands, Your Honor, we submit,

8   for at least four independent reasons: One, the information

9   at issue there and now here is not relevant, was not relevant

10   and in any event not necessary, two, requiring IBM to produce

11   that information would pose an undue burden on IBM; three, the

12   request comes too late in the day; and, four, contrary to what

13   Mr. Normand suggests here today, it is simply not conceivable,

14   Your Honor, that the Court could require that Magistrate Judge

15   Wells or Your Honor today could require IBM to produce the

16   information that SCO seeks without requiring an adjustment of

17   the Court's schedule.

18   Now, I don't intend in any great depth, Your Honor,

19   to discuss each of those four I think independent bases for

20   Magistrate Judge Wells' decision. They are set out in our

21   papers and I'm happy to address any questions Your Honor may

22   have about them. Let me say briefly this with respect to

23   them: As Your Honor has now heard, I'm sure more than you

24   wish, Linux is an operating system that is an open operating

25   system. It has been and is being developed in the public

1   view. There are millions, an equivalent of millions of pages

2   of paper available to SCO and to anybody else who wants to

3   look at it on the Internet, and in our papers, Your Honor, we

4   cite the Court to the Web sites in which you could find for

5   yourself, if you so desire, more information than you'd ever

6   like about the development of Linux.

7   In addition to that which is publicly available,

8   Your Honor, we have produced from the files of IBM, contrary

9   to what SCO suggests, a very substantial number of documents

10   relating to the development of Linux. In the three -- nearly

11   three years since this lawsuit has been pending, IBM has

12   produced documents from 236 custodians. By comparison, SCO

13   has produced documents from approximately 66 custodians.

14   Contrary to what Mr. Normand said here this morning, IBM has

15   not limited its production to the documents related to the

16   development of Linux to the files of the 20 Linux developers.

17   IBM has produced documents from the files of the company, from

18   the files of individuals relating to the development of Linux,

19   the number of individuals to whom have been produced Linux

20   development documents, Your Honor, is approximately 80. It is

21   not limited, as SCO suggests in its papers here, to 20.

22   The idea, Your Honor, and Mr. Normand suggests at

23   the last hearing in an effort to put this dispute behind us,

24   in an effort to reach a compromise, IBM offered to produce

25   documents from an additional 20 developers to be selected by

1   SCO, so that we would avoid disputes about whether we properly

2   selected the people, whether we were trying, as Mr. Normand

3   suggests, to pull a fast one.

4   SCO identified the 20 developers. We produced

5   documents from those developers. That exercise, Your Honor,

6   took 60 days, and it didn't take 60 days at a leisurely pace.

7   Those were an intense 60 days with a lot of people involved,

8   reviewing a lot of documents to determine whether they were

9   responsive or privileged to prepare those for production, and

10   yet what SCO asks for today, they ask Your Honor to require us

11   to produce and to find more -- importantly, Magistrate Judge

12   Wells acted contrary to law in ruling as she did -- documents

13   from hundreds of additional Linux developers. If you just

14   take the metric, Your Honor, of what it took to produce

15   documents from the files of the 20, which was 60 days, on

16   weekends, on a very late night review basis, we would be doing

17   the production, the discovery that they request for over a

18   year. The suggestion that there is not somehow undue burden

19   associated with that is I think simply incorrect.

20   The evidence of record is what matters to the

21   determination of this appeal, Your Honor, and though SCO

22   suggests that the Court should look beyond the evidence that

23   was presented to Magistrate Judge Wells. The deposition of

24   Mr. Frye, which they cite in their reply papers, which in any

25   event it doesn't support their contention, is beyond the scope

1   of the record. The evidence of the record at the time

2   Magistrate Judge Wells ruled indicated by Mr. Frye's sworn

3   testimony, they've had a chance to depose him for over two

4   days, that the production of these materials would impose a

5   substantial undue burden on IBM. There's not any question

6   that the IBM lawyers were involved with Mr. Frye in the

7   preparation of his declaration. He's not a lawyer. Mr. Frye

8   isn't actually doing the preparation of materials to be

9   produced. He's not doing the review, so obviously there was

10   some interchange between counsel and Mr. Frye as to the

11   contents of his declaration. And if you read SCO's excerpts

12   from that declaration as they appear in their reply brief, I

13   would suggest they don't in any way support the notion

14   suggested by SCO here today, that Mr. Frye's declaration was

15   somehow an attempt to pull a fast one.

16   Mr. Frye testified that the effort would require, as

17   is obviously the case, and common sense would suggest, a

18   production from the files of hundreds of people. If a

19   production is done right and the people are visited with and

20   they are interviewed and it is determined whether they have

21   documents and they pass them along and they are carefully

22   reviewed for privilege and for responsiveness, that is a

23   substantial exercise, and it is not one that, we respectfully

24   submit, that could be accomplished here, except by imposing

25   undue burden on IBM, and we think Magistrate Judge Wells got

1   it just right when she limited the issue we have here, the

2   discovery of question.

3   We're not talking, Your Honor, about a world in

4   which there is all the discovery or no discovery. Magistrate

5   Judge Wells in the exercise of her discretion drew a line.

6   Magistrate Judge Wells appreciated that there were enormous

7   volumes of information available publicly on Linux. She

8   understood the scope of IBM's production of Linux because we

9   made it, I think, clear. She understood that IBM had produced

10   on the order of magnitude that we're talking about here and

11   she drew lines, I think reasonably, to provide SCO with what

12   it needs without imposing on IBM undue burden.

13   Furthermore, Your Honor, contrary to what SCO

14   suggests here today, we do contend that SCO delayed for

15   bringing this motion to Magistrate Judge Wells' attention. If

16   you believe SCO, Mr. Normand reiterated it here this morning,

17   SCO has been seeking the documents at issue since the summer

18   of 2003, since the beginning of this case. Magistrate Judge

19   Wells rejected, and Mr. Normand does not dispute, Magistrate

20   Judge Wells rejected in her October 12 order the idea that

21   SCO's earlier motion to compel sought the information that is

22   at issue on this appeal.

23   What that means is, Your Honor, SCO didn't bring a

24   motion to compel the production of the materials it now says

25   are at the core of the case, without which it claims it can't

1   fairly proceed until approximately two and a half years after

2   the case began, months before the close of fact discovery, and

3   about ten days before the final deadline for the disclosure of

4   the allegedly misused materials.

5   And let me pause for just a second on that issue.

6   As Mr. Normand says today, if the materials at issue are as

7   important as they are, then how can it be, Your Honor, they

8   are not going to be used to supplement the alleged misuse of

9   material. That tells you a lot about the supposed importance

10   of these materials. They're not going to be used he says

11   today, except in perhaps in a substantial way to amend the

12   disclosures that are required to be made on December 20th as

13   to what's at issue in the case. If all Mr. Normand wishes to

14   know is something particular from IBM about the code already

15   identified as allegedly misused, there are other ways by which

16   SCO can find that information, and indeed they have propounded

17   a 30(b)(6) notice on IBM to discover information such as the

18   supposed significance of the information IBM is contributing,

19   the very thing that Mr. Normand suggests now today. They were

20   required the production of at least a million -- we don't know

21   exactly how many documents are at issue here, Your Honor, but

22   I think it's quite clear based on our experience it's going to

23   be a million pages of paper, and to require that and the

24   effort that would be involved to get it done, there are other

25   ways to get the same information, it respectfully makes no

1   sense.

2   So the motion was delayed unduly because there is

3   absolutely no reason that SCO couldn't have brought this

4   motion before. And Mr. Normand talks a lot today about SCO's

5   subjective state of mind. I don't have any idea, Your Honor,

6   what's in SCO's mind. What I can tell you is they claim they

7   propounded requests in 2003. Magistrate Judge Wells makes it

8   perfectly clear in her October 12, '05 order that no prior

9   motion to compel had requested that information. If that's

10   true, the first they requested it was September 2nd of this

11   year, effectively on the eve of the close of fact discovery.

12   That ought to tell you something how supposedly important the

13   information is and that ought to tell you something about

14   whether the motion was unduly delayed.

15   The idea that they somehow just figured this out in

16   connection with the motion briefing on IBM's motion to

17   reconsider with respect to Magistrate Judge Wells' ruling on

18   AIX is not supported by the record here as we explained to

19   Magistrate Judge Wells, Your Honor, below when this motion was

20   argued in front of her. IBM has throughout the litigation, as

21   has SCO, produced logs which disclose the identity of the

22   individuals from whom IBM has produced documents. SCO

23   propounded interrogatories early in the case asking who made

24   contributions, who were the people who were involved. They've

25   had the lists of people involved in making contributions for a

1   very long time. At the same time they've had the logs that

2   show from whose files documents were produced. One cannot

3   possibly have those two documents in hand, if they've read

4   them, and not have had it perfectly clear that IBM has not

5   done, as we have not done, a production from the files of

6   everybody in the Linux technology center who might have

7   information relating to the development of Linux.

8   Again, the contributions are publicly available and

9   to the extent they aren't, we have produced those. IBM has

10 produced a substantial volume of information relating to the

11 development of Linux. And, again, as I said, by our count our

12 production of information related to the development of Linux

13 is somewhere in the order of a million and a half pages of

14 paper.

15   As I said, Your Honor, it's not conceivable that the

16 relief they request would not -- would not result in a delay

17 in the resolution of this case, and effectively their reply

18 papers say that, and they encouraged Mr. Normand here today by

19 suggesting, despite saying that they won't, that the most that

20 might be required is an amendment to their disclosures of

21 December 20th. Well, that's a deadline, Your Honor. If

22 they're amending their disclosures on December 20th, they're

23 asking for a change in the schedule. If they're proposing

24 depositions into February and March, they're asking for a

25 change in schedules because the schedule at the moment allows

1 no discovery after January 27, '06 except as it relates to

2 defenses concerning the alleged misuse of material.

3   The last point, Your Honor, and I think it's not an

4 unimportant point, is that SCO's arguments in its reply papers

5 and some of its arguments today simply distort the record of

6 what has occurred here, and I want to run through just some of

7 those because I think in their aggregate they're not of small

8 significance, especially where Your Honor is reviewing this

9 against the record presented to Magistrate Judge Wells.

10   SCO contends at page 6 of its reply brief that IBM

11 has not argued that SCO did not diligently pursue court

12 intervention. As I said, that's wrong. Moveover, we said

13 just that at the point which they say we do not disagree at

14 page 10 of our opposition papers. SCO attacks Magistrate

15 Judge Wells' order, Your Honor, on the grounds that she failed

16 to consider the entire record here, but SCO then in its reply

17 papers seeks to take the Court beyond the record. SCO

18 contends that IBM only produced documents from 20. That is

19 not correct, we have reproduced documents related to the

20 developers of Linux. SCO contends that the criteria that IBM

21 used to select the documents that were produced in these 20

22 were, in the words of its reply at page 7, known only to IBM.

23   Your Honor, as I've indicated, SCO selected the 20

24 individuals from IBM to produce documents, not IBM. The

25 criteria is known only to SCO, not to IBM. Moreover, the

1 parameters of the search were not known only to IBM, they are

2 laid out in Magistrate Judge Wells' order at pages 3 through

3 4. Under the heading there is no good deed goes unpunished.

4 SCO contends, Your Honor, that IBM has conceded the relevance

5 of the information it seeks by offering at the last hearing,

6 by way of compromise, to search the files of an additional 20.

7 We expressly said on the record in making that offer of

8 compromise, Your Honor, that we disputed the relevance.

9 That's at page 56 of the transcript. We offered a compromise

10 to put the issue to rest, not to give rise to another motion

11 requesting additional documents.

12   SCO took the documents, and now we have another

13 motion to compel in front of Judge Wells for the rest, and we

14 have an appeal in front of Your Honor. SCO suggested to

15 Magistrate Judge Wells, Your Honor, that the documents were

16 required because they were critical for taking depositions.

17 That's at page 51 of the transcript below. IBM produced the

18 documents from the 20 and I think in record time. We've

19 provided a date for the deposition of every one of those 20

20 developers, only to have SCO take some of them but turn around

21 and cancel a substantial number of them who remain and

22 presumably never will be deposed, despite the significant

23 efforts to produce documents from a supposedly critical

24 individual.

25   It is suggested here today, Your Honor, that we

1   produce documents from the files of hundreds, and yet at the

2   same time suggested that only several additional depositions

3   are going to be required. So apparently we are going out to

4   sift through the files of hundreds of people so SCO can only

5   take the depositions of several of those individuals. At page

6   8 of its reply, SCO says that Magistrate Judge Wells expressly

7   found that the discovery at issue on this appeal was not,

8   before the Court, meaning before Magistrate Judge Wells. So

9   it follows, SCO says, that she didn't rule on SCO's request.

10   Well, Your Honor, Magistrate Judge Wells did say

11   that this discovery at issue here was not before her, but she

12   was talking about in the 2003 and the 2004 time frame. She

13   wasn't talking about not being before her on the 7th of

14   August, I think it was, when the argument occurred -- 7th of

15   September -- well, forget the date, I frankly don't recall --

16   where the argument was on this motion. SCO suggests IBM's

17   trying to have it both ways in these papers. It suggests on

18   the one hand we're saying SCO never asked this information, on

19   the other hand we're saying the information is duplicative of

20   SCO's seventh set of requests. We're not trying to have it

21   both ways.

22   We acknowledge that they say they requested this

23   information from the beginning of the case. The problem is

24   they didn't move to compel that until September 2nd of '05,

25   but what we're saying is, Your Honor, they've never moved to

1   compel that until now. That makes it too late.

2   SCO, Your Honor, says that it respects Magistrate

3   Judge Wells' order. This is at page 2 of their reply papers.

4   They say they respect Magistrate Judge Wells for the purposes

5   of this appeal. Mr. Normand said it again today as it relates

6   to her prior orders. Yet at page 4 of their reply they

7   suggest that IBM, again, hasn't complied with the orders. At

8   page 5 of their opening brief, they say that Magistrate Judge

9   Wells ruled that all Linux documents relevant to this case

10 were relevant to this case in her January order. She made it

11 perfectly clear in her order that's on appeal here that that

12 is not the case.

13   And SCO says at page 3 of its reply, that the relief

14 that it seeks here follows or flows from Magistrate Judge

15 Wells' earlier orders, again, a proposition expressly rejected

16 by Magistrate Judge Wells. Finally, Your Honor, SCO suggests

17 that it was incongruous for Magistrate Judge Wells to order

18 IBM -- to not require IBM to produce documents from all

19 developers of Linux when she required IBM to produce

20 development documents related to AIX and to Dynix.

21   Your Honor, Magistrate Judge Wells never required

22 IBM to produce all documents related to the development of AIX

23 and Dynix. She asked that IBM produce a central repository,

24 which we have done, two central repositories, which we've

25 done, and she ordered IBM to produce documents from

1   approximately 100 of the 3,000 or so developers who were

2   involved in development of AIX. That's approximately 2

3   percent of the developers.

4   We produced documents from a far greater number of

5   developers who were involved with Linux. So if congruity with

6   the rules of production for AIX is the rule, then, Your Honor,

7   we've already produced it.

8   In conclusion, Your Honor, respectfully, there is no

9   basis on this record for interfering with Magistrate Judge

10   Wells' determination. She did not act contrary to law. She

11   did not abuse her discretion and we ask Your Honor to overrule

12   the objection. Thank you.

13   THE COURT: Thank you, Mr. Marriott.

14   Mr. Normand, you get to reply. I think I have the

15   issues pretty well in mind, so you won't take too long, right?

16   MR. NORMAND: That's correct, Your Honor.

17   Standard of review at the bottom, we do think the

18   Magistrate Court made a mistake, so that is the standard of

19   review and that is what we think happened. There is no

20   indication at all in her October 12th order that she addressed

21   these issues, the kinds of issues that are relevant to a

22   motion to compel.

23   And that was one of Mr. Marriott's lead points. IBM

24   has argued that in her order the Magistrate Judge actually

25   resolved the question of whether IBM should now produce Linux