approximately 100 of the 3,000 or so developers who were involved in development of AIX. That's approximately 2 percent of the developers.

We produced documents from a far greater number of developers who were involved with Linux. So if congruity with the rules of production for AIX is the rule, then, Your Honor, we've already produced it.

In conclusion, Your Honor, respectfully, there is no basis on this record for interfering with Magistrate Judge Wells' determination. She did not act contrary to law. She did not abuse her discretion and we ask Your Honor to overrule the objection. Thank you.

THE COURT: Thank you, Mr. Marriott.

Mr. Normand, you get to reply. I think I have the issues pretty well in mind, so you won't take too long, right?

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

Standard of review at the bottom, we do think the Magistrate Court made a mistake, so that is the standard of review and that is what we think happened. There is no indication at all in her October 12th order that she addressed these issues, the kinds of issues that are relevant to a motion to compel.

And that was one of Mr. Marriott's lead points. IBM has argued that in her order the Magistrate Judge actually resolved the question of whether IBM should now produce Linux

development materials. In short, when you read the order, there is no indication that that is true. There's no discussion in that order of the relative relevance of the materials. There is no discussion in the order of any burden. There is no discussion in the order of how it might affect timing. There is no discussion in the order of how to balance the relevance against the effect on the discovery schedule about a balance of relevance against the possibility of burden. There is no indication in the order that she considered or adopted or disagreed with IBM's arguments about the burden.

Not to put too fine a point on it, Your Honor, but the plain language of the October 12th order speaks for itself and, as a practical matter, I'm sure the Magistrate Court, herself, has a view as to whether she resolved it and that may be the quickest route to resolving the issue. But from our perspective for purposes of this objection, this Court has a record of the law and on the record below which is the October 12th order, there is no indication that she considered the variety of factors that I think both of us agree -- Mr. Marriott and I would agree are relevant in our motion to compel.

But there is some suggestion that we should have immediately at the end of the hearing or in the days following a hearing when we negotiated with counsel that we should have

taken some formal step to essentially file a motion to reconsider with the Magistrate Court if she had not resolved this issue, and I didn't think we're entitled to do that and IBM's own conduct in connection with the January 2005 order shows that the parties had an option as to whether to move to reconsider or file an objection with this Court. As a practical matter, and as we have told both courts, we filed a motion to compel with the Magistrate Court roughly the same time as this objection, so it's not as if this issue is not before the Magistrate Court.

And when we were discussing the particular phrasing of the October 12th order, I did raise with counsel for IBM that we thought she had not resolved an issue and he disagreed. He said I think she did resolve the issue. Both parties took the position they're taking now, but it was not at all obvious and I don't think we're obligated to SCO at that time, in discussing the phrasing of what she had ruled during the October 7th hearing, that we were obligated to make these arguments.

Very quickly on the other points. Relevance, IBM says that they have produced these files from -- let me get the numbers right -- 80 developers. In their brief they said they had produced it from 55 developers. I don't know if the numbers are significant. The point is if IBM is willing to say now that they did produce these materials from 60 other

developers other than the 20, then how can it be that IBM argues at the same time that these materials are not relevant. Would they produce them to us, the relevant material from 60 other developers? If they produced from 80, then it must be that the 20 was just a further concession on IBM's part that these are relevant.

What was the significance of the concession? We finally got to identify the developers. We have no idea how IBM decided which of the 60 other developers among the 300 to chose from, even if they did do that. We're not conceding that they have produced from the 80. I don't think we can reach a consensus as to that number, but if they produced these materials from the files of any developers other than the 20 that we identified following the October 12th order, I think that's a concession that those materials are relevant.

With respect to the burden argument, as I said, there is no indication in the Magistrate Court's October 12th order that she considered these burden arguments. There's no affidavit in front of this Court as to burden. Those are all the first points.

I think it is just as important, Your Honor, that we raised this issue when we first got an indication from IBM that they are not going to produce these materials. The parties have fought like mad throughout 2004 over the scope of several categories of broad documents, and that was the focus

of the parties' arguments.

SCO took the view at that time that those were resolved and other discovery could be pursued. The first indication we got from IBM that they were not going to produce this material in whole was January of 2005. Since that time, we've pursued the issue. We've raised the issue before the current discovery schedule was set in place. We've sought what I think is a pretty small accommodation. We sought to amend in some part, the December 22nd submission, we don't expect it to be a very significant amendment at all, and we sought leave to take a few depositions. What we wanted to do is get the documents and examine them internally. We don't want to change discovery schedules, we don't think it's necessary, but to the extent it were necessary, I think it follows from the fact that we've been pursuing discovery for some time, and the delay in producing discovery shouldn't now preclude us from getting the materials and forcing us to run up against these discovery deadlines.

Finally, Your Honor, I know you'd like me to keep this brief on the argument about whether it's too late in the day and whether the schedule needs to be changed. IBM says that they don't know our state of mind, but in their briefs they said they did. In their briefs they said that we must not think or we must not have thought that this was relevant because we didn't pursue it. We think we did pursue it. IBM

further says this must just be delay. This is incomprehensible to us. We said to both courts at the same time, we're filing these motions, we're trying to meet the discovery deadlines. We understand that the resolution of the issue on one court will resolve the resolution of the other court. We did that for efficiency. We did that because we saw we were running up against the discovery deadline, and when IBM attributes to us a state of mind of trying to delay, when they on the other hand concede that they've already produced these materials as relevant from 80 developers and 60 whom we didn't even identify, that's an incongruous argument. We're not seeking to delay and it's true that IBM doesn't know our state of mind, and to the extent they say they did, they were incorrect about it.

Last point, Your Honor, on cancelation of these depositions, the purpose of discovery is, I think everyone could agree, fact discovery. Document discovery is to help determine whom to depose. We never said to the Magistrate Court or IBM that we will depose all of these 20 developers. We asked for the files of 20 that we identified because from what we could figure from the public documents they seemed relevant. There are many nonpublic documents that IBM concedes exist. Indeed their production from the 20 developers are labeled confidential. They're not materials that other -- that the Linux community has seen. They're not

materials we could have gotten. They're from these developers' sandboxes. They're confidential materials. Those are not public documents.

And to the extent we reviewed those nonpublic documents and decided that we couldn't afford to depose many of the deponents, I think that's a proper use of discovery and both parties have had this issue of where they're running right up to the deadline of depositions deciding whether they can take them at that time or a later time and canceled them. IBM has canceled on the eve of two 30(b)(6) depositions. I think that's not improper. I think it's to be expected. I think our review of the files from the 20 developers was appropriate discovery. Thank you, Your Honor.

THE COURT: Thank you, Mr. Normand. Thank you all. I'll take this objection under advisement and get a ruling out shortly. Thank you very much. Court will be in recess.

(The matter was concluded.)

C E R T I F I C A T E

STATE OF UTAH

COUNTY OF UTAH

I, Mindi Powers, Registered Professional Reporter for the State of Utah, do hereby certify that the foregoing transcript of proceedings was taken before me at the time and place set forth herein and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

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

IN WITNESS WHEREOF, I have hereunto set my name this 5th day of January, 2006

Mindi Powers

Mindi Powers, RPR