

COPY

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

THE SCO GROUP, INC.,

Plaintiff,

vs.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

Case 2:03-CV-294

BEFORE THE HONORABLE DALE A. KIMBALL

APRIL 21, 2005

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

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

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1 SALT LAKE CITY, UTAH, THURSDAY, APRIL 21, 2005

2 * * * * *

3 THE COURT: We're here this afternoon in the matter
4 of The SCO Group vs. International Business Machines
5 Corporation, 2:03-CV-294. For plaintiff, Mr. Brent Hatch and
6 Mr. Sean Eskovitz and Mr. Edward Normand; correct?

7 MR. NORMAND: Correct, Your Honor.

8 THE COURT: For defendant, Mr. David Marriott and
9 Mr. Todd Shaughnessy.

10 MR. MARRIOTT: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 All right. We have SCO's motion to compel IBM to
13 produce Mr. Palmisano for deposition; SCO's motion for leave
14 to file a third amended complaint, which might touch on the
15 question of defendant wanting or not wanting to narrow the
16 Ninth Counterclaim; and proposed scheduling orders from
17 everyone.

18 Now, the first and third of those motions clearly
19 have no confidentiality problems. The second one, the motion
20 for leave to file a third amended complaint, there might be
21 some alleged confidential information there, but you can argue
22 it in a way that doesn't refer directly to it. You can refer
23 to it in exhibits and so on. So I'm sure for the happy
24 conclusion of the spectators, the courtroom will not be
25 sealed.

1 All right. Let's take up the motion to compel.
2 Who's going to argue that?

3 MR. ESKOVITZ: I will, Your Honor.

4 THE COURT: And you are?

5 MR. ESKOVITZ: I'm Sean Eskovitz.

6 THE COURT: You are Mr. Eskovitz.

7 MR. ESKOVITZ: And, Your Honor, in connection with
8 both of the motions that will be argued this afternoon, we
9 submitted to the Court two separate binders of exhibits that
10 will come up during the argument.

11 THE COURT: And you've given them to opposing
12 counsel, no doubt?

13 MR. ESKOVITZ: We have.

14 THE COURT: Thank you.

15 MR. ESKOVITZ: Your Honor, SCO seeks to depose
16 Sam Palmisano because before he became IBM's chairman and CEO,
17 he personally spearheaded IBM's multi-billion dollar strategic
18 decision to shift the focus of its operating system business
19 from Unix to Linux, and that strategy is at the center of
20 SCO's claims in this case. Specifically, SCO alleges that in
21 order to carry out his strategy of quickly upgrading Linux
22 into an operating system that could compete with Unix, SCO's
23 product for business users, IBM took the shortcut of
24 misappropriating SCO's intellectual property in Unix and
25 contributing Unix' enterprise strength features into Linux.

1 Now, Mr. Palmisano spearheaded that IBM Linux
2 strategy when he was the vice-president in charge of IBM's
3 computer server group in late 1999 and early 2000, years
4 before he was installed as the company's CEO and chairman.
5 But IBM has attempted to shield Mr. Paul Palmisano from
6 deposition based on his current positions.

7 They've refused to produce Mr. Palmisano on two
8 grounds. First, they've argued that he has no knowledge
9 regarding any specific issues that are relevant to this
10 lawsuit; and they've also argued in the alternative that any
11 knowledge he has can be obtained by deposing other individuals
12 within IBM. And those objections are wrong as a matter of
13 fact and as a matter of law. And as I'll detail in this
14 argument, Mr. Palmisano clearly has knowledge regarding
15 specific relevant issues about IBM Linux strategy and with
16 respect to the legal position that IBM has taken. They
17 incorrectly base their refusal to produce Mr. Palmisano on an
18 inapposite body of case law that merely stands for the
19 proposition that in garden variety lawsuits where a party
20 should not be permitted to harass or interfere with the other
21 party's operations simply by attempting to take the deposition
22 of the highest executive of the company, who may have nothing
23 to contribute with respect to the matters at issue in the
24 lawsuit. And that doctrine has no application here.

25 Mr. Palmisano, as we'll detail, made key senior

1 policy decisions regarding Linux and had direct responsibility
2 for IBM Linux-related activities that are at issue in this
3 case, all while he was vice-president at IBM before he took
4 over his current responsibilities.

5 THE COURT: If I let you depose him, how long do
6 you want to take?

7 MR. ESKOVITZ: That was exactly my next point, Your
8 Honor, which is we would comply with the Court's restrictions.
9 It would be a seven-hour deposition one day. The deposition
10 could be done with a maximum of convenience. Our offices are
11 actually in Armonk, New York, which IBM is headquartered and
12 Mr. Palmisano has his office. He literally needs to cross the
13 street or we'll cross the street to depose him. And we can
14 schedule his deposition with him with advance notice to
15 accommodate his schedule. So it really is a minimum burden.

16 THE COURT: You're just happy neighbors there; is
17 that right?

18 MR. ESKOVITZ: That's right, Your Honor. It's a
19 small town. We all get along.

20 I forgot to mention, under all the applicable case
21 law, Mr. Palmisano's personal knowledge of IBM's intent and
22 motive with respect to the Linux strategy requires that he
23 give deposition testimony. As an initial matter, it is well
24 settled that -- and this is documented in Exhibit A that was
25 submitted to the Court in connection with this motion.

1 THE COURT: You don't trust our water here?

2 MR. ESKOVITZ: I don't want to spill it, Your
3 Honor. I'm prone to that.

4 THE COURT: Go ahead. I'm sorry.

5 MR. ESKOVITZ: It well goes without saying that an
6 order barring litigants to take a deposition is an
7 extraordinary form of relief. And the parties seeking such an
8 order under the case law that we cited in Exhibit A
9 establishes that the parties seeking to quash a deposition
10 notice bears the burden of showing that the proposed deponent
11 has nothing to contribute.

12 And that is particularly true with respect to the
13 case law cited in Exhibit B, when the deposition that is
14 sought relates to the issues of a company's motivation and
15 intent with respect to implementing a relevant corporate plan
16 or strategy. The courts recognize that when it comes to the
17 matter of corporate motivation, the high-level executive who
18 proved the strategy or implemented the strategy is the person
19 with the most probative information to give on a deposition.

20 And constructive on that point is the Travelers
21 Rental vs. Ford Motor Company case, which we cited in our case
22 and also in Exhibit B. And the Court recognizes in that case,
23 District of Massachusetts case, that:

24 Those with greater authority may have
25 the last word on why, in this case the Ford

1 Company, formulated and/or administered the
2 plan in the manner in which the lower level
3 executives describe it as being formulated
4 and/or administered. And as the ultimate
5 authority, their views as to why may be of
6 far greater probative value on the issues of
7 intent and motive than the views of the lower
8 level executives.

9 IBM has told us that they have hundreds of
10 individuals working on their Linux strategy. And we have, in
11 fact, deposed some of those. But those individuals are not in
12 a position to tell us why Mr. Palmisano approved the strategy
13 that he approved. And that is unique knowledge that
14 Mr. Palmisano has that no lower level executive is going to be
15 able to give us in a deposition. And it is precisely the
16 situation where courts permit high-ranking executives to be
17 deposed. And certainly, as a matter of law, high-ranking
18 corporate executives are not immune from deposition.

19 It's precisely -- this is precisely the kind of
20 case in which such depositions are appropriate because, as I
21 said, first, Mr. Palmisano was personally involved in
22 formulating and approving the Linux strategy; and, second,
23 that strategy is relevant to numerous issues in this case.
24 And I'll take those two points in turn.

25 First, there can really be no dispute that while he

1 was an IBM vice-president Mr. Palmisano was personally
2 involved in and indeed spearheaded IBM's strategy to embrace
3 Linux and guided IBM's Linux-related efforts.

4 In Exhibit C that we've handed up to the Court,
5 there's a *New York Times* article from March 2000 that featured
6 Mr. Palmisano explaining his role in connection with what it
7 described as IBM's ambitious Linux strategy. The article
8 describes Mr. Palmisano as the leader of that ambitious
9 strategy, the IBM senior executive who pushed both
10 emphatically for the Linux initiative. It quotes
11 Mr. Palmisano's hand-picked Czar from the technology side of
12 the Linux operation as referring to IBM's Linux strategy as
13 Sam's bet. And the article quotes Mr. Palmisano --

14 THE COURT: Sam's bet?

15 MR. ESKOVITZ: Sam's bet. It was Mr. Palmisano's
16 bet on Linux on behalf of IBM.

17 And the article quotes Mr. Palmisano as describing
18 that Linux strategy, and this is important to the King Czar
19 case, as driving the Linux momentum at the front because, in
20 his view, moving quickly was imperative for IBM.

21 And as I explained, and I'll get into more, the
22 fact that IBM's motive here was to upgrade Linux as quickly as
23 it possibly could in order to begin to recoup the billions of
24 dollars that they invested into that strategy, it's critical
25 to proof of our contract claim as well as defenses to the

1 copyright claims in this case and for other independent
2 reasons.

3 At Exhibits D and E of the book that Your Honor has
4 are IBM's own descriptions of Mr. Palmisano's contributions.
5 And they credit him in Exhibit D with leading IBM's adoption
6 of the Linux operating environment; and in Exhibit E, as
7 spearheading when he was head of IBM's server and enterprise
8 storage businesses, a major initiative to embrace Linux across
9 IBM's server line.

10 And, indeed, shortly after IBM adopted
11 Mr. Palmisano's Linux strategy in January of 2000,
12 Mr. Palmisano, this is in Exhibit F, publicly announced that
13 IBM would take the lead in the industry by making IBM
14 technologies available to the Linux and open source
15 communities.

16 And as I alluded to earlier, we have taken the
17 deposition of other IBM executives with respect to the Linux
18 strategy, and particularly Mr. Wladawsky-Berger, who I
19 described earlier and the *New York Times* described as IBM's
20 technical Linux Czar. And Mr. Wladawsky-Berger testified in
21 his deposition, and these are excerpted in Exhibit F, that he
22 reported and made his recommendations directly to
23 Mr. Palmisano; that Mr. Palmisano made the decision that IBM
24 should embrace Linux; and that Mr. Palmisano believed that
25 IBM's Linux strategy was a high priority, important effort for