IBM.

So I don't think there's really much dispute here that Mr. Palmisano was directly involved and, as the *New York Times* described, spearheaded, and as IBM itself describes, spearheaded the strategy. So the question is, what relevance does the strategy have to SCO's claims?

And as I alluded to earlier, there are several independent bases on which the strategy is relevant. The first one I described already, which is that the corporate motive and intent of IBM in throwing its weight and billions of dollars that have been publicly reported behind Linux is the reason why IBM took the shortcuts that SCO claims it did and misappropriated SCO's code in order to upgrade Linux as quickly as it could to make it enterprise-hardened, is the word that has been described in the industry, to make it a viable competitor with Unix as quickly as possible. To turn it from a hobbyist's interest into something that -- operating system that would appeal to sophisticated businesses.

Second, and maybe even more directly, SCO has tort claims including a claim for unfair competition in its complaint, and it's in Exhibit G. We cite some case law for the Court, these are in the our briefs, as well, that it is an element of SCO's unfair competition claim to show IBM's bad faith or IBM's corporate intent, its motive. And that's obviously also relevant to SCO's claim for punitive claims

under its tort claims.

With respect to the unfair competition claim, SCO specifically alleges that IBM has engaged in a course of conduct that is intentionally and foreseeably calculated to undermine and/or destroy the economic value of Unix and to seize the value of Unix for its own benefit and for the benefit of its Linux distribution partners. Obviously, the evidence that Mr. Palmisano can give as to why IBM and why he on behalf of IBM proof of Linux strategy is evidence that goes to IBM's intent with respect to the tort claims of punitive damages claims.

And finally and independently with respect to damages, the evidence of IBM's corporate intent or motive is relevant to the benefit that IBM receives by being able to shortcut the development process and being able to rely on misappropriated Unix code in developing Linux.

It bears noting in connection with the relevance point that Mr. Palmisano's Linux documents have already been the subject of two separate court orders from Judge Wells compelling their production. And those orders recognize the relevance of the high-level documents and Linux -- and IBM's Linux strategy to the claims in this case.

Specifically in March 2003, the Court ordered IBM to produce all the documents and materials generated by and in the possession of employees that have been and that are

currently involved in the Linux project. And the Judge specifically provided that IBM was to produce materials and documents relating to IBM's Linux strategy from Mr. Palmisano and other high-level executives. However, among other deficiencies in IBM's production, they have not produced a single e-mail or other correspondence discussing Linux from Mr. Palmisano's files.

We renewed our motion to compel. Counsel for IBM represented to the Court that it would look again for relevant documents, even though it had already been ordered to do so in March of 2003, and Judge Wells ordered IBM to produce affidavits from the high-level executives concerning the efforts with respect to document production. After that order, IBM produced additional documents from Mr. Wladawsky-Berger file, but still has not produced any correspondence or e-mails relating to Linux from Mr. Palmisano's own files. They did not produce any explanation as to why they have not produced any of those documents. And in response to the Court's order, they simply produced a very source affidavit from Mr. Palmisano that says he gave his lawyers unrestricted access to his files. But again, no explanation as to why these e-mails had not been produced.

So to date, despite these two prior court orders on this issue, IBM has not provided any explanation for this

shortcoming in its document production from Mr. Palmisano. Mr. Wladawsky-Berger, and the Court has the testimony, testified that he communicated by e-mail to Mr. Palmisano. And in Exhibit H that the Court has, IBM produced at least one such document, but not from Mr. Palmisano's file. So we have at least an indication, a confirmation of Mr. Wassenberger's testimony from IBM's production that, in fact, Mr. Palmisano communicated about the Linux strategy in writing --

THE COURT: You mean Exhibit I?

MR. ESKOVITZ: I believe I'm going to get to Exhibit I -- I'm sorry. You're right. Sorry, Your Honor. Exhibit I is the IBM-produced document. And Exhibit J is another e-mail that we found on the Internet from Mr. Palmisano relating to the Linux strategy. Neither of these documents were produced from IBM's -- from Mr. Palmisano's files. We still have not received from Mr. Palmisano's files any such Linux-related correspondence.

We have a third motion to compel such documents, which are currently pending before the Court. But what's important for these purposes is that for the very same reasons that the Court has seen fit to order IBM now twice to produce these Linux documents, because it's the same reason why Mr. Palmisano's testimony is relevant to this case, he was a key decisionmaker. And frankly, Your Honor, given the difficulty that we've had getting documents and getting

straight answers about why these shortcomings persist with respect to the production, we should be permitted to explore the adequacy of Mr. Palmisano's document production, as well.

As I alluded to earlier, IBM's argument essentially relies on an inapposite body of case law in which parties resisting high-level depositions establish that the potential deponent either had no personal knowledge of the events at issue frequently in the cases of discrimination cases or unfair termination cases where there were no corporate strategies that were at issue, or at least identify the particular witnesses who could provide the testimony that was being offered. For example, where a plaintiff is looking for financial information, and the defendant says, you can get that from our accountants or from our CFO. You don't need the CEO for this.

Again, Mr. Palmisano is the only person who can explain his reasons, his motives for adopting the policy that he adopted. And unlike many of the cases in which IBM relies on, they have not provided any affidavits from Mr. Palmisano disclaiming relevant knowledge, and they haven't identified who these witnesses would be. They've said there's hundreds of people who are involved with the Linux strategy.

And finally, I should note that IBM had served notice on SCO for our CEO. We intend to produce him. And I don't see any real reason for, you know, IBM's CEO being

treated any differently.

So Mr. Palmisano is an important witness in the case. He's got relevant testimony to give. The case law establishes that that relevant testimony requires him to sit for a deposition. There's no basis for IBM certainly to resist that deposition, and they certainly haven't met their burden of showing good cause that Mr. Palmisano has nothing to contribute. Thank you.

THE COURT: Thank you, Mr. Eskovitz.

Mr. Marriott?

MR. MARRIOTT: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. MARRIOTT: As much as we disagree with SCO with respect to their claims, Your Honor, we recognize that IBM must provide, and, indeed, we have provided, some measure of discovery with respect to their claims. We have, in fact, provided substantial discovery. IBM has produced millions of pages of paper. It's produced hundreds of millions of lines of source code. And it's made available for deposition very high-level executives, including the head of IBM software business, Steve Mills; Irving Wladawsky-Berger, the person SCO describes to people as IBM's Linux Czar; and the head of IBM's Linux technology center, Dan Frye.

Now, we recognize that a person is not protected from deposition merely by virtue of being a CEO or chairman of

a Fortune 100 Company. But the circumstances in this case, we respectfully submit, are such that it does not make sense that Mr. Palmisano be deposed, certainly not at this juncture of the case. In our judgment, a CEO of a Fortune 100 Company like Mr. Palmisano should not be deposed, except where the information they haven't provided is directly relevant in a case, where they have in this case as described, has unique personal knowledge and the information sought is not available from others, such as the other 300,000-plus persons who are employed at IBM.

THE COURT: SCO says unlike the unusual cases where the CEO is protected from deposition, here this particular CEO had some direct involvement with the set of problems that form the basis of this case.

MR. MARRIOTT: Well, Your Honor, I appreciate that's the contention that SCO makes. It's SCO's formulation, however, that there is virtually no circumstance under which a CEO would not be subject to deposition because under the SCO view of the world, any person, any CEO who has any personal knowledge of those things over which that person is in charge. And there's no question, and I'll come to it momentarily, Mr. Palmisano has some knowledge with respect to Linux. We all, indeed, now have some knowledge with respect to Linux. But there's nothing that is unique, Your Honor, about Mr. Palmisano's knowledge with respect to Linux.

Whether or not Mr. Palmisano should be deposed is, of course, a matter committed to Your Honor's discretion. And I would like just in a few minutes offer two reasons why we believe the Court should exercise its discretion not now to require Mr. Palmisano's deposition. First, Your Honor, is that there is persuasive authority, notwithstanding Mr. Eskovitz' contention of the contrary that the deposition of an apex employee, that is, the CEO or chairman of a company like IBM, should not be deposed except where that person has unique personal knowledge.

THE COURT: I do know what apex means.

MR. MARRIOTT: Pardon?

THE COURT: I know what apex means.

MR. MARRIOTT: I wasn't doubting you did, Your Honor.

In the words of the Baine case, which we cite at Pages 6 and 8 of our brief, quote, the legal authority is fairly unequivocal, close quote, on this point. Moore's Federal Practice says, Your Honor, federal courts, quote:

> Often are reluctant to permit apex depositions of the highest level corporate officers or managers or who are unlikely to have personal knowledge of the facts sought by the opposing party, close quotes.

And in the Cardenas case, which we cite on Pages 3

and 4 of our brief, the courts says, the courts, quote:

> Frequently restrict efforts to depose senior executives where the party seeking a deposition can obtain the same information with less intrusive means or where the party has not established the executive has some unique knowledge pertinent to the issues in the case.

And, Your Honor, SCO has made a number of arguments to suggest that that is not a unique personal knowledge, the controlling standard. In fact, in its papers at Page 8 in its opening brief, SCO suggests that it is well-settled that a company's CEO is subject to deposition where his knowledge is, quote, even arguably relevant, close quote.

And that simply is not the test. None of the cases cited by SCO suggest that is the test. Indeed, some of the cases cited by SCO, such as the Six West case, which is cited on Page 9 of its brief, makes it quite clear that a unique set of personal knowledge is what the test is.

SCO suggests in Footnote 3 and Mr. Eskovitz said again here this afternoon that the doctrine of limiting these depositions to those persons who have unique personal knowledge is somehow inapplicable in cases of this kind. And it applies to cases that Mr. Eskovitz describes as garden variety cases, Your Honor.

In SCO's brief, it says the doctrine is limited to

personal injury, employment, and contract cases. This is, Your Honor, in an important respect a contract case. And the only case on which SCO relies for the proposition that the doctrine set out, for example, in the Cardenas case is somehow limited to cases of this kind is the Bridgestone/Firestone case. In Bridgestone/Firestone, the Court there observed nothing other than that a rigid rule is applicable in cases -- in cases of whether apex depositions should be taken. In that case, Your Honor, the Bridgestone/Firestone case, the Court allowed deposition to proceed, but only after substantial discovery, most depositions had been completed, and only after the plaintiff filed a list of specific questions about which -- subjects about which it would question the witnesses in court, in where we would submit there is a greater showing of knowledge, of unique knowledge on the part of the CEO.

THE COURT: Greater than here, you mean?

MR. MARRIOTT: Greater than here, Your Honor.

SCO suggests that IBM bear a heavy burden, which is rarely ever met, to avoid deposition of this content. The cases cited by the parties, Your Honor, as I understand, regarding this were a little more than the proposition that the party seeking a particular form of relief bears the burden to establish a basis for that relief. Parties seeking to compel a deposition bears the burden to establish a basis for compelling a deposition. Parties seeking a protective order