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

\_\_\_\_\_  
THE SCO GROUP,

Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES  
CORPORATION,

Defendant/Counterclaim-Plaintiff  
\_\_\_\_\_

COPY

Case 2:03-CV-294

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 Sovereign case, in which  
2 Sovereign 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.

1 MR. NORMAND: Thank you, Your Honor.

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

4 THE COURT: Mr. Shaughnessy?

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

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

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

23 We have, Your Honor, undertaken a reasonable search  
24 for documents. We have produced all of the documents that we  
25 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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STATE OF UTAH )  
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COUNTY OF SALT LAKE )

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

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

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

And hereby set my hand and seal, this \_\_\_\_ day of February 2006

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