IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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| THE SCO GROUP, INC., a Delaware corporation,<br><br>Plaintiff,<br><br>vs.<br><br>INTERNATIONAL BUSINESS MACHINES CORPORATION,<br><br>Defendant. | Case 2:03-CV-294 |

BEFORE THE HONORABLE DALE A. KIMBALL

JUNE 8, 2004

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

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

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SALT LAKE CITY, UTAH, TUESDAY, JUNE 8, 2004

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THE COURT: We're here this morning in the matter of the SCO Group vs. International Business Machines Corporation, 2:03-CV-294. For plaintiff, Mr. Brent Hatch, Mr. Robert Silver, and Mr. Frederick Frei. Is that correct?

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

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

MR. FREI: That's correct.

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

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

THE COURT: We have plaintiffs' motions to bifurcate and to amend the scheduling order.

Who's going to argue those?

MR. HATCH: Your Honor, Mr. Frei is going to address the bifurcation issue, and I'll address the scheduling issue, if that's okay with you.

THE COURT: Go ahead, Mr. Frei.

MR. FREI: Thank you, Your Honor.

Your Honor, we filed a motion to sever the three patent counterclaims from the remainder of the lawsuit seeking to have those claims at a separate discovery schedule and separate trials. It is my understanding of IBM's position from their briefing that they do not seriously contest that

the claims are severable and that severance is not something that should not be considered in this case. Their sole position, really, was there's no need to decide the motion now. Wait until you know about the case. Most, if not all of the patent claims will be decided on summary judgment, as well as the rest of the case on summary judgment, and, therefore, no need to do anything now.

And what I'd like to do is discuss what these patent claims are and how they've already been impacted by being part of this case and why they need to be separated for all of the reasons set forth in the rule.

These claims are not compulsory counterclaims. They're separate and distinct. They involve three separate patents, 40 separate patent claims. They cover three different kinds of methods, three different kinds of hardware, machinery, apparatus, computer equipment, and they cover at least, according to IBM, four SCO products that are alleged to infringe.

Seven inventors are responsible for these three patents. The patent filings were made from 1983 forward to 1996. These patents have nothing to do with each other, much less the rest of the case.

The first patent, very complicated, mathematical type of patent dealing with data compression. A form of Lempel and Ziv. These are both Ph.D. mathematician type of

people. 18 claims, two inventors in that case. That patent issued in 19- -- late 1980.

THE COURT: I can hardly wait to read it.

MR. FREI: Pardon me?

THE COURT: I can hardly wait to read it.

MR. FREI: I felt the same way. My background is chemical engineering, and this stuff is pretty heavy-duty, electrical engineering and advanced computer science.

The next patent deals with self-verifying receipt and acceptance system for electronically delivered data objects. Filed in 1988, 10 claims, two inventors, two products are alleged to infringe.

Third patent is a method for monitoring and recovery of subsystems in a distributed/clustered systems, filed in '96. 12 claims, three inventors.

Now, it's very complex technology. Each of these patents is going to involve separate lines of inquiry from each other, different proofs from each other and different lines of inquiry and proofs from the remainder of the case, which is mostly licensing, copyright and contract.

THE COURT: It sounds like you're making an argument to separate the patent claims from each other.

MR. FREI: I am not making that argument now. All I can say is that in many, many cases, that ultimately happens, not only separating patent claims from each other,

but within a patent the federal circuit has said that the preferred way of trying these cases is to trifurcate. Validity, damages, infringement, done in separate trials. But we're not getting to that. We're just saying, take us away from the rest of this case.

THE COURT: Appellate courts are often fond of saying things that don't work very well in the actual, real trial world, are they not? Instead of 14 trials, have 20 trials.

MR. FREI: They have good intentions.

THE COURT: Yes.

MR. FREI: But these counterclaims were first filed August 6. The counterclaims were amended late September. They were amended again the end of March when originally there were four patents and it was reduced, IBM dropped three -- or dropped it down to three patents.

Discovery is barely beginning on the patent side of the case. There was a stay of discovery in the entire case for three months from early December to early March. We served document requests. IBM responded a month ago. We've not yet gotten documents. IBM served document requests. Our responses to those requests are due next week. There have been no patent depositions taken yet. And yet, IBM says this whole case can be handled to the completion of fact discovery by August 6 of this year. Patents and the rest of the case.

That is unconscionable. It's not possible.

We have estimated based on our experience that the trial of a patent claims could take up to five weeks of actual trial time. We have estimated that it could take 60, 70 depositions. Most of the reason for that is --

THE COURT: Why would the patent aspects of this case take five weeks to try?

MR. FREI: Because we have -- validity is a separate line of inquiry with all sorts of third parties where we have to dig out the prior art, put those witnesses on the stand either live or through depositions. We have upwards of 40 claims that may be at issue. We don't know how many IBM is ultimately going to choose.

We have at least four products, separate and distinct products. And we have raised many defenses, I mean, the key which are unique to patent cases: Validity; noninfringement; doctrine of equivalence; enforceability, due to what we say is inequitable conduct in prosecuting the patents; latches, estoppel; and waiver, to name a few of the defenses. And I would --

THE COURT: I'm no fan of cumulative or duplicative testimony, just so you all know that.

MR. FREI: Right. But these are separate patents, separate inventors, separate documents, separate witnesses. Everything about these patents is separate. Normally, you

might have three separate patent infringement suits, and here we have one, and it's just one of 14 counterclaims that's been asserted.

THE COURT: But often once the claims are construed, the focus narrows and some of the issues are resolved; right?

MR. FREI: That is correct. Issues of infringement would be resolved on -- some issues of infringement can be resolved on claim interpretation, at least literal infringement. Doctrine of equivalence is very seldom affected by Markman rulings. Validity is not really affected, and forceability is not really affected, and our other defenses are not affected. But Markman rulings can sometimes result in cases being narrowed, and hopefully that could happen in this case.

As far as IBM's statement that most, if not all, of the patent claims can be disposed of on summary judgment, I don't know where that comes from. But obviousness, doctrine of equivalence, and enforceability, which is the heart of our cases are seldom, seldom disposed of on summary judgment. Infringement sometimes. 102, novelty or lack of novelty issues can sometimes be disposed of. But whether a claimed invention was obvious to one of ordinary skill in the art is replete with factual issues.

We believe there are numerous benefits to severing

this case now and giving us our own discovery schedule. Right now, we have been impacted by the discovery schedule in this case. There are 40 depositions per side. We would somehow have to fit what we think might be 70 patent depositions into that 40 with the rest of the case. There were 25 interrogatories per side.

THE COURT: You're describing a law firm's billing dream, aren't you?

MR. FREI: This case has been a very intensive case.

THE COURT: I'm sure it has.

MR. FREI: As evidenced by the number of people in the room. That's not our doing. We didn't add these counterclaims into the case.

But we have three interrogatories left for the entire case. We would -- if we want to get more we would either have to stipulate with IBM or file a motion with the Court.

The case needs to proceed at its own pace. The last three patent case that I tried was two and a half years from filing of the complaint to filing of the case -- or to trial in the case. That was in the District of Delaware, which is pretty current on their dockets, has a lot of experience in patent cases.

THE COURT: Besides arguing the motion to

bifurcate, it sounds like you're slipping over periodically in the motion to amend the scheduling orders.

MR. FREI: I'll try to pull myself back from that, Your Honor.

But it looks like IBM filed the patent counterclaims to have a spillover affect in the rest of case as far as the jury deliberations are concerned. They have said clearly in their brief, and I quote:

> SCO claims to respect the intellectual property rights of others. It has infringed and is infringing on a number of IBM's copyrights and patents.

Just the risk of prejudice to the jury that if they think we infringed IBM's patents that somehow our claim doesn't have merit, the rest of our claim doesn't have merit, just that risk of confusion is enough to sever the case. The confusion that would arise from the three separate claims, the patent laws, all those issues, and then copyright infringement, and the contract claims, it would be very difficult for the jury to keep everything straight. The trial could conceivably be twice as long. The deliberations would be -- there's really no word to describe what the deliberations would be with all of these complex issues of software, copyright infringement and patent infringement.

So we believe to avoid prejudice --

THE COURT: But let's assume for a minute that I don't sever. The total trial time wouldn't be any different, would it?

MR. FREI: It would be very different because we have different documents, different witnesses, different issues. We're saying that given whatever the trial time --

THE COURT: If you sever, you're saying we have one five-week trial and then another one later. If we don't sever, then we have a 10-week trial for everything.

MR. FREI: Right. The ten-week trial --

THE COURT: Then the total trial time wouldn't be any different.

MR. FREI: Correct. The total trial time, it's unlikely it would be any different. But the jury confusion would be minimized. The jury could focus on one area of the law, patent law and those issues, and the confusion would be minimized. The jury fatigue from sitting through possibly a 10-week trial and then having to deliberate on 36 claims and counterclaims and defenses would be obviated.

THE COURT: What else do you want to tell me about the severance motion?

MR. FREI: We believe that we cannot proceed on the patent case within the scope of this case and that we should have our own separate case where we can agree on separate schedules, have a separate Markman hearing and proceed at its

own pace without prejudicing any of the parties.

THE COURT: Thank you, Mr. Frei.

Who's going to argue this motion for defendant?

MR. MARRIOTT: Dan Marriott, Your Honor.

THE COURT: Mr. Marriott, go ahead.

MR. MARRIOTT: Good morning, Your Honor.

THE COURT: Good morning.

MR. MARRIOTT: There is I think no question that the Court has the power to separate out the patent claims from the other claims in the case, if it wishes. And as we lay out in our brief, it may, in fact, ultimately make sense for the Court to do that. It seems to us, however, Your Honor, that there is no reason for the Court to make that determination now at a point in the case when it is not clear which, if any, of the claims will be tried. And for that reason, simply, Your Honor, we respectfully request that the Court defer this decision until that point in time when it's more clear which, if any, issues will be tried.

The principal argument assumingly raised at least this morning with respect to why the schedule -- why the patent claim should be separated out is that there is a massive amount apparently of discovery to be taken with respect to the patent claims. And I respectfully disagree with that, Your Honor. These are patent claims. There's no question there is some level of complexity there, but no more

so with respect to any patent case. We're the plaintiff. We have the burden to show the infringement.

It is my estimation as I stand here in court today that we can conduct our fact discovery with respect to those patents somewhere in the neighborhood of five depositions. I have little doubt that SCO Group has the view it would require more depositions than that. There are seven inventors, as he indicated, and I imagine they would want to take the depositions of those inventors.

But it is difficult to imagine why it would be the case that 60 to 70 depositions would be required, and I would respectfully request that, in fact, very few depositions will ultimately be taken.

For that reason, Your Honor, because there's no reason to decide the case now, we ask the Court to deny the request to bifurcate. Thank you.

THE COURT: Deny it without prejudice to renew it.

MR. MARRIOTT: Yes, Your Honor.

THE COURT: Okay.

Mr. Frei? Excuse me. Go ahead.

MR. FREI: May I have one more minute?

THE COURT: Yes. This is your motion. You get to reply.

MR. FREI: Thank you.

Your Honor, if this was the type of case where the

counterclaims were somehow related or of the same genus as the main claims and there was a, like, for example, a racial discrimination, a retaliatory termination claim, things that were related, rising out of the same conduct that were at least less complex, this type of thing, I would say it would make sense to defer the decision to sever, because it's clear that summary judgment could reduce and maybe even eliminate a need for a trial on a large chunk of the case.

But when you know upfront that the claims are totally different, will involve different witnesses, et cetera, then I think that it doesn't make any sense, and you don't gain anything by delaying the decision.

They say they don't know why we would need to take 60 to 70 depositions. Well, they have a presumption of validity. They can go into court, and all they have to do is put on a case of infringement, and that's it. We have to prove that patent is invalid by clear and convincing evidence. And we have to go out and get that evidence from third parties. We have to go out and depose people in connection with our enforceability claims. We have about a 10-typewritten page of affirmative defense on unenforceability laying out all the things that they did, the things that were not disclosed that should have been disclosed in our opinion.

We have we're being sued for damages. Damages would be either loss profits or at a minimum, reasonable

royalties. So we have to take discovery on what reasonable royalties for these kinds of patents in this industry or what are the loss profits that IBM is seeking. We have to take a lot of discovery on our defenses of estoppel, waiver, and latches, which go back 10, 15 years' worth of conduct is necessary or will be looked at in connection with those defenses.

The seven inventors, the patent attorneys that prosecuted these cases and perhaps were instrumental in withholding prior art from the Patent Office, that's at least 10 witnesses there right off the bat.

So I'm not -- I'm not saying that there will as a matter of fact be 70 depositions. I'm just saying that this case could, based on what we know about it now, result in 70 depositions, simply because of the number of issues involved. And we happen to have the burden of proof on most of those issues. IBM does not.

So in summary, all the cases IBM cited on Pages 4, 5 of their brief, I think they cited six cases saying defer, two of those cases, there was no motion for -- motion to sever even pending. Two of the cases were very simple, just a claim or two, not much. Summary judgment motions were going to be filed. They could have eliminated most, if not all, of the case. And in other cases, they were bifurcating damages and liability. And the Court said, we're going to defer the

decision on bifurcating damages and liability until later on.

But this is just something totally different from the rest of the case that should be done now, and there's just no reason to delay it. There would be no benefit that I see from delaying the case right now. Thank you.

THE COURT: Thank you, Mr. Frei.

Let's take up SCO's motion to amend the scheduling order. Mr. Hatch, you're going to argue that.

MR. HATCH: Your Honor, our case should be a rather straight-forward approach. The scheduling order that was originally set in this matter, I believe with Magistrate Nuffer, was by agreement of the parties at a time where the case was very different than what it is now. Since the time that schedule was sought, this is the first time that -- a lot of extensions for briefing and things like that, but this is the first time there's ever been asked for an extension of the discovery, the full discovery period and trial date. Since that time, we've had several amendments to the complaint. There's been a lot of procedural posturing in order to get this thing in order.

THE COURT: And there have been counterclaims.

MR. HATCH: And there have been as we just heard 14 counterclaims, in and of itself caused this to be a very different case. And I think even IBM would acknowledge and I think has acknowledged that at the time we met and set the

original schedule, nobody was contemplating that this case would have 14 counterclaims and it would be merged into a large patent case, as well.

In addition to that matter, there's been, you know, as always at the beginning of the case, the complexity, when we're dealing with good attorneys and aggressive attorneys, there's been a considerable amount of jockeying that has affected the schedule. And part of that resulted in Judge Wells at one point staying discovery for a period of three months. And then at the end of that three months, giving one party 45 days to respond to some of the discovery the motion compel at the beginning of that. So that took about four and a half months out of it, as well.

So if we look at that, and it really is -- what we're asking for is not particularly extraordinary. Other cases similar to this -- it's hard to find a case that is particularly similar, but, you know, I think the judges -- the Court is very well aware of cases like Caldera vs. Microsoft. That was a large case that was handled in this district. And that case involved less money. It involved fewer claims, fewer depositions. It didn't have counterclaims. It wasn't turned into a patent lawsuit. And it still required three extensions of the trial date.

And, you know, I wasn't involved in that case. Some people on our team were. But I don't think it was those

extensions were, like here, the fault of any particular party. It was just a result of a magnitude of the issues that were before the Court. The factual issues that had to be dealt with. That case ultimately took four years before it had to be resolved. And we're not asking for anything --

THE COURT: You said four?

MR. HATCH: I think it was four years or more.

THE COURT: For a minute I thought you said 40.

MR. HATCH: No. That's my accent, I think.

And I think we're at a point now where I think even the actions of IBM themselves really I think points to the fact that this current schedule that we're under is unreasonable. Both parties in working with Magistrate Wells, I think operated under the presumption of this case would go smoother if the initial documents could be obtained and digested prior to beginning depositions in the case. And as a result, virtually no depositions have taken place.

And IBM has now apparently felt that they have sufficient documents to begin depositions discovery of the case. But given the current schedule has required of them -- and I don't fault them for this, because it's the current schedule. But they require double-tracking and double-booking on multiple days of every week until that period ends. And that doesn't even account --

THE COURT: That's the dream I was speaking of

earlier.

MR. HATCH: Yes. I think the reason the lawyers are here, Your Honor, and it may actually be a dream for clients that we finally quit doing our work. But the reality is we're humans, too, and the schedule I think becomes a little onerous physically.

Also I think as an intellectual matter, when you add to that we hold the current schedule, we need to notice up our depositions, as well, which is just as numerous as IBM, mainly third parties. We're not going to be able to control which days are most convenient for them. And we're going to find ourselves in cities all over the United States and potentially on some days triple and quadruple tracking.

Even if we can control the date, we would be virtually every day, two depositions every day somewhere in the country to here to the end of discovery. That seems unreasonable, impractical at a physical standpoint.

But I also say it really puts -- it should put both parties at a real disadvantage, because just getting the deposition done isn't the gain. Part of what we're doing is trying to assimilate what we're learning from these depositions, being able to determine what other discovery needs to be done, what needs to be asked of coming witnesses. And there needs to be some continuity in some instances where people who are taking the depositions, all of which will be

denied us if we have to keep with that type of schedule.

So given the kind of case it is and given where we are, I think it's not -- it's well within the realm of reason to be able to put this on a reasonable schedule. And we're not asking for a lot of this time. I mean, I can't promise you depending on how the depositions go, we may decide there is additional discovery, there may be additional avenues we have to pursue. We don't know that yet because we're not that far down.

But as of right now, our proposed schedule would move the trial date out only an additional five months by moving the end of discovery to essentially where the trial date is now.

Now, as part of that, we also feel that we are still working through the magistrate to get the discovery we need to even begin depositions. I understand IBM has now noticed theirs. I don't know if that's been because they're running out of time on the current schedule, and if they have noticed them whether they feel they are completely prepared for taking them. But we don't feel we are because we don't feel we've gotten all the documents that we should have gotten by now and that we have the time to assimilate the ones we have had. There are millions of documents produced by us in this case, and we've got hundreds of thousands back.

One of the things that's very interesting, and I

think IBM has tried I think to a large part to cast blame on us for what they've used seeking a delay in this trial. We've answered that in our reply brief in some detail because we believe the allegations they made are really not particularly relevant here and they're somewhat misguided in many instances just plain flat wrong and misrepresent the record.

But what we do know is that we've known since day one that this case is about source code, and it's about our allegations and contentions that IBM has moved source code that was copyrighted and owned by us under which IBM had the contractual obligations to us not to use elsewhere, and they've moved it to Linux.

This hasn't been a secret since day one, and it's not a secret to IBM, either. In at least one article, and I think this article is actually cited by Judge Wells in CRN where it's called: "Linux will be on par with Unix in no time." It says:

> IBM will exploit its expertise in AIS -- which is their group to bring Unix -- to bring Linux up to par with Unix, an IBM executive said Thursday.
>
> 'The pathway to get there is an eight-lane highway,' Mills said, noting IBM's deep experience with AIX and its 250-member open-source development team will be applied to make the Linux kernel as strong as that of Unix. 'The road to get there is well understood.'

THE COURT: Tell me what it had has to do with the scheduling order.

MR. HATCH: It's essentially the gravamen of our complaint. And one of the reasons we are where we are today is because IBM says they've been moving forward and there's no reason why we should have to go have any further extensions. But the reality is that even knowing that source code was the key issue of this case since day one, we didn't get our first deposit of source code, we don't believe it's enough, until over a year after the case was filed, in other words, March of this year. And we're still fighting for additional source code that we can use and examine so that we can --

THE COURT: So the point is you're still fighting in front of the magistrate about the things you think you need.

MR. HATCH: And we're going to continue to do that. Your Honor, one of the things -- I brought it here today because I think it's somewhat illustrative, because they say in the brief that they're, you know, giving us everything we want and what have you.

We made one simple request. Based on that article I just read to you, he indicated they had a 250 man team that was working on this. So we asked them to identify the team and identify what they did, you know, what was the project they were working on, because we've got a limited number of

depositions, and we want to make good use of them.

Now, the response to that was this response. There's the names. I think it's been represented there is as many as 7200 names there with no explanation of who they are and what they're doing. They basically gave us every employee. They don't answer directly. The discovery request asked who worked on developing source code. And they responded, these are people they say were believed to have access to code.

And so instead of getting this case -- answering the question we asked so that we can get this case moving and get it to where it needed to be, we got a lawyer's response, which was, let's dump everything on them so they can't find it and we have to continue to fight.

Now, these are the kind of fights we're fighting in front of Judge Wells, and she, in fact, has ordered them to give us a more useful list. And so far the responses, you can tell from the public record. But we'll fight that in front of Judge Wells and continue to do that. There are going to be more motions to compel.

But that's why we aren't even ready -- we don't have the information that we need to begin depositions, particularly third-party discovery which will require us to have the information we need so that we can make effective cross-examination. And that's one of the reasons that we are

asking the Court also to not allow depositions to begin at least til September until we finish this document exchange. We can do that with Judge Wells and getting it well resolved.

So the bottom line is we don't think it's unreasonable to have a five-month extension at this point in the trial date. It really isn't outrageous. It's not unreasonable. And it really in the context of the complexity of this case, I think it's a workable solution.

Now, if Your Honor hasn't ruled on the motion Mr. Frei argued, I think our position is if the patent claims stay in, that's going to really dramatically impact this. It's going to require us to have a lot more time than we're asking here. I am making this argument in the context of those claims being served out because, you know, I've tried and been involved in the patent cases in this District Court and in front of Your Honor and in front of other judges here, and those cases take on their own life. They're not five deposition cases. They're actually quite complex cases. We haven't had a Markman hearing or done anything to get that going. And that's going to require -- that's a case in its own. That's going to take a couple years. And I would ask Your Honor to take that into consideration, as well.

THE COURT: Thank you, Mr. Hatch.

MR. HATCH: Thank you.

THE COURT: Mr. Marriott or Mr. Shaughnessy?

Mr. Marriott?

MR. MARRIOTT: Mr. Marriott.

Thank you, Your Honor. At the risk of stating the obvious, this is not an ordinary case. And if it were --

THE COURT: It doesn't seem to be, does it?

MR. MARRIOTT: It doesn't. And if it were, I would like to believe that we wouldn't be here this morning over a scheduling dispute. This is, however, in our judgment an extraordinary case and not a case in which extension of discovery period should be entered for nine and a half months, a case in which the scheduling order as agreed to by the parties and entered by the Court should be adhered to.

And in the time that I have, Your Honor, if I may, I'd like to do three things, if the Court finds this helpful. First, I'd like to by way of background say something about operating systems and claims in the case, because I think without some background with respect to that, the issues presented are less crystalized. And, second, I would like to offer four reasons why it is we believe that the present schedule should hold. And I'd like to respond specifically, as my third point, Your Honor, to each of the three grounds asserted by SCO for extension in the case.

THE COURT: Go ahead.

MR. MARRIOTT: An operating system, Your Honor, is at the heart of this case. In fact, a series of operating

systems are. Without its software, a computer -- the computer sitting on the desk in front of Your Honor is essentially a useful lump of metal. With it's software with the operating system, the computer can perform a number of useful functions. There are basically two kinds of software. There is system software on the one hand which controls the operation of the computer itself; and there is application software on the other hand which allows the user to perform a particular function.

In the most fundamental kind of -- the system software is the operating system, and it's the operating system that is at issue in this case. The operating system is interfaced between user and the lump of metal on your desk. So when Your Honor, for example, writes a letter using the computer that sits in front of you, you interact with that lump of metal by the operating system. You might use a program, for example, like Microsoft Word. That's an application program that assists the operator and allows you to perform that particular function.

Now, operating systems are originally written in a programming language prepared by human beings which is known as source code. The source code consists of thousands of files, Your Honor, and millions of lines of code. And with the Court's permission, I'd like to illustrate, if I may, a source code by handing a copy of that to the Court.

This, Your Honor, is an illustration of the source code that comprises an operating system. And you'll see the numbering of lines along the left. There are in this particular file 3,070 lines of source code. An operating source code can be comprised of many millions of source codes. The computer has to translate the code into a language which is useable machine language, and it does that by a device called compiler.

There are basically three operating systems that matter in this case and about which I should say something. They are, first, the Unix System V Family X of operating systems. There, second, set of operating systems created by companies like IBM, sometimes using portions of code from the Unix family of operating systems. And there are the Linux operating system. And with the Court's permission, I'll illustrate those, if I may.

This blue stack of papers, Your Honor, is meant to represent Unix System V Family of operating systems. The red stack, while it's just blank paper, is to represent the source code and comprises the second set of operating systems those created by IBM. And the third set represents the source code that comprises the operating system known as Linux.

Now, the Unix operating system, Your Honor, was first developed in the beginning in 1969 by AT&T and Bill Lattery. AT&T licensed that software very widely to hundreds

of thousands of companies. Some of whom like IBM took source code from that family of operating systems and included it with source code that they themselves had written to include in their own operating systems.

THE COURT: At some point you're going to tell me how this relates to the scheduling order.

MR. MARRIOTT: Absolutely, Your Honor, it does. And if this is not helpful, I'm happy to skip to my four reasons.

THE COURT: Don't take too long on it.

MR. MARRIOTT: Okay. This category of code, Your Honor, is the code written by companies like IBM, Hewlett-Packard and Sun and Sequent. And this code is almost entirely written by those companies. Sometimes versions of the operating system in this category include code from the Unix V Family operating system.

Beginning in 1991, Linux Torvalds, an undergraduate student at the University of Helsinki, wrote the Linux operating -- began a product to write things what is known now as Linux operating system. That operating system was written by posting a note on the Internet saying he wished to write the operating system, and anyone who wished to participate could. And since -- in a decade or so, all that operating system now comprises of millions of lines of source code itself.

The crux of this case, and let me say a little bit about SCO's claim and I'll come to my four reasons why we believe the schedule should hold. The crux in this case as is described by SCO, Your Honor, is that IBM, at least at the outset, took source code from the Unix System V Family operating systems and contributed that source code to the Linux operating system.

After two motions to compel and two orders requiring disclosure, it's become clear, in fact, SCO has effectively conceded that it has no evidence that IBM took source code from the Unix operating system and put it into the Linux. Instead, the crux of the case, it is now clear, is that IBM according to SCO has taken its own code out of its own separate operating system and contributed that code to the Linux operating system. And that as they describe the contract case being the crux of the case is the case as they appear to see it.

Now, the parties of course have exchanged a series of claims and counterclaims. If I may provide the Court with a brief summary of those.

THE COURT: Sure. Did you give Mr. Hatch one of those?

MR. MARRIOTT: As this chart indicates, Your Honor, the SCO Group has asserted four contract claims against IBM along the lines of what I just described. IBM's counterclaim

for breach of contract. SCO has asserted a copyright claim against IBM, and we have counterclaims for declarations of noninfringement and asserted a copyright claim ourselves. And SCO has asserted a variety of business -- what it calls business torts, which essentially alleged IBM in one respect or another interfered with the operation of its business. And we have in turn asserted a series of business torts against SCO alleging in effect that the claims in this suit are as part of as we see it efforts to create fear and uncertainty in the marketplace with respect to the Linux operating system and IBM's own operating system.

The second thing I want to do, Your Honor, is essentially offer the Court four reasons why we believe the present schedule should hold. Rule 16(b) provides, of course, that scheduling orders set by the Court shall not be modified except upon a showing of good cause. And as the proponent of that delay here, SCO bears that burden.

Four reasons we don't think they can satisfy. First of those reasons, Your Honor, is that the issues presented here are important issues. And they are issues we think deserve an expeditious resolution. SCO asserts essentially that it either owns or has the right to control a very significant chunk of the world's operating system source codes. All of the Unix V Family operating source code.

SCO acknowledges that IBM owns its own home-grown

code, but contends it has the right to control that code. And SCO asserts the right to control to license, the Linux operating system developed by thousands of developers over a decade.

Those issues we think are important, and SCO itself, Your Honor, says that the issues presented by this case are, quote, the biggest issues in the computer industry in decades. And it insists that the software industry indeed, its CEO says, the future of global economy hangs in the balance.

If the issues in this case are that important, we respectfully submit that they ought to be decided on the schedule on which the parties agreed, not on a schedule that it can be delayed as proposed by nine and a half months.

The second point that I'd like to make, Your Honor, is that the delay that is proposed here we think would be prejudicial to IBM and we think contrary to the public interest. SCO says and has said publicly that it is entitled to up to $50 billion of damages from IBM. It said it is entitled to an additional $1 billion of damages every week that passes.

And in addition to that and in addition to trumpeting its claim, SCO has threatened by way of letter 1500 of the world's largest corporations, including principally IBM's customers and prospective customers. SCO said those

companies must have a license from it if they wish to use the Linux operating system. SCO is already involved, Your Honor, as you may know in four related litigations, one of which is before the Court.

THE COURT: I certainly know about that one.

MR. MARRIOTT: One of which is pending in Delaware. In that case, SCO has sought a stay of the proceedings there pending the resolution of this case. Another case pending in Nevada is a case in which a motion to stay has been filed, again pending the resolution of the issues in this case.

Issues presented in this case are issues which are not only important, but have the prospect of resolving in part, if not in their entirety, the issues raised in the other cases. So that we submit delay in this case is effectively to delay legal peace. Those who are the recipients of SCO's letters threatening suit including importantly IBM customers.

I would think, Your Honor, as plaintiffs in the case, as the plaintiff seeking billions of dollars in damages, SCO would wish an expeditious resolution in the case.

The third point which I would like to make is that from our perspective, SCO has not proceeded diligently in conducting the litigation. And diligence is the key inquiry in determining whether or not good cause is established. SCO has publicly stated from the beginning of this litigation, Your Honor, that it has mountains, in its words, of evidence

of IBM's alleged misconduct. SCO's CEO has spoken of truckloads of evidence it has of IBM's wrongdoing and even described that evidence as representing in comparison to an iceberg. In fact, the CEO has said the company had enough evidence to go to Court when it brought the case.

From the beginning of the suit, we've undertaken to figure out precisely what it is is alleged that we have done in violation of SCO's rights and to see the evidence that is described as representing mountains of evidence. And from our perspective, Your Honor, from the beginning, we have met resistance.

At the outset, the centerpiece of this case in the complaint was misappropriation of trade secrets. We asked SCO, what trade secrets have we allegedly misappropriated and put into the Links system? Again, after two motions to compel and two orders requiring the production of that information, SCO effectively concedes it hasn't misappropriated any trade secrets and dropped the claim.

From the beginning of the suit SCO asserted that we had infringed SCO's copyrights related to the Unix System V Family operating system. And SCO doesn't own the copyrights for the IBM operating system and the copyrights with respect to Linux are owned by those thousands of individuals and corporations which have made contributions to Linux. But it asserts that IBM has infringed its copyrights.

We moved for the declaration -- we filed a claim, Your Honor, for declaration of noninfringement. SCO moved to dismiss the claim and/or stay it pending the resolution of the suit it's brought in Nevada assuming a similar claim against Auto Zone, the auto parts company. In the 15 months of this litigation, SCO has not noticed a single deposition of IBM. Instead, again from our perspective, SCO is undertaking, if anything, to delay IBM's ability to take depositions.

As recently as Friday of last week, Your Honor, SCO cited a protective order with respect to a handful of depositions that we noticed asserting the contract that allegedly governs the relationship between IBM and SCO. The contract at issue was appended to the original complaint filed by the SCO Group. The depositions were of those individuals who negotiated and/or signed the agreements. Those individuals were identified in their interrogatory answers to us as individuals who had knowledge of the case. And yet, those depositions were allegedly needed to be deferred because there were not enough lawyers to handle it.

I'm told this morning, Your Honor, in addition to counsel seated here there are three lawyers in North Carolina on behalf of SCO handling that deposition which was represented to me to be deferred.

Even today, Your Honor, SCO has still not identified in more than a year in litigation a single line,

not a single line of the Unix System V Code, this is not Unix System V Code, a single line of the code from this family operating system which we're alleged to somewhat misappropriate.

The fourth reason, Your Honor, why we believe the current schedule should hold is that if it affords the parties as we agreed to it to more than two years of time in which to litigate these claim, that is ample time, we believe, even in a complex case. A significant amount of discovery has, in fact, occurred. We have essentially completed our document production in the case including the patent documents, which were referenced previously. Patent documents were produced yesterday, Your Honor. It amounts to something less than 15 boxes of documents.

SCO has propounding in this litigation 144 document requests. We've produced more than 3.8 million pages of paper in response to those requests. Your Honor, in the parties' agreement and the Court's order, SCO has the right to propound 25 interrogatories. It's propounded 22, and we have responded to those.

To be sure, there is additional discovery that needs to be done in this case. We do not dispute that. We believe, however, with as many law firms and lawyers as there are in this case and as important as the issues apparently are if the case, we ought to be able to resolve that in the two

months that remain. By our count, 14 lawyers have filed notices of appearance on behalf of SCO. If that's right, Your Honor, and I believe that it is, there is no reason why we ought not to be able to complete the depositions on the schedule.

It is hypothesized in the SCO brief in the reply that in order to properly conduct discovery in the case, the deposition discovery will take something in the order of a year. SCO's proposal of nine and a half months, and Mr. Hatch seems hold to open prospects of seeking a future delay, if I may provide the Court with an additional exhibit --

THE COURT: Okay.

MR. MARRIOTT: Now, again, by our count, there are 14 lawyers who have filed notices of appearances, Your Honor. Assuming there's just 10, on the current schedule, and you'll see that reflected on the second column on the right, with 10 lawyers participating in the depositions, that's four depositions per month per lawyer. And if they was to double team the depositions and have two lawyers do them so that you have five lawyers handling them, five teams of lawyers handling the depositions, it's eight depositions per month.

By contrast, Your Honor, if you look at the SCO proposal of a fact discovery extension of nine and a half months, with 14 lawyers having filed notices of appearances that's .5 depositions a month. And even if you look at five

lawyers or teams of lawyers handling depositions over the proposed schedule, it's 1.4 depositions a month.

Those, Your Honor, are in sum the four reasons why we believe the present schedule should hold. Now, in an effort to extend the proposed schedule, SCO essentially makes three arguments. And the first of those arguments is that an extension of the fact discovery period is required because Magistrate Judge Wells entered a stay during the three-month period.

Magistrate Judge Wells entered a stay for certain, Your Honor. The stay was for three months to have SCO provide the discovery which IBM requested. And it would not we think make sense to allow SCO to obtain an additional extension of the case based upon what we view as its failure to provide discovery in the first instance.

SCO suggests that the Court enter the order in the case because both parties required more discovery. And I would respectfully submit that if you look at Judge Wells' order, your Honor, that simply isn't what she said. She ordered that IBM need not provide any discovery until SCO provided basic information about this case. At no point did she order IBM to provide discovery before SCO was to provide discovery. And in any event, we did not sit idly by in the three months of that stay and do nothing.

SCO has propounded in all 163 discovery requests.

We spent those three months interviewing people concerning the documents they might have responses to the requests, reviewing them for privilege and responsiveness and preparing them for production. And the day after, the day after the Court lifted the stay, we produced hundreds of millions of lines of source code, Your Honor, six or so weeks before the Court required us to produce that information.

The second argument on which SCO relies on here is an extension here is necessary because IBM filed counterclaims in the case. There's no question that IBM filed counterclaims in the case, Your Honor. But IBM's counterclaims cannot not have been anticipated in this litigation, especially in view of the nature of the claims asserted by SCO.

Moreover, as counsel I believe acknowledges, the majority of those counterclaims were filed in August of last year, allowing one year of discovery on those counterclaims. Importantly, most of the counterclaims, Judge, asserted by IBM are merely responsive to the claims asserted by SCO.

And if Your Honor will take a look at the first chart I handed --

THE COURT: They agreed on the discovery schedule before the counterclaims, wasn't it?

MR. MARRIOTT: Absolutely true, Your Honor. But it was also absolutely true that at least I contemplated, and it's hard for me to believe that the counsel for other side

did not contemplate, that there would be counterclaims asserted in the case. There is no question in this case it was before

THE COURT: Go ahead.

MR. MARRIOTT: The counterclaim on which SCO focuses as the principal reason why he illustrates the counterclaims have somehow expanded the scope of the case is the IBM counterclaim seeking a declaration of noninfringement with respect to IBM's Linux activities. The issues raised by that counterclaim have been in this litigation from effectively the beginning. They were part of IBM's original counterclaims. They're part of IBM counterclaim for unfair competition.

THE COURT: Would you contend that that was a compulsory counterclaim?

MR. MARRIOTT: I would not contend that that is a compulsory counterclaim.

The issues in that claim, Your Honor, have not only been in the case from the beginning, but we have, as the Court may know, recently moved for summary judgment with respect to that claim. And we obviously can't predict what the Court will do with respect to that motion, but we don't believe that is a claim which should extend in any significant way the scope of this case.

The third argument that SCO makes, Your Honor, is

that it is entitled to an extension of the schedule because of IBM's delays in responding to SCO's discovery requests. IBM has provided SCO with a discovery to which it's entitled as soon as it can be produced and in some cases, as I indicated, well before the Court imposed deadline. To date, SCO has served 163 discovery requests, 144 document requests, 22 interrogatories. Of those 163 discovery requests, SCO has moved to compel only with respect to six of them, Your Honor, and only in basically what amounts to three different areas.

And as we read Judge Wells' order, Judge Wells did not require IBM to do in response to that motion to compel anything that IBM basically had said that it would do. The notion that IBM has dragged out discovery so as to create a significant reason for additional delay in the schedule for discovery is I think, Your Honor, simply mistaken..

SCO's real complaint alluded to by Mr. Hatch appears to be that IBM hasn't produced enough source code. IBM has produced hundreds of millions of lines of source code. That source code is from its own AIX and Dynix products. It has produced all of the source code for all of the AIX and Dynix releases during the relevant period of time. SCO now says, and this is the subject of its earlier motion to compel, it now says, we need more. We need hundreds of millions of additional lines of source code. And they made that submission and recent request to Judge Wells.

Respectfully, Your Honor, Judge Wells denied SCO's motion for that discovery first time around and said simply, ask me later in the case. And to read SCO's reply brief is to come away from the impression that Judge Wells has established a procedure for SCO getting the additional information which contemplates necessarily the extension of the fact discovery schedule. And I respectfully submit that that's not in any case what happened with respect to that discovery. We will respond to SCO's essential motion for reconsideration with respect to that discovery, and Judge Wells will do what Judge Wells elects to do. But that motion is, I would respectfully submit, in no way a basis for an extension for this schedule.

And just to conclude, Your Honor, one final -- almost to conclude, one illustration of why it is that discovery does not matter in this case. As I indicated, and you understand why I hope I felt background was important, in the middle of the section of the source code, there is not just IBM operating system, which is known as AIX, and the operating system company called Sequent, which was later acquired by IBM called Dinux. There are may other companies, hp, Hewlett-Packard, Sun.

In the last hearing in front of Magistrate Judge Wells -- this is SCO's chart -- in the last hearing in front of Magistrate Judge Wells, SCO presented this exhibit. And

this exhibit is apparently designed to show that SCO owns the Unix operating system. It has its name on it. That's code developed by AT&T, and SCO purports to own. And SCO says IBM has a contract with AT&T, hp does, and Sun does. hp and Sun, according to SCO, fully complied with its discovery obligations. IBM and Sequent, which again was acquired by IBM, have not. And you'll see that illustrated here. This chart is supposed to show that IBM and Sequent have improperly made contributions of code to the Linux operating system, where as hp and Sun has not.

So, SCO says, SCO needs millions and millions of additional source code from IBM to have any idea whether they should take depositions and whether or not there is some evidence that IBM engaged in misconduct. SCO has acknowledged publicly that neither hp or Sun in any way breached their agreements with SCO or with AT&T without having a single line of source code.

We have produced hundreds of millions of source code from this category. That's not enough. They need hundreds of millions of lines more. They have no source code from hp and have had no difficulty publicly representing that hp doesn't in any way infringe their contract. That would be necessary, and we will make our presentation to Judge Wells in that respect. But it should not, we respectfully submit, influence the decision here to extend the schedule.

Finally, SCO does not separately raise the grounds for the extension of the schedule several points. But one I think that stands out is that Mr. Hatch's reference to the 7200 names of people identified by IBM. SCO propounded an interrogatory. The interrogatory said, who had access to IBM AIX, and who has access to Dinux. We answered their question. The question called for an answer of 7200 names. Those names are not, as their reply suggests, a list of witnesses. Those individuals are I suspect totally irrelevant to the case. We provided it not to bury information, but to answer a question which was asked and we believe properly responded to.

To conclude, Your Honor, we believe the schedule should hold. We don't believe they can establish a good cause. If this were a question of needing an additional month to tie up loose ends in discovery, that would not be something that we would have a disagreement about. And I believe we have stated that in our opposition papers.

This is not what is proposed. What is proposed is instead a nine and a half month extension for the fact discovery period when they contend with every week passes, they're entitled to additional billions of dollars of damages.

Respectfully, Your Honor, we request that the motion to amend the schedule would be denied.

THE COURT: Thank you, Mr. Marriott.

Mr. Hatch?

MR. HATCH: My first reaction is we probably just need an extension to respond.

THE COURT: You mean to respond to his argument?

MR. HATCH: What?

THE COURT: You need the extension to respond to his argument?

MR. HATCH: No. I think it would take about nine months to correct all the statements.

Your Honor, it is really quite amazing because Mr. Marriott sits here and tells you, we're doing everything we should, and we're expediting this thing, and there is no reason not to. And we'll talk about a couple of things, if you allow me.

But the most amazing thing to me is he talks about the source code and you hear that's the case. He wants to tell you what, we think some of it is not relevant. And we, IBM, get to make that determination.

There were plenty of orders, there are plenty of people, experts and other people who can do what they need to with the code, and they're not given the opportunity. And what we're doing is playing big firm games. He mentioned this Fraser deposition. And you see very active writing on our side during Mr. Marriott's argument involving most of the motion. This Mr. Fraser deposition, we had a hearing in front of Judge Wells yesterday. We indicated that we do not have

what we need from them. IBM is withholding information for us. We're not prepared to go forward, and they ought not to do that. And on top of that, we had a hearing today, as well.

Now, do we have enough physical bodies that we can throw at this? Yes. But the fundamental question isn't, do we have physical bodies, and can we do 40 people a month over the next six weeks? The question is, are we getting the information from IBM? As Mr. Marriott sits here and tells you there appears to burden himself. Do you know what happened this morning, Your Honor? The first thing they pulled out at the deposition and they faxed it to us is a declaration of Mr. Fraser. And you know what they're doing in the deposition today? Because apparently Mr. Fraser has a hard time recollecting things himself. This is document prepared by Cravath, Swaine & Moore with some input from Mr. Fraser. And they're reading paragraphs of this to him and saying, isn't that true? Well, yeah, that's true.

It's not a real deposition. This is the one that they had to have. There was an emergency. They had to have it right now and couldn't put it off, and apparently that we had all the information for.

Guess what? They never turned this over to us. Very interesting to me that we turned to the signature page, a document they prepared, March 28th, 2004. And they sat and told Judge Wells, they're prepared. They've got everything.

Let's go forward. You're just delaying, SCO.

Where is this? Where is the fairness? This is games. He just sat there and told you after I read to you, Your Honor, what the discovery request was on the 7200 names, he sat and just told you that we just said who had access to it. Because remember that's how they entered it, and that's how they justified playing big law firm games and giving us 7200 names instead of something relevant that we can use in the case. What did we ask? I read that. We want persons who worked on developing the source code or derivative work, and give the exact and precise contributions that they made.

My guess is that if we had the time in the next four or five years to figure out who these 7200 people are, we're going to have secretaries, we're going to have janitors, we're going to have the donut boy. But, you know, this is not an inexperienced law firm. They know what we are asking for. If they want this case to move forward, quit playing games. They give us relevant information so we can know who to write to take their deposition of.

You recall I read the article. You asked me, what does this have relevance to? It may not have, but it certainly has relevance to what he was talking about. What did it say in the press article? He said there were 250 on the team that were working on it. And they were taking Unix and using that as an opportunity to build Linux faster than it

could be built if people independently built it. I didn't get 250 names. I'd like to know who they are. I got 7200 names.

And this is very interesting, because what he's essentially saying, is, we've got these three separate piles. What is really going on is they're hiding, and they're taking Unix. They're building AIX, and they're stuffing them in throughout the pile. And they're saying, guess what. You identify for us first what the problem is, because we're not going to tell you where it is.

And, Your Honor, this is just games. We didn't even got the first source code until this case was over a year old. That's not the conduct of a party who wants to expedite things, who wants us to have a fair chance to prosecute our claims. And he totally misrepresents to even claims themselves.

We've gone through this with Judge Wells several times. He used something that we used previously. And if you don't mind, if I can give you a copy of this.

THE COURT: Sure.

MR. HATCH: It's demonstrative. We've used it in the past.

Do you need a copy?

MR. MARRIOTT: Yes.

MR. HATCH: This is from the original software licensing agreement, software agreement with AT&T Technology,

our predecessor. And as you can see, it's talking at the page further into the document, it gives IBM the right to use our product for its own internal business purposes. It says:

Such right to use includes the right to modify the product, and Mr. Marriott spoke about, and to prepare derivative works based on software product.

So they can modify. And they can do derivative works.

Provided, and this is the part they ignore, the resulting materials are treated hereunder as part of the original software product.

And if we go down, it says:

Licensee agrees that it shall hold all parts, not just some of them, but all parts of the software products, which now includes anything they derive based on them, subject to this agreement for who? For AT&T, which is now SCO.

And it says:

Except for as provided elsewhere in this agreement, they won't transfer and expose software product, which is now defined as including their additional work, in whole or in part.

Well, that's why we want to know. We want to know, and they're trying to deny us, which of these blue envelopes are in here. They won't give it to us. They only until

recently gave us one later version. We don't have the initial version of it.

Everybody here has got to admit here that the case in the very beginning clearly is going to require them to turn over some AIX code and some Dinux code. I don't think anybody can stand in front of you and make a credible argument that we were going to get zero. And that was irrelevant discovery. And yet, over a year into this case, that's what we have is zero.

We've now got one version, and Mister -- IBM wants to say, well, we don't want you to be able to sort this out. We want you to have to prove your case first before we're going to let you sort this out and know what's there. And we're going to determine what's relevant, not you.

Well, that's not typically how discovery goes, and that's why we're having this fight in front of Judge Wells.

I have a little problem with how they even couch what the stay was for. The stay they say was because of us. And the reason they say that is because initially we were told, produce what you have first. Do the best you can without having this source code so we know kind of the types of thing that you're talking about.

Now, we disagreed with that. We felt that both parties ought to be going at the same time, and there really isn't any hardship for them turning this stuff over. But,

Judge Wells said -- essentially, she didn't say approximately or how to either of us. She said, look, you say, IBM, you've got to have SCO go first. SCO, you say you have to have IBM go first. I don't know. But I'm going to make a call. It's right in the order. It's as plain as day. It doesn't say what they say, you're the plaintiff. I'm going to make you go first.

That's all it was. And as soon as we'd gone, what did she say? She said in her order, we, SCO, had made a good faith compliance with their order. And then she ordered IBM to start turning things over. In other words, it's their turn. But they still want to limit what their turn is.

So we find ourselves in a position where -- and it's not -- as I look at it today, probably not, shouldn't be unexpected in the sense that they're putting up a vigorous defense. I can't fault them for that. But what I can fault them for is coming here today and saying, we're ready to go and we've done everything to expedite this, when until just a month or two ago we had zero versions of the source code. They hadn't even produced that.

Still today, they haven't even identified the 250 people in this group that was contributing our Unix into Linux. And they were doing it for their profit. Until today we don't get an affidavit for a deposition that's going forth today that they've been holding onto for three months. This

is -- and for somebody who wants to expedite things, they chose to throw into case for whatever tactical reason 14 counterclaims that considerably hamper the case and make it more complex. Those are not the actions of people who want to expedite a matter.

Their chart about, you know, 1400 and 2.9 depositions a month. The reality there is 40 depositions a month. How many of those lawyers we can put on that and are capable of doing that, would have the knowledge of the case, were able to take them, able to take meaningful depositions is some number significantly less than that. But the reality is that I don't think they can point to a single case in this district or any other that unless there was some extraordinary reason that any judge was going to make anybody do 40-plus depositions in a month. It's just -- even though you could take the physical bodies and maybe get the plane rides and get all over the country how that, it just isn't practically possible to be able to take those depositions, be able to prepare the next one, and be able to gather the information in a consistent manner, to allow them to adequately prepare their case and fairly meet the demands of the legal issues of the case. That certainly hasn't been the case in any case in this district that I'm aware of.

Just yesterday we got -- he's talking about they produced patent documents. We're ready to go toward. Five

depositions, and we can do it in just the next six weeks, seven weeks, until the discovery cutoff. We got the 15 boxes of patent documents yesterday. And 15 boxes may not be a lot to Mr. Marriott, but that's a lot to me. And that's got to be a lot to digest. And my guess is by the end of that seven weeks, we wouldn't have digested the seven boxes, let alone to take the depositions based on those. And we haven't even had a Markman hearing yet.

THE COURT: Anything else, Mr. Hatch?

MR. HATCH: Your Honor, I'm just checking real quick. There are about 50 minutes I got here in the course of Mr. Marriott's presentation, and I want to make sure -- I won't hit every single one of them, but I think I made the main points.

I think in conclusion what I probably ought to say is there is no question of the hotly contested piece of litigation. I think you've got excellent lawyers on both sides. I have nothing but the highest regard for Mr. Marriott and Mr. Shaughnessy. In my mind, they are lawyers of absolutely the first rate, and I hope they feel the same about us. And I think both sites are going to contest this thing as well fought-out lawyers should and will.

This is not an insignificant case. The issues deserve a fair and thorough treatment. And it really isn't the kind of case where a schedule of the type that's being

produced here should be shoved down anyone's throat. This is a matter that requires some thought, some consideration. And when we are -- when you think about it, and someone made this point to me and I think it's a good one. What we're asking for is nine months extension on the discovery table, but only five months on the trial. When you consider it took in excess of nine months to get us the first set of code, we still don't agree enough, and that again wasn't considered unreasonable, it's hard to put in the same picture that nine months now is an unreasonable time period when the key element of the case were only partially prepared in that same group of time.

So I would ask, Your Honor, our proposal is I think a reasonable one. We tried to be reasonable. Mr. Marriott is exactly right. I did leave open the possibility if we continue to have discovery problems what we may be back in front of you or Judge Wells again. But I think for now a reasonable schedule would be that deposition discovery not continue until we have resolved the core of the document claims and let Judge Wells be the arbiter of that. And we propose at least for now September. Discovery cutoff at the end of May of next year and the trial to follow thereafter.

THE COURT: Thank you.

MR. HATCH: Thank you, Your Honor.

THE COURT: You look like you want to say something else. If you say something else, I've got to let him say

something else.

MR. MARRIOTT: Okay.

THE COURT: Go ahead. 30 seconds.

MR. MARRIOTT: Thank you, Your Honor.

THE COURT: And you'll get 30 seconds, Mr. Hatch

MR. MARRIOTT: Mr. Hatch makes reference of needing a bunch of code to figure out what's in the stack. This is public information, Your Honor. It's available on the Internet. They don't need anything from us to figure that out.

He complains about not receiving the declaration of David Fraser. Until that declaration was used at his deposition this morning, it was our work product. They have sat for six-plus months on a variety of affidavits which are disclosed by them publicly. We specifically asked for them and never got them. They never asked for that affidavit, and they didn't get it because until it was used it was work product.

Mr. Hatch makes reference to 7200 names. The question -- the argument to which he refers to is a very different question asked. The article was about individuals who had made contributions to Linux. Their interrogatory was who had access. Very different things.

Mr. Hatch complains about receiving 15 boxes of documents, yet asked for hundreds of millions of lines of

source code, which is equivalent of about 4-plus million pages of documents.

Thank you, your Honor.

THE COURT: Thank you.

Mr. Hatch?

MR. HATCH: I think both points are wrong, as you can guess. The parts that we're asking for here is a considerable amount of this is what they did is not public. And we will find it out. I think it would take another hour here to find it out.

I don't know why he argues about the interrogatory. It doesn't say access. It says those who worked on it. We want those people, because what we are asking for is using Unix as a basis to build that. So I think, you know, there's no doubt we have -- we're going to quibble about absolutely everything. We probably will to the day the jury comes in. But the reality is, if nothing more that shows you this isn't a case that is going to be tried on a fast schedule, because, you know, if we're going to have to be fighting about everything and disagreeing, we're going to have to do that. Magistrate Wells is going to hate our guts, but we're going to be there. And I think that speaks further to the fact that this needs to be put on a more reasonable schedule.

THE COURT: Thank you. I'll get a ruling out on these motions shortly. I know that there's some interest in

getting these motions resolved fairly quickly. I'll take them under advisement and get a ruling out in a few days.

Thank you very much. Court is in recess.

(Whereupon, the court proceedings were concluded.)

* * * * *

STATE OF UTAH )

) ss.

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 June 8, 2004, 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 56 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 9th day of June 2004.

Kelly Brown Hicken

KELLY BROWN HICKEN, CSR, RPR, RMR