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

SCO GROUP, et al.,)	
)	
Plaintiffs,)	
)	
-vs-)	2:03-CV-139 K
)	
NOVELL, INC.,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE DALE A. KIMBALL
DATE: MAY 25, 2005
REPORTER'S TRANSCRIPT OF PROCEEDINGS
ARGUMENT ON MOTION

Reporter: REBECCA JANKE, CSR, RMR

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A P P E A R A N C E S

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1 MAY 25, 2005

SALT LAKE CITY, UTAH

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P R O C E E D I N G S

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THE COURT: We're here this afternoon in the
5 matter of the SCO Group, Inc., vs. Novell, Inc.,
6 2:04-CV-139. Plaintiff is represented by Mr. Brent Hatch,
7 Mr. Sean Eskovitz, Mr. Ed Normand, correct?

8

MR. HATCH: Correct, Your Honor.

9

THE COURT: Defendant by Mr. Michael Jacobs,
10 Mr. Thomas Karrenberg and Mr. John Mullen.

11

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

12

THE COURT: This is defendants' motion to dismiss
13 the Amended Complaint, correct?

14

MR. KARRENBERG: Correct.

15

MR. HATCH: Yes, Your Honor.

16

MR. KARRENBERG: Mr. Jacobs will handle the
17 presentation, Your Honor.

18

THE COURT: Mr. Jacobs.

19

Who's going to argue for the plaintiff?

20

MR. HATCH: Mr. Normand will, Your Honor.

21

THE COURT: Mr. Normand.

22

Go ahead, Mr. Jacobs. There was some talk in one
23 of the briefs about treating this as a motion for summary
24 judgment?

25

MR. JACOBS: Yes, Your Honor.

1 THE COURT: That seems premature to me. I'm not
2 inclined to do that. I guess somebody could try to talk me
3 into it briefly.

4 MR. JACOBS: I'll try briefly, Your Honor. They
5 submitted documents outside of the record, of the
6 Complaint. The rules are clear. The Tenth Circuit has
7 been very strong on this, that if you go outside the record
8 and you submit additional evidence, you risk conversion of
9 the motion into summary judgment. But it is your call,
10 Your Honor. I think you have a lot of discretion in this
11 area and, given your initial inclination, I think I'll
12 argue this as if it's a motion to dismiss.

13 THE COURT: Why don't you do that. Take a minute
14 at the end and try to persuade me otherwise.

15 MR. JACOBS: First, Your Honor, I want to note
16 the overlap of the issue in this case with the SCO v. IBM
17 case that you are handling. I believe Your Honor will
18 recall that there is a -- that the same copyright ownership
19 issue that underlies the slander-of-title claim here is at
20 issue in SCO v. IBM, and, in the IBM case, IBM moved for
21 summary judgment. In your order of February 9, you noted
22 that that issue was out, and I just wanted to make sure we
23 keep you informed of the crossovers here.

24 THE COURT: I do know something about that.

25 MR. JACOBS: Yes. You noted in your order, first

1 of all that SCO had made a -- that there was a plethora of
2 public statements concerning IBM's and others' infringement
3 of SCO's purported copyrights to the UNIX software. And
4 then you observed that SCO, in its briefing, chose to
5 cavalierly ignore IBM's claims that SCO could not create a
6 disputed fact regarding whether it even owned the relevant
7 copyrights. And this is since we filed the motion to
8 dismiss. There was a motion for summary judgment on
9 ownership, and SCO could not create a disputed issue of
10 fact on ownership.

11 Looking at our motion, Your Honor, it seems to
12 me, just stepping back from the briefing, there are two
13 things that leap out. One is that, in trying to argue that
14 they have well-pleaded the issue of malice, SCO has shifted
15 gears in their theory of ownership.

16 On the original motion to dismiss, they were
17 arguing the Asset Purchase Agreement plus Amendment Number
18 2. And you parsed the language of those carefully in your
19 original order and gave us your views on what they meant.
20 And what Your Honor said about the Asset Purchase Agreement
21 was that it was undisputed that it, standing alone, didn't
22 transfer copyright ownership.

23 In arguing that their Complaint is well-pleaded,
24 what SCO has done, notwithstanding that reading of the
25 underlying documents that they attached to their Complaint,

1 what they have done is gone back and said that the Asset
2 Purchase Agreement transferred copyright ownership, and
3 that's why their Complaint is well-pleaded, that's why they
4 can show malice.

5 That they have had to do this I think tells us
6 that there are problems with the pleading in their
7 Complaint. The basic issue on the motion to dismiss side
8 of this, I think, is this: If the Asset Purchase Agreement
9 indisputably didn't transfer ownership, and if they
10 can't -- and if they are still arguing that it did, does it
11 suffice, for the purposes of an allegation of malice,
12 merely to say "malice" and attach other malice-like words
13 to it?

14 That can't be the standard on a motion to dismiss
15 when there is a record like the record you have before you
16 on this motion. It's a well-pleaded Complaint that we look
17 at, and we construe only reasonable inferences in their
18 favor. And if what they have to do to argue to you that we
19 acted maliciously in asserting that -- we, Novell, acted
20 maliciously in asserting that we believe we owned the
21 copyrights, is point to an agreement that you have already
22 construed and said it's undisputed that it doesn't transfer
23 copyright ownership, then I don't see how they overcome
24 their pleading burden.

25 I call it a pleading burden, but I think really

1 what we are saying is, if you look at this Complaint, the
2 allegations are controverted by the very documents that
3 they attach to their Complaint, and that doesn't pass
4 pleading muster.

5 So, the first point, the first title of the point
6 was, they have gone back and they are now looking at the
7 Asset Purchase Agreement and saying that, on a stand-alone
8 basis, transferred copyright ownership. They say Amendment
9 Number 2 was merely confirmatory. The documents don't
10 support that. To argue it, to base your allegations on it,
11 is to make allegations that are controverted by the
12 underlying documents.

13 The second point that leaps out is this: In our
14 opening memorandum on this motion, we pointed out that part
15 of the back-and-forth between the parties was a letter from
16 Novell to SCO in which Novell says, "The fact that you came
17 to us and asked us to transfer the copyrights to you, and
18 we refused, tells us that we own the copyrights."

19 We flagged that in several places in our opening
20 brief. SCO's opposition doesn't even treat that issue.
21 They don't mention this once, and so our basic -- at a very
22 simple intuitive level, our argument to you is this: How
23 can it be that if they came to us and asked us to transfer
24 to them the copyrights, they can now turn around and say
25 it's malicious for us to claim that we own the copyrights?

1 The two don't go together, and, once again, what
2 we're saying is, this allegation of malice is controverted
3 by the underlying record, the record that's within the four
4 corners of the Complaint. You don't need to go outside the
5 Complaint. The letter is a letter they averted to. It's
6 properly in the record on the motion to dismiss.

7 So we have two gut-level instincts or two
8 gut-level points to make on this motion to dismiss. One.
9 If we have a meritorious argument on ownership, then just
10 saying malice can't controvert the basis for that, where
11 the basis for that appears in the four corners on the
12 Complaint. And, number 2, taking that a step further,
13 where the four corners of the Complaint show that they came
14 to Novell and asked Novell to transfer copyright ownership
15 to SCO, it can't be malicious for Novell to say, having not
16 transferred copyright ownership in response to that
17 request, it can't be malicious for Novell to say, "We own
18 the copyrights."

19 And no amount of argument about the standard on a
20 motion to dismiss will overcome that basic controversion of
21 their essential theory. That's the core of the argument on
22 the motion to dismiss. We went off and did some exegesis
23 on conditional privileges, on the proper standard on
24 malice, but I don't think you need to reach a lot of those
25 issues in order to decide the motion. I'm happy to

1 entertain questions and try and pars where the law is on
2 the motion to dismiss.

3 I think that's -- just maybe one note on it. I
4 think the basic issue between the parties is whether the
5 restatement applies, and if the restatement applies, then
6 the conditional privileges apply and then we have this
7 argument from structure and logic that the standard on
8 malice has to be higher to overcome the conditional
9 privileges because, as Your Honor noted in the original
10 order, knowing falsehood is an element of a claim of
11 slander of title. So to say knowing falsehood is a sort of
12 recursive problem here. If it's just knowing falsehood is
13 sufficient to overcome the conditional privileges, then we
14 haven't done anything to a defendant to protect the
15 interests that the conditional privileges protect if we
16 just leave the standard at knowing falsehood.

17 One reason to think of this as a motion for
18 summary judgment is you then don't have to worry about our
19 successive motion to dismiss issue, which they briefed --
20 the parties briefed well. I would note a couple of things,
21 though, on the successive motion to dismiss issue. One is
22 that in response to your -- to your earlier order's mandate
23 that they clarify their pleading of special damages, their
24 clarified pleading highlighted the availability to us of a
25 conditional privilege because their point on pleading

1 special damages was that the -- that Novell's assertion of
2 ownership caused people that they were communicating with
3 not to take licenses.

4 And our point is, on a conditional privilege,
5 that is exactly right. These are interested parties in the
6 issue of ownership. We properly communicated with them.
7 We didn't overly communicate with them. We are, therefore,
8 eligible for the conditional privilege, and we cite their
9 additional pleading of special damages. I think one reason
10 to treat this as a motion for summary judgment, Your Honor,
11 is, I believe the following is true. This is not a
12 slander-of-title case. It is, at best, a declaratory
13 judgment of copyright ownership.

14 That's what they should have pled originally.
15 That's what they certainly should have pled in response not
16 only to our original motion but to your order. Your order
17 should have said to SCO -- if I were in SCO's shoes, and I
18 get an order, which the order says, "Novell has some
19 persuasive arguments here," how then do I turn around and
20 just refile allegations of malice? How do I satisfy my
21 Rule 11 obligations to just say malice, when the Court's
22 order; well reasoned, articulate, detailed, says persuasive
23 arguments?

24 And that's the basic problem here. However you
25 kill this claim, whether on a motion to dismiss or a motion

1 for summary judgment, this is not a slander-of-title case,
2 and SCO must have some strategic reason for trying to treat
3 it as a slander-of-title case. I think they want the
4 community out there to believe that they have a slam dunk
5 on copyright ownership and so if they plead it as a
6 declaratory judgment of copyright ownership, they must feel
7 they are going to be conceding what we all know to be true,
8 which is that there is a real horse race here of who owns
9 these copyrights.

10 And I don't think any of us are really going to
11 know, really going to know in a positive sense, until you
12 rule on the ultimate question of who owns the copyrights.
13 Again, though --

14 THE COURT: You say I can grant the motion to
15 dismiss without even reaching that question, right?

16 MR. JACOBS: That's exactly right. You can grant
17 the motion to dismiss the slander-of-title claim, and our
18 argument to you is you should do it with prejudice because
19 they have had several chances to plead it right. What it
20 really is -- and to use this courtroom for some outside
21 strategic purpose is not something that should be
22 countenanced.

23 It's a declaratory judgment of copyright
24 ownership at best. They didn't plead it that way. The
25 slander-of-title claim should be dismissed. Maybe it

1 should be dismissed on both theories. They converted it to
2 a summary judgment. They haven't created a disputed issue
3 of fact, but if we didn't convert it to a summary judgment,
4 looking within the four corners of the Complaint, their
5 allegations of malice are controverted within those four
6 corners. Thank you.

7 THE COURT: Thank you, Mr. Jacobs.

8 Mr. Normand.

9 MR. NORMAND: Good afternoon, Your Honor. My
10 name is Ted Normand. I represent the SCO group. I'm going
11 to be alluding to some slides in binders that I will be
12 giving to opposing counsel.

13 THE COURT: All right. Thank you.

14 MR. NORMAND: Your Honor, this is Novell's second
15 motion to dismiss challenging SCO's claim for slander of
16 title. In its first motion, Novell argued that SCO had not
17 adequately pleaded the falsity or special damage elements
18 of its claim. The Court ruled on that motion in June, 2004
19 and held that SCO had adequately pleaded the falsity
20 element of the claim but had not adequately pleaded the
21 special damages.

22 Let me quote the relevant portion of the Court's
23 order. At Tab 2 the Court said, "Drawing all inferences in
24 favor of SCO, which this Court must do on a motion to
25 dismiss, this Court cannot conclude that SCO can present no

1 set of facts that would prove this claim."

2 SCO, thereafter, filed an Amended Complaint in
3 which it pleaded special damages. SCO's allegations
4 concerning the other elements of this claim remain the
5 same. Novell then filed its second motion to dismiss. In
6 that motion, Novell does not challenge the sufficiency of
7 the allegations of the malice element of SCO's claim. It
8 does not challenge the sufficiency of the allegations of
9 any other element of the claim.

10 Instead, Novell argues that where Novell has
11 asserted a colorable legal argument on the ownership issue,
12 it must follow that Novell, when it has made claims of
13 ownership, did not act with malice. Now, of course Novell
14 could have made that argument in its first motion to
15 dismiss and has not disputed that fact.

16 Novell's motion to dismiss fails for three
17 independent insufficient reasons. First, Novell waived the
18 argument in its second motion. Tab 3, Your Honor: Under
19 Rule 12(g), a party shall not thereafter make a motion
20 based on the defense or objection so omitted from its
21 initial motion to dismiss.

22 In tab 5, Your Honor: Under 12(g), the filing of
23 an Amended Complaint will not revive the right to present,
24 by motion, defenses that were available but were not
25 asserted in timely fashion prior to the amendment.

1 Novell has said in its briefing and has said
2 today that its motion was triggered by the Court's June,
3 2004 order, but nothing the Court said in that order
4 constitutes a new matter in the Amended Complaint, and
5 nothing precluded Novell from arguing that the falsity
6 issue affects the malice issue in its first motion to
7 dismiss.

8 The second reason that Novell's motion fails is
9 that SCO properly alleges the fact supporting a claim for
10 slander of title. Although SCO is obligated under Rule
11 9(b) to allege malice only generally, we have alleged
12 malice specifically. Novell argues today otherwise but
13 SCO's allegations of malice are plainly sufficient to
14 overcome the privileges that Novell has asserted.

15 Tab 8, Your Honor: SCO has alleged that Novell's
16 false public statements of ownership were made
17 intentionally, maliciously and with utter disregard for the
18 truthfulness thereof.

19 That is, of course, the conclusory language that
20 Mr. Jacobs referred to, but, in Tab 9, we go on in some
21 detail: SCO has alleged Novell's purpose and motivation
22 for making its false public statements of ownership. SCO
23 has alleged that Novell made its wrongful and injurious
24 statements to interfere with SCO's exercise of its rights,
25 rights with respect to UNIX and UNIXWare technologies, to

1 cause customers and potential customers of SCO to not do
2 business with SCO and to attempt, in bad faith, to block
3 SCO's ability to enforce its copyrights.

4 Tab 10, Your Honor: Novell suggests that SCO
5 must prove a certain level of malice to overcome the
6 asserted privileges.

7 At least Novell made that argument in its
8 briefing, but SCO has alleged that Novell acted with the
9 full range of malice, all sorts of malice that are
10 addressed in the line of precedent under the Utah Supreme
11 Court precedent. Those allegations satisfy the requisite
12 pleading standard and defeat the privileges that Novell has
13 asserted.

14 The third reason Novell's motion fails is that
15 Novell's argument about the relationship between the
16 falsity element and the malice element are mistaken. In
17 fact, Novell cites no case to support the argument that a
18 party's assertion of ownership can preclude a finding of
19 malice. Instead, Novell argues again --

20 THE COURT: Your position is that even if there's
21 a real contest over ownership, you can still have malice;
22 is that right?

23 MR. NORMAND: That is our position, Your Honor,
24 and I'll address that argument in a little bit more detail
25 when I get to what Novell has called the merits of its

1 claim. I'm trying now to show that on its own terms, as a
2 motion to dismiss, the allegations are sufficient to defeat
3 the privileges that Novell has asserted.

4 Novell's main argument is that this Court has --
5 this is Novell's words -- that this Court has made an
6 objective determination that Novell's statements were made
7 in good faith. Now, we don't think that is a remotely
8 reasonable reading of this Court's June, 2004 order. This
9 Court concluded that SCO's Complaint presented a
10 substantial federal question regarding copyright ownership.
11 The Court did not even comment on Novell's state of mind
12 when it made its claims of ownership.

13 The Court did not address whether Novell actually
14 believed the copyrights had been transferred when it made
15 its claims of ownership, and, in fact, the Court declined
16 to consider such questions in the order.

17 Tab 15, Your Honor: The Court stated, "The
18 parties each have their own divergent interpretations of
19 the agreements at issue in this case. However, the Court
20 agrees with SCO and concludes that all of these arguments
21 as to the parties' understandings and interpretations of
22 the agreements would more properly be before the Court on
23 motions for summary judgment or trial."

24 We made these three independent points in our
25 opposition memorandum, and we believe that they defeat

1 Novell's motion to dismiss. Now, in response to these
2 arguments, Novell has essentially, and confirmed that
3 today, abandoned its motion to dismiss. Novell concedes
4 that it seeks conversion in order to avoid the application
5 of the waiver rule. Novell now argues that this Court
6 should convert the motion because, in the background
7 section of its opposition memorandum, SCO cited certain
8 materials on the issue of falsity, not on the issue of
9 malice.

10 This Court has broad discretion in determining
11 whether to convert, and if the Court does not rely on the
12 materials outside the pleadings, there is no basis to
13 convert. And we set forth those cases at Tab 19. I won't
14 dwell on this argument in light of Your Honor's comments,
15 but I will summarize our arguments as to why there is no
16 basis to convert, Your Honor.

17 First, as I mentioned, SCO expressly submitted
18 the materials in its opposition memorandum on the falsity
19 element, not as to malice. Novell, itself, attached
20 numerous materials to its moving papers. Novell repeatedly
21 says that SCO submitted the materials to try to show
22 Novell's malice, but that is not a fair reading of our
23 memorandum as we show in Tab 21, Your Honor.

24 By way of example, we stated in our memorandum
25 that to provide the context for its allegations, SCO

1 addresses here the numerous bases -- even before discovery
2 has begun in this case -- that compel the conclusion that
3 Novell's claim to ownership of the UNIX copyrights is
4 meritless.

5 We also stated that the legal plausibility of a
6 party's argument for ownership does not even constitute
7 direct evidence of the party's good faith, let alone
8 resolve the question. We made clear that the Court need
9 not consider the materials SCO submitted in resolving
10 Novell's motion, and if there is any lingering doubt, let
11 me be clear that we are not relying on any material outside
12 the record in opposing the motion to dismiss.

13 I mean, in the argument I just made in opposition
14 to the motion to dismiss, I did not refer to any material
15 outside the record.

16 Very quickly, Your Honor, two other points. Case
17 law bears out Novell has not even filed a 56.1 statement.
18 There are cases pointing out that in a party's failure to
19 do that, there is no basis for a conversion, and there has
20 been no discovery. We cite the relevant precedent at Tabs
21 24 and 25 on those issues, Your Honor.

22 As to what Novell calls the merits, Your Honor,
23 again, I won't dwell, but Novell's motion, as revised,
24 fares no better. As we show in some detail in the slides,
25 each of Novell's two main arguments fail under the relevant

1 precedent. Let me summarize these arguments very quickly
2 in light of Your Honor's comments.

3 First, Novell continues to assert that its legal
4 arguments on falsity preclude a finding of malice as a
5 matter of law. This goes to the question Your Honor asked
6 earlier. Novell again insists that the Court has already
7 resolved that issue, that the Court has undertaken what
8 Novell says is an inquiry into Novell's subjective state of
9 mind. Again, that's not a fair reading of the June, 2004
10 order.

11 More to the point, Your Honor, let me emphasize
12 how the necessary implications of Novell's argument are
13 unreasonable. If fact issues on falsity precluded a
14 finding of malice, then a slander-of-title claim could
15 survive summary judgment only by first proving the falsity
16 as a matter of law. In other words, a slander-of-title
17 plaintiff would have to prevail on a required partial
18 motion for summary judgment on the falsity issue in order
19 even to get to trial.

20 There is no basis in logic or the authority for
21 that argument, and, in fact, the cases Novell cites made
22 clear that a defendant can have a plausible argument as to
23 legal ownership and still act with malice. Novell's
24 second-made argument is that it is entitled to judgment as
25 a matter of law on the basis of the asserted privileges.

1 As Mr. Jacobs says, there is a complicated line
2 of authority on the question of what, exactly, malice is
3 under Utah law, where the Utah cases come out as to the
4 elements of a claim for slander of title. Suffice it to
5 say that, regardless of how the Court resolves those
6 issues -- and they need not be resolved now -- our
7 allegations are sufficient to overcome the privileges, and
8 even pre-discovery, the documents we already have defeat
9 those arguments that their privilege requires judgment as a
10 matter of law in their favor.

11 Novell concedes, for example, that common law
12 malice would be sufficient to defeat the privilege they
13 assert. Even in the absence of any discovery, we have
14 documents that demonstrate common law malice -- we can
15 demonstrate common law malice -- and certainly documents
16 from which the Court can infer that Novell acted with
17 malice, which is, of course, the standard that applies if
18 the Court deems it appropriate to convert this into a
19 motion for summary judgment.

20 One example is Novell's press release on June 6,
21 2003, which we quote at Tab 43, Your Honor. That press
22 release alone controverts the arguments that Mr. Jacobs
23 made today about how the APA operates. Novell's press
24 release states: "Amendment Number 2 to the APA was sent to
25 Novell last night by SCO. To Novell's knowledge, this

1 amendment is not present in Novell's files. The amendment
2 appears to support SCO's claim that the ownership of
3 certain copyrights for UNIX did transfer to SCO."

4 At an absolute minimum, Your Honor, the press
5 release constitutes one, and the admission that Amendment
6 Number 2 is relevant on the question of ownership, and,
7 two, evidence that Novell had acted recklessly in claiming
8 ownership because it was not even aware of the amendment.
9 Certainly the Court can infer those facts from that
10 evidence.

11 As the Court noted in its June, 2004 order,
12 "Moreover, the press release may indicate that Novell
13 initially believed that the APA, as amended, appeared to be
14 a sufficient Section 204(a) writing for purposes of the
15 Copyright Act, i.e., that Amendment Number 2 confirms that
16 there had been a transfer of copyrights."

17 Novell tries to explain away the press release --
18 at least it did in its papers -- asking the Court to infer
19 certain unstated meaning to the words that Novell used in
20 the press release. One of the many reasons that argument
21 fails is that the Court must draw inferences in SCO's
22 favor. And, of course, Your Honor, it almost goes without
23 saying, the entire point of the press release was for
24 Novell to correct what it had previously and publicly said
25 about the APA.

1 It's important to note, Your Honor, that the
2 premise of Novell's own argument is that the Court can
3 infer, from the evidence on the question of falsity,
4 Novell's own malice. Those are inferences the Court draws
5 in SCO's favor. It follows from Novell's argument that the
6 evidence on falsity that is before the Court does bear on
7 the issue of malice. We have, we would submit, new
8 material that we have obtained, even since our opposition
9 memorandum, on the question of falsity.

10 Novell has taken issue with that evidence prior
11 to the Court's June, 2004 order and in both its memoranda
12 on its motion to dismiss. We have not had discovery, but
13 we have been able to obtain additional affidavits that
14 confirm that, one, the APA was intended to transfer the
15 copyrights; and, two, Amendment Number 2 to the APA
16 confirms that the transfer was made. And, again, if Your
17 Honor likes, I can walk through that testimony.

18 One final point, Your Honor.

19 THE COURT: That's here under several of your
20 Tabs?

21 MR. NORMAND: Yes, Your Honor. It is at Tabs 54,
22 55 and 56. The testimony summarized at Tabs 55 and 56 is
23 new. We have obtained it since the time of our opposition
24 memorandum.

25 Given Mr. Jacobs' focus in his argument, let me

1 address, in some detail, the May, 2003 press release that
2 Novell relies on so heavily. Tab 46, Your Honor: Novell
3 says the press release demonstrates that Novell could not
4 have disseminated a knowing falsehood. In that press
5 release, according to Novell, Novell confirmed that SCO had
6 recently asked Novell to transfer the copyrights to SCO.
7 Novell says SCO asked for a transfer, Novell refused, and
8 then SCO asserted that it owns the copyrights anyway.

9 Then Tab 47, Your Honor, Novell relies, as they
10 have again today, on that press release above all other
11 evidence. Indeed, reviewing the record, one single
12 uncontroverted fact is enough to defeat SCO's claim that
13 SCO asked Novell to transfer to the copyrights to it. Now,
14 as an initial matter, we are in a Catch-22. Novell claims
15 that we have not controverted their evidence on malice. We
16 have not submitted material on malice. We have submitted
17 material on falsehood.

18 Tab 48, Your Honor: Novell does not present any
19 evidence that SCO had actually made any such request for a
20 transfer. As to SCO's supposed request, the press release
21 is inadmissible hearsay. As Novell says, only admissible
22 evidence can be heard on summary judgment.

23 And, again, we have the document that Novell
24 purports to characterize, and it shows that SCO expressly
25 asked Novell to clarify that in the APA the parties did

1 transfer all right, title and interest. In short, the
2 document on which Novell places its heaviest reliance is
3 inadmissible and mischaracterizes the actual facts of SCO's
4 communication with Novell.

5 One final point, Your Honor. Tab 58 will
6 summarize some of the abundant case law on the issue of
7 malice. Although the Court may address malice as a
8 question of law, in the absence of any evidence, such
9 evidence does create a classic fact issue. The issue of
10 malice is ordinarily a factual issue. Malice is a question
11 of intent that involves many intangible factors, such as
12 witness credibility, which the Court has seen none of, that
13 are best left to the consideration of a fact finder after a
14 full trial.

15 And as to public statements, in particular,
16 malice calls into question a defendant's state of mind,
17 about which we know virtually nothing, or about which we
18 have had no discovery, and does not lend itself readily to
19 summary judgment.

20 In sum, Your Honor, Novell's motion fails as a
21 motion to dismiss. There is no basis to convert it, and
22 even the pre-discovery evidence defeats it, to the extent
23 the Court wants to treat it as a motion for summary
24 judgment.

25 THE COURT: Thank you, Mr. Normand.

1 Reply, Mr. Jacobs?

2 MR. JACOBS: There are a couple of
3 oversimplifications going on here. One is that falsity and
4 malice don't intersect and have no overlap. I think there
5 are a couple of reasons why that's an important argument
6 for SCO to make. One is the conversion argument. Having
7 put this in a section on falsity of their brief, SCO now
8 argues, well, falsity has nothing to do with malice and so
9 don't convert a motion on malice to a motion for summary
10 judgment. We didn't mean it, Your Honor. It wasn't really
11 important.

12 But the law is not so simple, and malice is not
13 so simple, as many of the cases we cited show. Our
14 argument is not so simple. Our argument is not simply that
15 we had a good faith basis. Your order demonstrates our
16 good faith basis for our ownership argument. Our argument
17 is, look at the record of the communications back and forth
18 between the parties. Look at the thoughtfulness of those
19 communications. Look at the fact that Novell asked SCO, do
20 you have any basis, under Amendment Number 2, for believing
21 that the copyrights were required? SCO was silent.

22 In each case, we're relying on evidence, now
23 characterized as inadmissible, that SCO relied on in its
24 Complaint. The press release, for example, that says --
25 and SCO asked us to transfer the copyright -- is referred

1 to in SCO's Complaint. It can't be inadmissible. It's
2 part of the Complaint for purposes of the motion to
3 dismiss.

4 What the -- what a detailed review of the
5 correspondence back and forth shows, coupled with the fact
6 that the Court has held, has found, preliminarily, to be
7 sure -- and I'm cautious about over relying on an initial
8 order -- but that's what triggered the motion was, how can
9 we have malice when there's a real horse race here? Take
10 the correspondence back and forth. Take the points that
11 Novell made to SCO that were not responded to during that
12 period. Couple that with a review of the Asset Purchase
13 Agreement and the conclusion that the Asset Purchase
14 Agreement excluded copyrights.

15 That is enough to grant a motion to dismiss or,
16 if converted, a motion for summary judgment.

17 Let me flip Mr. Normand's opening argument on its
18 head. If ever there was a case where a motion to dismiss
19 could be granted on a slander-of-title claim, if ever there
20 was a case where litigants could head off getting into each
21 others' subjective, legally-informed, legally-advised state
22 of mind about a legal dispute, this is it. There is no
23 evidence of malice in the tenor or content of the
24 back-and-forth between the parties. There's a real horse
25 race on ownership. We should not have to go further and

1 find out why people said what they said.

2 Thank you, Your Honor.

3 THE COURT: Thank you.

4 MR. NORMAND: With Your Honor's permission, may I
5 speak briefly?

6 THE COURT: Sure. Then he gets to speak again
7 because it's his motion.

8 MR. NORMAND: Of course, Your Honor. Just a few
9 points very quickly. We did say, expressly, in our
10 opposition memorandum that falsity and malice are related.
11 We just don't think they are related nearly as closely as
12 Novell argues, and we think the cases show that they are
13 not related that closely.

14 Second, we do not believe that there is a horse
15 race or a real contest on the question of ownership. Under
16 California law, the extrinsic evidence of the sort that we
17 have already presented creates ambiguity in the agreement.
18 There clearly is ambiguity, and the extrinsic evidence is
19 not ambiguous. We think the documents argue they are
20 ambiguous, as the Court acknowledged. The extrinsic
21 evidence is clear. Novell's own chief negotiator says, "We
22 intended to transfer the copyrights in the APA." And our
23 position is that Amendment Number 2 clarifies that intent.

24 Finally, Your Honor, Mr. Jacobs argues as to the
25 tenor or the substance of the claims of ownership

1 themselves. We explained in our slides why there is no
2 support for that argument in the case law. The question is
3 Novell's state of mind when it made assertions. Novell
4 can't essentially put up the words it used in claiming
5 ownership as a shield to an inquiry into its state of mind.
6 In fact, Novell's own argument is that this Court has
7 already made an inquiry into Novell's state of mind in the
8 June, 2004 order. Novell concedes that there has to be
9 some assessment of its state of mind. Thank you, Your
10 Honor.

11 THE COURT: Thank you.

12 Mr. Jacobs?

13 MR. JACOBS: I think the issue is joined, Your
14 Honor. I think you have it.

15 THE COURT: Thank you. I'll take the motion
16 under advisement and get a ruling out hopefully not too far
17 off. Thank you all. Court will be in recess.

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REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, REBECCA JANKE, 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 May 25, 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
numbered 1 through 28 constitute a full, true and
correct record of the proceedings transcribed.

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 20th
day of July, 2005.

REBECCA JANKE, CSR, RMR

