

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

THE SCO GROUP, INC.,)	
)	
Plaintiff,)	
)	
vs.)	
)	
NOVELL, INC.,)	Case No: 2:04CV00139
)	
Defendant,)	
_____)	
)	
)	

BEFORE THE HONORABLE DALE A. KIMBALL

May 31, 2007

MOTION HEARING
VOLUME I

KELLY BROWN HICKEN, RPR, CSR, RMR
Court Reporter
350 South Main Street, 209
Salt Lake City, Utah 84101
(801)-521-7238

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S

FOR THE PLAINTIFFS: HATCH, JAMES & DODGE
BY: BRENT O. HATCH
SASHI BORUCHOW
Attorneys at Law
10 WEST BROADWAY, SUITE 400
Salt Lake City, Utah 84101

BOIES, SCHILLER & FLEXNER, LLP
BY: EDWARD NORMAND
Attorney at Law
333 MAIN STREET
ARMONK, NEW YORK 10504

FOR THE DEFENDANT: ANDERSON & KARREBERG
BY: THOMAS R. KARREBERG
Attorney at Law
50 WEST BROADWAY
SALT LAKE CITY, UTAH 84101

MORRISON & FOERSTER, LLP
BY: MICHAEL JACOBS
GRANT L. KIM
KENNETH BRAKEBILL
Attorneys at Law
425 MARKET STREET
SAN FRANCISCO, CA 94105

1 SALT LAKE CITY, UTAH, THURSDAY, MAY 31, 2007

2 * * * * *

3 THE COURT: We're here this afternoon in the matter
4 of SCO vs. Novell, 2:04-CV-139. The plaintiff is represented
5 by Mr. Brent Hatch.

6 I don't have your name for some reason.

7 MR. HATCH: This is Sashi Boruchow.

8 THE COURT: Okay. I do have your name. Never
9 mind.

10 Mr. Brent Hatch, Mr. Edward Normand and
11 Ms. Sashi Boruchow; correct?

12 MR. HATCH: Yes.

13 THE COURT: The defendant is represented by
14 Michael Jacobs, Mr. Thomas Karrenberg.

15 MR. KARREBERG: Yes, sir.

16 THE COURT: Mr. Grant Kim.

17 MR. KIM: Yes.

18 THE COURT: And Mr. Kenneth Brakebill; correct?

19 MR. BRAKEBILL: Yes.

20 THE COURT: All right. First we'll hear the
21 arguments on Novell's motion for summary judgment on First
22 Claim for Slander of Title for Failure to Establish Special
23 Damages.

24 Who's arguing?

25 MR. JACOBS: I will, Your Honor.

1 THE COURT: Mr. Jacobs.

2 And for you?

3 MR. HATCH: Mr. Normand.

4 MR. NORMAND: I will.

5 THE COURT: Mr. Normand?

6 Go ahead.

7 MR. JACOBS: Good afternoon, Your Honor.

8 THE COURT: Good afternoon.

9 MR. JACOBS: We were here several years ago on the
10 question of damages for slander of title.

11 THE COURT: Several years ago.

12 MR. JACOBS: And we moved to dismiss. You granted
13 our motion and allowed them to replead, and now we're back on
14 summary judgment.

15 Two things have happened since then of substance.
16 One, all the evidence is now in front of us; and, two, I think
17 we've exhausted every possible research avenue to discern the
18 law of special damages as it applies to slander of title
19 actions. And the two litigants have brought that law before
20 and asked you to call this particular question.

21 I want to start out with an observation and not
22 withstanding the thoroughness of the research. Both sides
23 have cited only one slander of title case involving title to
24 intellectual property. And we've looked far and wide for more
25 slander of title cases involving intellectual property, and

1 they are very few. And the one we cited is the only one that
2 we were able to find that is actually is in any way helpful to
3 the damages issues in front of us today.

4 That's not because there's a shortage of
5 intellectual property ownership disputes. As you know from
6 the briefing we've done on the copyright ownership issue,
7 there are lots and lots of copyright cases. And if we were to
8 be in patent law or other areas of intellectual property, we
9 would see even more ownership disputes. But there are very
10 few slander of title claims that are brought.

11 The one that is in front of us, the case that is an
12 IP case is the Macia decision. There the Court noted at the
13 motion to dismiss stage, which is the only published decision
14 in the case, that plaintiff's damages were likely going to be
15 speculative. It's a trademark claim, and the defendant had
16 asserted that it was the rightful owner of the mark against
17 the plaintiff.

18 The Court also noted in a footnote that because the
19 plaintiff had retained the intellectual property cause of
20 action, the trademark cause of action there, certain potential
21 claims for special damages were not being asserted in the
22 action. The Court was trying, in that footnote trying to I
23 think wind its way through special damages as it applies to
24 intellectual property disputes, which are fundamentally
25 disputes about who owns a right to assert against someone

1 else.

2 We don't know what ultimately happened in the Macia
3 case, but we believe that its skepticism about damages was
4 very well-placed. It's not just that damages generally are
5 often difficult to prove and that courts are on the watch for
6 speculative damages theories. In slander of title cases, the
7 damages rules are quite strict. The restatement and the cases
8 applying it show that the kind of modeling and predictions
9 about future markets that often underlie intellectual property
10 laws process disputes just don't meet the legal standard.
11 Instead, courts are instructed to look for realized and
12 liquidated losses that are the direct and immediate result of
13 the alleged slander.

14 These turn out to be difficult to prove even in the
15 Lanham cases that so populate interestingly the courts of Utah
16 and the courts of Texas. These turn out to be -- yet, these
17 cases get thrown out on damages theories frequently. We did a
18 tally on the cases that are in front of you. And in 15 of the
19 cases, it was zero damages leaving aside the question of
20 attorney's fees.

21 The Utah Supreme Court has followed this trend
22 towards strictness in evaluating special damages claims. But
23 it's in Texas where the cases seem to have arisen that most
24 clearly present the kind of before-and-after question that is
25 the heart of our -- heart of our brief.

1 THE COURT: You talk about meeting the legal
2 standards. How would you articulate that standard?

3 MR. JACOBS: The legal standard in slander of title
4 cases is a requirement to show realized and liquidated losses
5 including -- and this is maybe the heart of the dispute
6 between us or at least one way you can decide this motion. If
7 you agree with us that that includes a showing of the value of
8 the intellectual property, once the cloud on the title has
9 been released or vacated by some action, some release of a
10 lien or some declaratory judgment action, if that
11 before-and-after requirement is an element of the damages
12 claim as the cases we cited indicate, then they've made no
13 such showing. We'll get to what they say about SCO itself,
14 which is a different question. But they made no
15 before-and-after showing.

16 And the fundamental purpose of that requirement,
17 Your Honor, and this is why I think it has to be an element in
18 this case, is it's the only way to avoid a double recovery.
19 Only if you do a before-and-after analysis of that sort, you
20 avoid the situation which SCO has presented squarely to the
21 Court, we want to have our damages from Novell for lost
22 licenses. Some more or less particularized and some vague and
23 extreme.

24 But once you decide, once the Court decides that
25 we're the owner, SCO says, we'll be back. We'll be back

1 asserting our intellectual property rights. We'll be back in
2 front of Hewlitt-Packard. We'll be back in front of literally
3 tens of hundreds of thousands of Linux -- of users of Linux
4 asserting our copyright claim. And they've made no effort to
5 reconcile the double recovery issue that is so well addressed
6 by the Texas court in the Rio case with their damages claim
7 here.

8 Now, one question is whether you should follow
9 Texas law at all because the Texas cases are pretty strong on
10 this.

11 THE COURT: I was going to ask that.

12 MR. JACOBS: I'm sorry?

13 THE COURT: I was just going to ask, what attention
14 should I pay to Texas law?

15 MR. JACOBS: Exactly. Well, I have one way to get
16 you will there, which is the Valley Colour case, which is a
17 Utah Supreme Court case, of course, in 1997. And it cited a
18 Texas case Belo, B-E-L-O, for the proposition that a specific
19 lost sale must usually be proven. And then Belo gets followed
20 by other cases in Texas which puts some boundaries around what
21 the essence of that lost sale showing must be.

22 There are cases in other jurisdictions, though,
23 that have reenforced this before-and-after element of the
24 rule. And so it's not unique to Texas. We believe it's the
25 prevailing standard, and we've cited cases outside of Texas

1 for that proposition.

2 In the intellectual property context, it is
3 particularly difficult to show the requisite degree of loss
4 even if you just follow the looser standard that SCO is
5 advancing without this requirement to show that the -- after
6 the cloud on title is released what the value of the
7 intellectual property is.

8 We agree that the costs of actually quieting title
9 should be readily provable and are recoverable in a slander of
10 title action involving intellectual property. So that part is
11 not difficult, the cost of actually quieting title, and we'll
12 get to the attorney's fees question in a minute. But when it
13 comes to showing a realized and liquidated diminution in value
14 in the intellectual property context, that's tough. And I can
15 imagine scenarios in which it could be readily proven.

16 Let's suppose that I write a script and I submit it
17 to a movie producer, and the topic is hot at that particular
18 moment. And then my friend Mr. Normand comes in, and he says,
19 I own the script. You don't, Jacobs. And so the movie house
20 passes on the script. Then we have a dispute, and we -- and I
21 win. I did have title to the script. I resubmit it to the
22 movie house. The movie house says, you know what, we're not
23 interested anymore.

24 I had a transaction before. I had a transaction
25 after. I can probably show a realized and liquidated loss.

1 Or I didn't have a transaction after. It was valued at zero,
2 and so I get the value of the lost transaction. There was a
3 moment when my script was valuable. The passage of time
4 caused that to go away.

5 THE COURT: But you say this is different.

6 MR. JACOBS: This is absolutely different; because
7 what's happened here is that the Linux -- there's been no
8 showing of the diminution of value of the UNIX copyrights that
9 particularly is applied to Linux. Limit has blossomed in the
10 intervening period. And at the risk of being a little cute on
11 the question, we've probably done them a favor on this,
12 because if they had been successful in asserting their
13 copyrights --

14 THE COURT: They ought to be paying you.

15 MR. JACOBS: Exactly, Your Honor. And we hope they
16 will at the end of this litigation, but not on their claim for
17 slander of title. On our claims.

18 It is a little -- I realize it comes off as a
19 little cute, but the point is this. The Linux market has
20 expanded dramatically in the four years since SCO launched
21 SCOSource. The cute part of it is that had they been
22 successful with SCOSource in 2003, it undoubtedly would have
23 put brakes on the expansion of the Linux market.

24 So in the intervening period, Linux has expanded
25 because SCOSource founder for all of the various reasons that

1 we pointed to in our brief, the number of Linux
2 implementations is far larger than when SCO launched
3 SCOSource. So the value of the copyrights has if anything
4 have gone up in the interim, not down. That's the basic
5 problem --

6 THE COURT: So if they own them, their value has
7 increased.

8 MR. JACOBS: Exactly.

9 Now, there are a whole bunch of assumptions lurking
10 in that. That if they really can prove infringement. You
11 have before you in the IBM case their evidence of
12 infringement. But for present purposes, I want to just set
13 aside all of those other factors for a minute and just focus
14 on the question of ownership.

15 So that's the basic problem, though, with SCO's
16 claim. They have not made the requisite showing that if the
17 cloud Novell has cast on its alleged title is removed, it has
18 suffered a realized and liquidated loss, and that any such
19 loss is the direct and immediate result of the alleged
20 slander. Those are the requirements. Realized and
21 liquidated, direct and immediate.

22 Now, there is one instance that just kind of looms
23 large in the briefing, so it's worth focusing on for a minute,
24 and that's the HP transaction. We are going to be asking --
25 we are asking you on these motions really to do two things, I

1 think. One is to patrol the evidence. We have submitted
2 evidence through objections, and there are huge evidentiary
3 issues with SCO's damage claim. The other thing is to make
4 the ruling as a matter of law that certain contentions even
5 after you get through the evidentiary issues survive the
6 requisite filter.

7 THE COURT: There are motions to strike objections
8 to evidence. I assume you would not really spend a lot of
9 time arguing those.

10 MR. JACOBS: That's correct.

11 THE COURT: But I should decide those on the briefs
12 as part of the decision with respect to the motions.

13 MR. JACOBS: I'm sorry, Your Honor?

14 THE COURT: I would decide them on the briefs as
15 I'm deciding the motion.

16 MR. JACOBS: That is our intent, Your Honor;
17 although Mr. Brakebill is here to answer any questions on the
18 evidentiary objections, if you'd like.

19 So let's focus on HP for a minute. And I'm going
20 to set aside the evidentiary objections because it illustrates
21 the problem SCO has. It's the lack of concreteness on both
22 ends of the HP story. It's the lack of concreteness at the
23 beginning. What exactly was the value of the transaction that
24 they were contemplating doing with HP? And how much of it
25 turned on -- how much of the value of the transaction was

1 actually about the Linux issue and the ownership of the UNIX
2 copyrights? There were a whole bunch of things going on in
3 that transaction as SCO's evidence illustrates. And then
4 there's even more -- there's nothing on the back end of the
5 story because we have no information at all on what would
6 happen if following a successful court decision that SCO owns
7 the UNIX copyrights, SCO went back to HP and said, we're back.
8 We'd like to do this transaction again. On that topic,
9 they're simply silent. They made no such showing, and I think
10 it's inerrant in the nature of this case in the way they
11 litigated it they can make no such showing, because they put
12 the cart before the horse here and sought to prove slander of
13 title damages before they've been able to release the cloud on
14 the title, or it's just in the nature of the intellectual
15 property right that it's going to be very hard absent that
16 sequence to actually show diminution in value.

17 All SCO has really offered on this is speculation
18 about what might or might not occur in the future, and
19 speculation is very much what special damages law is designed
20 to weed out.

21 The one -- so where I think SCO is moving on this
22 and looking ahead of their slides, I think they're jumping in
23 the direction of the large number of unknown purchasers, and
24 they find some comfort in your ruling on the motion to
25 dismiss. It is true that there is law in special damages, and

1 special damages is supplied to slander of title. That if the
2 communication was widely disseminated and you can't count up,
3 you can't find the people who didn't take the -- in this case
4 didn't take the license that they might have a wedge in
5 proving special damages.

6 But that's not our case. We know who they
7 contacted. They presented us with a chart. It has -- it's in
8 front of you. It has no -- it has no entries for Novell as a
9 cause for people not taking the license. The number of
10 Linux -- the population of Linux users is knowable. They
11 contacted these people and offered them SCOSource licenses, so
12 we're not in unknowable territory. I don't think they've been
13 able to prove that.

14 Moreover, we think, and this is something you may
15 have to decide in ruling on this motion, we think the better
16 view of the case law is that once you move over into unknown
17 purchasers, the causation requirement is heightened. And now
18 the plaintiff must rule out other causes by which there was a
19 diminution in value on account of unknown purchasers who
20 didn't enter into a transaction with SCO.

21 The directed and immediate standards bites at one
22 other element of SCO's argument, and that is the "we are
23 wounded." SCO is a wounded actor now, and it doesn't have
24 money and it's had to disband its SCOSource staff.

25 Aside from the speculative nature that we've

1 highlighted in our brief, I want to note that the direct and
2 immediate element of a slander of title damages proof
3 precludes SCO from so arguing. Those are circumstances unique
4 to SCO. That doesn't go to the value of the intellectual
5 property right. And what the direct and immediate cases show
6 is that things like the lost interest you would have gotten on
7 the money had you been able to make the sell earlier, that's
8 all too tangential to meet the direct and immediate test. We
9 think the same thing applies to the "we are wounded"
10 contention that SCO has advanced.

11 Attorney's fees. We think that there are two
12 principles out there that have to be reconciled in the way
13 that SCO's teed up the attorney's fees claim. One is, and one
14 that this Court has articulated is that damages are not
15 recoverable based on attorney's fees and slander of title
16 actions because that will allow bootstrapping. And the other
17 is that damages are recoverable --

18 THE COURT: That's the Bloomberg case?

19 MR. JACOBS: What?

20 THE COURT: The Bloomberg case?

21 MR. JACOBS: Yes.

22 And the damages are recoverable for expenses of
23 quieting title. So what they've done is they've submitted a
24 declaration from an attorney who says, I can look at the
25 bills, and I can figure out how much of SCO's attorney's fees

1 are attributable to the ownership element, which is an
2 element of -- which is the falsity element of their slander of
3 title claim.

4 So what do we do? Can't get attorney's fees in a
5 slander of title action. Can get attorney's fees for quieting
6 title. We think that the answer is to look at the pleading.
7 SCO did not bring an action to quiet title. It brought a
8 slander of title action. Had it brought an action to quiet
9 title, whether it was styled as a quiet title or declaratory
10 judgment action, the claim we have said for the last several
11 years is the right claim to be bringing here if they want to
12 prove their ownership. Then they might be able to allocate
13 attorney's fees to that cause of action. But we think that
14 the principle that attorney's fees are not available in
15 slander of title actions trumps their ability to try and
16 divide up the attorney's fees among various elements of the
17 proof in that action.

18 So on summary judgment, we're asking the Court to
19 dismiss SCO's slander of title claims on the claim on the
20 grounds that SCO has not proven special damages. In the
21 alternative, we are asking you to go through what they have
22 proven, what you think they have proven and decide which of it
23 meets the standard and which of it doesn't.

24 There's a case that I want to refer you to in this
25 connection that we found after the briefing that is sort of a

1 road map in this product disparaging case. It's the Brooks
2 Power case at 1994 US District Lexis, 11451 from the Eastern
3 District of Pennsylvania. In that case, the Court goes
4 through the evidence quite randomly and decides what's out on
5 evidentiary grounds and what meets the special damages
6 requirement in a disparagement case and what doesn't.

7 Thank you.

8 THE COURT: Thank you, Mr. Jacobs.

9 Mr. Normand?

10 MR. NORMAND: Thank you, Your Honor. Good
11 afternoon.

12 THE COURT: Good afternoon.

13 MR. NORMAND: We submit that SCO is entitled to
14 show the jury that we've suffered special damages and that
15 none of the precedent that Novell cites or the evidence that
16 they take issue with suggests otherwise.

17 And counsel started off by referencing the Macia
18 case. That's a case cited at Tab 25 of our binder, in which
19 the Court denied the motion to dismiss and said it was for the
20 trier of fact to resolve the issues of proof that were
21 presented in that case. We think that case supports our
22 argument for summary judgment here is inappropriate.

23 Counsel also alluded to the Court's June 2004
24 order. We summarize that at Tab 1. That's where the Court
25 said that:

1 The motion to dismiss stage that the
2 harm alleged by SCO to its SCOSource licensing
3 program must be a natural consequence of the
4 alleged cloud of ownership and customer confusion
5 and would amount to a realized pecuniary loss.

6 I think then we agreed with the other side that
7 that is the other arching standard, and we submit that our
8 evidence easily satisfies it.

9 Let me take a step back, Your Honor. What's at
10 issue is a series of slanderous statements that we allege that
11 Novell has made over the course of years. And Your Honor has
12 seen those statements summarized in previous briefings. We've
13 also set forth those statements at Tab 6 of the binder. And I
14 think we have a board that summarizes those statements, as
15 well.

16 Of course, the key statement, Your Honor, May 28,
17 2003, when Novell first claimed publically to own UNIX and
18 Unixware copyrights. As SCO's expert evidence will show and
19 as the undisputed facts show, SCO stock price dropped
20 25 percent that day. And that is the only day since that time
21 in which SCO's stock has fallen in a statistically significant
22 way in a single day. Obviously the claim of ownership had an
23 affect on the market.

24 The evidence further shows that Novell intended
25 such a negative impact when it made the statement. And we

1 cite at Tab 3, Your Honor, the testimony from an industry
2 reporter who spoke with Novell senior executive
3 Christopher Stone the day before the announcement was made.
4 And Mr. Stone explained that they were making the announcement
5 that day in order to affect the SCO's stock price.

6 SCO also made repeated claims of copyright
7 ownership to SCO as reflected in the board privately forcing
8 SCO to acknowledge to the many customers who asked that Novell
9 was continuing to make claims of copyright ownership. So we
10 have a mix of private and public statements, which as Your
11 Honor knows we allege to be slanderous.

12 Now, there is no question that SCO suffered an
13 effect after Novell's statements. The undisputed foundation
14 of the SCOSource program, to which Mr. Jacobs alluded, was
15 that SCO owned the UNIX copyrights. I don't think that is
16 disputed. In the event that issue is disputed, we have expert
17 testimony explaining that the ownership of copyrights was the
18 key foundation for that program. And that's summarized at
19 Tab 7.

20 Harvard Business School of Economic Gary Pisano
21 explained that because the would-be licensees SCO's
22 intellectual property already had access to that property via
23 Linux, their willingness to pay for a license is a function of
24 their belief that SCO owned the rights. Again, the
25 self-evident proposition and one that certainly couldn't be

1 decided against you us on summary judgment.

2 After Novell began to make its claims of copyright
3 ownership, SCO had very little success in entering into its
4 SCOSource licenses to the point that as of the middle of 2004,
5 the program essentially faded away. SCO executives decided to
6 end it. And in addition, since 2004. As Mr. Jacobs
7 acknowledged, SCO has incurred attorney's fees in seeking a
8 clear title to the copyrights.

9 Now, with this background, we come to the principal
10 issues that Novell's motion raises. The first main issue is
11 whether these damages, these losses that occurred after Novell
12 began making these statements constitute special damages. We
13 submit that they do. We set forth the legal standard, Your
14 Honor, at Tab 8. This is from the Restatement of Torts:

15 The following specific types of damages
16 are recoverable under a slander of title claim:

17 Loss caused by prevention of a particular sale.

18 Loss caused by deprivation of opportunity to
19 sell to a particular purchaser.

20 Loss resulting from diminution of price.

21 And loss caused by prevention of sales to
22 unknown purchasers.

23 And it bears noting that in Your Honor's June 2004
24 order, Your Honor stated that where the losses are realized,
25 a showing of a specific amount of damages is not necessary.

1 Now, on the facts and pleadings of evidence, SCO
2 shows three different types of special damages corresponding
3 to the Restatement.

4 One, that specific customers declined a
5 SCOSource license.

6 Two, that the prices for such licenses has
7 eroded if not faded away entirely.

8 And, three, that SCO lost sales to unknown
9 purchasers.

10 Both this Court's June 2004 order and the
11 Restatement made clear that SCO can prove such damages even
12 more specific identification of all loss of consumers and
13 potential customers may be impossible. And it bears emphasis
14 that the universe of the Linux users is millions.

15 So the notion as Mr. Jacobs suggested that we
16 contacted many or a significant percentage of these potential
17 customers I think is illusory. We summarize, Your Honor, at
18 Tabs 10 and 11 some law regarding the possibility of
19 identifying all potential customers.

20 At Tab 10, as Your Honor noted in the June 2004
21 order:

22 Once SCO shows that there, in fact, has been
23 a realized pecuniary loss as a result of Novell's
24 statements, a showing of a specific identification
25 of customers may be impossible.

1 That reflects the standard in the Restatement
2 Section 633 and in cases summarized at Tab 10.

3 And at Tab 11, until I heard Mr. Jacobs suggest
4 otherwise today, I thought Novell had conceded that it may be
5 impossible to identify potential customers. And that is a
6 tenant that follows from a finding where the slander is widely
7 disseminated, it may be impossible to identify such customers.
8 I think it's undisputed. Certainly the Court would find in
9 favor of summary judgment that Novell's statements were widely
10 disseminated.

11 The precedent also shows that where the plaintiff
12 has incurred legal costs, through the claims of slander of
13 title, such costs constitute special damages. We summarize
14 that law at Tabs 14 and 16. And we think it's worth noting at
15 the outset that Novell in its reply does not respond to the
16 citation to their own pleading that we make in our opposition
17 brief. In Novell's own slander of title claim, they allege
18 slander:

19 Has resulted in special damages, inter
20 alia, Novell's cost and fees in prosecuting this
21 action.

22 We think, as we set forth at Tab 15, that Utah law
23 is clear at this point. That's the Computerized Thermal
24 Imaging case, quoting the Bass case from 1988 that Your Honor
25 is familiar with:

1 Attorney's fees are permitted as special
2 damages in a slander of title action if incurred
3 to clear title or to undo any harm created by
4 whatever slander of title occurred.

5 And Tab 16 cites the cases reflecting that that is
6 the clear majority rule.

7 Counsel has alluded to Your Honor's earlier order
8 regarding special damages. We understood that to be a
9 defamation case, which we think is different from a slander of
10 title case for among other reasons the fact that any slander
11 of title case premises that you can clear title. You can in
12 effect try to solve the problem.

13 And the premise of a defamation case is that you
14 can't solve the defamation that's occurred. And that is built
15 into the damages that are available to a defamation claim. In
16 short, we've provided direct evidence of the special damages
17 that we've suffered.

18 Now, the next question that Novell's motion raises
19 is whether the damages that SCO has suffered, special damages,
20 were caused by Novell's conduct. We think the evidence and
21 reasonable inferences certainly show that they were.

22 It's important to note, Your Honor, the dearth of
23 evidence that Novell has on this point. Novell cites no case
24 resolving the issue of causation on summary judgment and no
25 case even suggesting that it is appropriate to resolve the

1 issue of causation on summary judgment. In contrast, SCO set
2 the precedent holding the resolution of such issue is not
3 appropriate for summary judgment including the Macia case that
4 now we both refer to. We have summarized that law, Your
5 Honor, at Tabs 24 and 25.

6 Your Honor asked what the legal standard is. I
7 think the parties are in disagreement on this. We believe the
8 case law shows clearly that we must show that Novell's
9 statements for a substantial factor in causing the losses at
10 issue. We summarize that law at Tabs 19 through 20. Tab 19,
11 Restatement of Torts:

12 Publication of an injurious falsehood is
13 a legal cause of pecuniary loss if it is a
14 substantial factor in bringing about the loss.

15 The Restatement has defined substantial factor in
16 the context of a slander of title action specifically.

17 At Tab 20, Your Honor, we summarized the law
18 showing that courts across the country adopted and applied the
19 substantial factor test in actions evaluating special damages.

20 And finally, Your Honor, at Tab 23, we show that
21 Utah has adopted the Restatement of substantial factor test in
22 a variety of context.

23 The direct and immediate standard that Mr. Jacobs
24 referred to as we explained in our briefing we believe is a
25 subset incorporated by the substantial factor test, not a

1 different or independent test.

2 In short, SCO does not have to prove let alone show
3 on summary judgment that Novell's conduct was the only or
4 exclusive factor causing the special damages that we've
5 suffered.

6 Now, as you've heard Novell say, they argue that
7 our evidence is inadmissible or insufficient. We think Novell
8 is wrong for several reasons on this issue of causation.
9 First, causation isn't an issue of expert analysis. And we
10 summarize some of that expert analysis at Tabs 26 and 27.

11 Tab 26, Professor Pisano testifies that he has:

12 Concluded that Novell's conduct had a
13 substantial impact on SCO's ability to sell the
14 SCOSource Intellectual Property License for Linux.

15 And at Tab 27, University of Utah accounting
16 Professor Christine Botosan testifies that she has concluded:

17 Novell's statements reduced SCO's profits
18 from its SCOSource licensing program.

19 These opinions are well supported, non-conclusory,
20 and they're supported by the record evidence. The cases make
21 clear that such analysis is appropriate to assess damages on
22 claims for slander of title, and the precedent also shows that
23 it would not be appropriate for the Court to exclude that
24 testimony on summary judgment. The admissibility of the
25 testimony has to be decided after a Daubert examination, and

1 Novell's objections are premature and don't even begin to cite
2 or acknowledge all the relevant Daubert factors.

3 And in the reports, SCO's experts do account for
4 other potential causes for the losses and they reconcile
5 those. It's important to note also that objecting to these
6 reports Novell takes these out of context. It was Novell who
7 recently requested the enlargement of time to exchange the
8 initial expert reports. That brought the exchange reports
9 after the time before briefing. And that's what resulted in
10 reports being submitted to the Court yesterday. And in any
11 event, you don't hear Novell to argue that they suffered any
12 prejudice by virtue of the submission of the reports this
13 week.

14 Now, in addition to this expert analysis, the other
15 evidence goes to show, and again, easily permits the inference
16 that Novell's statements were a substantial factor in causing
17 SCO's special damages. SCO submits, for example, letters from
18 customers specifically called out the issue of copyright
19 ownership as a reason for declining to enter into the
20 SCOSource licenses. We summarize those letters at Tab 35, and
21 I believe we have a board on that, as well.

22 As Your Honor can see, letters from big players
23 such alleges Merrill Lynch, Sherman Williams, Ford,
24 Morgan Stanley, Google and the like. Novell argues that these
25 letters are inadmissible as hearsay, but we submit that

1 they're wrong. If the Court were inclined to resolve these
2 issues on summary judgment at all, there's no reason to doubt
3 the reliability or authenticity of these letters. And the
4 evidence is the best evidence that SCO could obtain about the
5 state of mind with such potential customers. The letters
6 satisfy the residual hearsay exception under Rule 807.

7 Indeed, in a recent copyright case, the Federal
8 District Court applied Rule 807 and admitted evidence of
9 unsworn complaints from customers about their confusion
10 between the plaintiff's work and the allegedly infringing
11 work. I think decisions like that, Your Honor, reflect the
12 fact that there really is no other highly probative source on
13 these customers' state of minds. And we summarize that case
14 and a similar case, Your Honor, in Tab 46.

15 Novell's new evidentiary objections are also a
16 basis for summary judgment if the Court were inclined to
17 consider that issue. Novell stated in its opening brief
18 actually that it was not objecting on any hearsay grounds.
19 They decided that they wanted to object to SCO's hearsay
20 evidence. Novell itself relied on hearsay evidence in their
21 opening brief. On that basis alone, we submit the objections
22 are no basis for summary judgment.

23 It's also undisputed with respect to the facts that
24 the SCOSource was part of SCO's business as of May 2003, and
25 that after Novell made its initial statement, SCO stock price

1 fell precipitous. And based on those facts alone a reasonable
2 juror could concur that Novell's statements are a substantial
3 factor in the decline of SCOSource plummeted.

4 It's also undisputed as we set forth in the briefs,
5 Your Honor, that SCO's CEO senior vice-president and senior
6 vice-president in charge of the SCOSource program and senior
7 salesperson in charge of SCOSource all testified to their view
8 that Novell's claims of copyright ownership negated the
9 SCOSource business. They reached that conclusion based on
10 evidence and discussions cited in our opposition brief. SCO's
11 experts are entitled to rely on that evidence. There's no
12 question about that.

13 And we submit that a jury would be entitled to
14 reach the conclusion that those executives based on their
15 experience and their industry knowledge were correct. It may
16 be that the statements that the executives attribute to the
17 customers are themselves hearsay, but the conclusions the
18 executives reach is admissible evidence for the jury to
19 consider.

20 We think that Novell underscores the genuine
21 factual disputes at issue in arguing that the expansion of the
22 Linux market has increased SCO's value in the copyrights.
23 That's an issue for the experts to fight about. And the
24 crucial issue here is the willingness of the market to enter
25 into SCOSource license. It's not the sheer number of the

1 potential customers. And we submit the evidence shows there
2 is less willingness now than there was three or four years
3 ago, and that's an issue I'll touch on in a few minutes that I
4 have left, Your Honor.

5 So this last issue is whether SCO's losses are
6 realized. Again, the evidence and reasonable inferences show
7 that they are. We submit that the legal standard -- and we
8 agree with Mr. Jacobs that there's not a wealth of precedent
9 on this issue. We cited a case at Tab 48 showing that losses
10 are realized where slander has a residual impact on the
11 vendibility of the product at issue. That's the Marseilles
12 case from the Northern District of Illinois 2003.

13 And the issue there according to the Court was
14 whether you can prove that the alleged slander had a damaging
15 residual effect on the vendibility on market value of the
16 product. We submit that we easily meet that standard.

17 Now, Novell has cited some real property cases, and
18 that's the lynch pin for their argument that there shouldn't
19 be a double recovery. We see a very fundamental difference
20 between a real property cases and an intellectual property
21 case.

22 In a real property case, the full value of the lost
23 sale, if you lost that, you might not be entitled to damages
24 because you'd be entitled to damages, you might not be
25 entitled to anything beyond that. Intellectual property is

1 different. It's not a one-time event. It's undisputed that
2 in the case of an intellectual property, the owner can enter
3 into multiple licenses for his property. In fact, your
4 ability to enter into multiple licenses is the way or at least
5 one principal way that you value the copyrights.

6 Mr. Jacobs suggests that we should submit evidence
7 of a value of the copyrights. The costs or prices at which
8 you can enter into the license history in intellectual
9 property is the reflection of the value of copyrights. It's a
10 more specific way of rendering that than even trying to
11 estimate what the sale of the business would be. We submit
12 that our evidence is more reliable and more specific than the
13 more general standard that Mr. Jacobs proposes.

14 Novell also argues that our evidence on realized
15 losses is insufficient or inadmissible. We think they're
16 wrong about that. First of all, like causation, the issue of
17 realized losses is the subject of expert analysis. The main
18 question is if SCO did clear a title of the copyrights, could
19 SCO then sell SCOSource licenses at all or at the same price
20 it could three or four years ago? SCO's experts and CEO
21 explain why SCO could not do so. And we summarize that
22 evidence, Your Honor, at Tabs 51, 52, and 53.

23 Mr. Pisano, Professor Pisano, quite candidly says:

24 It is my opinion that even a court's
25 determination that SCO owns the UNIX copyrights

1 probably would not restore SCO to the position
2 they were in before Novell's statements.

3 It's not an issue of super clarity, Your Honor.
4 It's an issue for the experts to fight about and for the
5 juries to draw inferences from.

6 Mr. McBride is more equivocal, of course, and his
7 testimony would be admissible. He says:

8 The market and SCO's position in it
9 has substantially changed during the four years
10 in which Novell has been making its false claims.

11 This is the CEO of the company. The jury is
12 certainly entitled to conclude he has experience in the
13 relevant markets and has knowledge of the relevant markets.

14 And Novell argues that we failed to draw a
15 connection between Professor Pisano's acknowledgement of
16 probability and Mr. McBride's more unequivocal testimony
17 regarding that his view of the market is different. But those
18 two types of testimony are reconciled, and we summarize that
19 at Tab 53. Mr. McBride states:

20 Companies that have been now using Linux for
21 several years simply will not perceive the risk of
22 an infringement action as credible at this time,
23 even if copyright title is cleared, and SCO would
24 not have the resources to pursue such actions.

25 That's admissible testimony.

1 Professor Pisano concludes:

2 Because would-be licensees of SCO's
3 intellectual property already had access to that
4 property via Linux, their willingness to pay for a
5 license is a function of their belief that SCO
6 owned those rights, and would enforce those
7 rights.

8 Same testimony we pointed Your Honor to earlier.
9 Taking that testimony together, a reasonable jury certainly
10 could conclude that the value of the SCOSource program has
11 faded significantly, if not entirely disappeared.

12 In addition to the expert testimony, SCO submits
13 other evidence in support of this assertion. The fact that
14 SCO will have the right to seek licensing fees doesn't mean
15 that it will succeed in doing so.

16 Indeed, we submit, Your Honor, that the only
17 conclusion that the jury would have to reach to conclude that
18 the market is less favorable for SCO now than it was in 2003.
19 If the jury reached that conclusion, they could conclude that
20 the value of the SCOSource program is faded.

21 THE COURT: Is what?

22 MR. NORMAND: That the value of the SCOSource
23 program has faded. That the only conclusion that the jury
24 would have to reach is the market is less favorable than it
25 used to be. The jury could reach that conclusion based on

1 undisputed facts such as the drop in SCO's stock price since
2 that time, an undisputed fact, and questions raised about
3 SCO's viability in the recent past, an undisputed fact, and,
4 in fact, the subject of Novell's pending motion for
5 preliminary injunction.

6 It is undisputed, for example, with respect to HP
7 that Mr. Jacobs brought up that since Novell began making
8 these statements, HP launched its own indemnification loan.
9 That fact alone shows that the clock can't be unwound. SCO
10 could not now enter into a deal with HP whereby HP would sell
11 SCOSource with HP hardware to customers who have since taken
12 the HP indemnification. That opportunity is lost. And on
13 that basis alone, the jury could conclude the market
14 conditions are not as favorable.

15 Novell's evidentiary objections, and this one also
16 is a basis for summary judgment, Mr. McBride's testimony, for
17 example, is based on his personal knowledge.

18 And finally, Novell cites no relevant precedent for
19 the proposition that the Court can resolve on summary judgment
20 the question of whether SCO's losses are realized.

21 In closing, Your Honor, the undisputed facts, the
22 well-established precedent will show that SCO is entitled to
23 bring this claim to the jury. We think that Novell cites no
24 cases to support its argument to resolve these issues on
25 summary judgment. And we also think that Novell is wrong on

1 the merits. We respectfully ask the Court to deny Novell's
2 motion.

3 THE COURT: Thank you, Mr. Normand.

4 MR. NORMAND: Thank you.

5 THE COURT: Reply, Mr. Jacobs?

6 MR. JACOBS: I think we have converged, Your Honor,
7 on the issues, and it is well-teeed up to you. A couple things
8 to highlight in Mr. Normand's comments.

9 Number one, on this expert testimony and
10 Mr. McBride's testimony on residual impact, there has to be
11 more than just speculation, Your Honor. There has to be more
12 than SCO unique factors that give rise to the market's
13 unwillingness to take SCOSource licenses. It defies -- merely
14 asserting that in the face of the basic legal principles that
15 are at issue here in the assertion of intellectual property
16 rights does not create a fact dispute.

17 As even Pisano's declaration, leave aside his
18 expert report, as even his declaration admits, this is all
19 about people taking licenses to avoid copyright lawsuits. If
20 SCO has ownership of the copyrights, they can bring their
21 infringement lawsuits. Whether you're indemnified or not,
22 somebody is going to be liable for that infringement. That is
23 a basic A follows B -- B follows A aspect of intellectual
24 property law. And merely speculating that that won't happen
25 if SCO's successful on ownership isn't enough to create a

1 disputed issue, a disputed issue of fact.

2 THE COURT: Mr. Normand, with respect to causation,
3 he talked about the quarrel between your direct and immediate
4 standard and what he calls the substantial factor standard.
5 Do you remember his argument on that?

6 MR. JACOBS: Both are applicable, Your Honor. We
7 don't disclaim substantial factor, but it's in the very next
8 section of the Restatement.

9 The pecuniary loss for which a publisher of
10 a injurious falsehood is subject to liability is
11 restricted to in relevant part the pecuniary loss
12 that results directly and immediately from the
13 effect of the conduct of third persons including
14 impairment or vendibility or value caused by
15 disparagement.

16 So direct and immediate is in there, but that's
17 another test. I think the right way to think about this is
18 substantial factor is kind of a course grain filter, and
19 direct and immediate is a very tight filter, a very fine grain
20 filter. And they have kind of written the element of the
21 damage proof out of their claim by saying that it's not
22 applicable.

23 The irony of this argument, Your Honor, is that --
24 and in a sense I think what SCO is really saying is they were
25 rolling people back in May, June before Novell statements,

1 they had the industry in a turmoil and they had people signing
2 licenses out of fear. Now the facts are out on the table,
3 they're saying, including the facts, for example, about the
4 strength of their infringement claim. So there may be some --
5 the other causational factors that we highlighted in all the
6 letters that came out are still going to be there. They're
7 going to be there. They were there before. The letters say,
8 we don't see any evidence of copying. Well, now the copying
9 has been before the Court, and it's been widely publicized so
10 people can judge for themselves just how strong that evidence
11 of copying is.

12 But I don't think their ability to roll the
13 industry out of uncertainty is the kind of link to substantial
14 factor and direct and immediate that slander of title was
15 designed to promote. The fact that there are more facts out
16 on the table now about the strength of their Linux claims, and
17 maybe those claims are weaker now is just because they were
18 hiding them all back in May and June on the very issue that
19 people were asking them to come forward with. I don't think
20 that's legally probative. But if you drill down to what
21 they're saying, that seems to be the essence of it.

22 On residual effect, they really haven't made a
23 showing of a residual effect. Again, I think it's inherent in
24 the way they litigated the case. It's very difficult. It
25 would be speculative inherently to talk about what would

1 happen once the cloud on title were removed. Had they
2 litigated it differently, had they sought to remove the cloud
3 on title and then go back and relaunch SCOSource, then at
4 least we would have the after condition. I think we would
5 still have a lot of uncertainty about the before condition.
6 But we would have the after condition clearly teed up before
7 the Court. But that's not Novell's problem. That's SCO's
8 problem for the way they sought to tee up the issues for
9 adjudication.

10 And importantly, direct and immediate does not
11 allow the unique SCO circumstances, drop in stock price, lack
12 of resources, maybe no motivation to pursue SCOSource anymore,
13 those factors are irrelevant to the special damages equation.
14 And that is very clear from the direct and immediate cases.

15 In sum, Your Honor, we actually think the issue is
16 a legal one here. There are some evidentiary issues.
17 Mr. Normand's recitation about the back and forth is not quite
18 right between us. And in any case, we had it scheduled for
19 summary judgment. All the evidence in opposition should have
20 been in with their oppositions. But at the end of the day, I
21 think what we're asking you to do is take a look at the cases
22 and decide what the legal standard is for proving slander of
23 title and special damages. Thank you.

24 THE COURT: Thank you, Mr. Jacobs.

25 Do you want to take a short break between each

1 motion, or do you want to try to get another one done before
2 we take a break? Or what do you want to do?

3 MR. JACOBS: We're ready to jump in, Your Honor.

4 THE COURT: All right. Let's go on the second
5 motion. Novell's motion for partial summary judgment on SCO's
6 noncompete claims and Second and Fifth Claims; right? Same
7 people arguing?

8 MR. JACOBS: Yes.

9 THE COURT: All right.

10 MR. JACOBS: If I might take one minute.

11 MR. HATCH: Your Honor, we'll change on the next
12 motion. Maybe take a break.

13 THE COURT: Yeah. It might kill us to be here
14 three hours straight.

15 MR. JACOBS: Your Honor, this is the binder that
16 we've all be been waiting for. It is the thin binder in which
17 the key agreement documents are before you so you don't have
18 to go look at the Brakebill declaration or the Normand
19 declaration. Yes, Your Honor, I think that's it.

20 And at the back of it, this will be more relevant
21 for our arguments on Monday, what we've done is provided the
22 Court with the language of the APA as amended by Amendment
23 Number 1 and Amendment Number 2. In other words, we've gone
24 back at Tab 7, for example, or Tab 8, and we have put --

25 THE COURT: You red-lined.

1 MR. JACOBS: Exactly. But the choice of exhibits,
2 Your Honor, reflects the basic thrust of our motion on the TLA
3 and on other issues that we're going to argue Monday, and that
4 is that these disputes are governed by legal documents
5 carefully crafted by trained lawyers, carefully reviewed by
6 sophisticated companies engaged in a complicated transaction,
7 and that the plain language controls. And if you look at the
8 agreements, you should decide these motions -- if you look at
9 the agreements as we believe the law requires, summary
10 judgment motions should be decided in our favor.

11 On the technology license agreement motion, this is
12 embedded -- this issue is embedded in several causes of
13 action, but what we're in essence asking you to do at this
14 stage on summary judgment is to decide the legal meaning of
15 certain aspects of the TLA. And what we're going to do, what
16 I'm going to do now is reverse the order that we argue these
17 issues in our briefing because if we prevail on the question
18 of which change of control provision controls, then the
19 relevant limitations are out of the TLA, and it doesn't matter
20 whether it's a limitation or a covenant. So if we prevail on
21 our reading of the TLA, then the issue of whether it's a
22 limitation on a license or a covenant giving rise to a
23 contractual lawsuit is mooted.

24 So that's the issue that I want to talk about
25 first, which change --

1 THE COURT: But if you don't, then it isn't mooted.

2 MR. JACOBS: That's correct. So we'll get to it.

3 Which change of control provision controls? Is it
4 the APA's provision which voids the disputed provisos and the
5 TLA in the case of Santa Cruz only within two years and only
6 as to specified purchasers, or is it the provision the TLA
7 points to which unambiguously we submit drives to a different
8 outcome, that there was a change of control and that the
9 provisos are, therefore, were no longer in legal effect?

10 Let's start with the TLA so we can walk through
11 together how we're reading the document. The TLA is at
12 Tab 5. And if you look at Roman II-A(2), you'll see the
13 provisos that follow from the grant of the license in (2).
14 Note that the provisos don't apply to (1); they just apply to
15 (2):

16 Provided, however, that such technology and
17 modifications may be sublicensed and/or distributed
18 by Novell solely as -- skip ahead -- a composite
19 offering. The composite offering shall not be
20 directly competitive with core applications
21 server offerings of SCO, and the licensed
22 technology shall not constitute a primary portion
23 of the value of such composite offering.

24 We're calling those the disputed provisos.

25 And then if you go to the next paragraph,

1 Paragraph B, it says:

2 In the event of a Change of Control of SCO and
3 commencing with the effective date of such Change
4 of Control, the proviso in Subparagraph II-A(2)
5 setting forth restrictions on the sublicense
6 and/or distribution of licensed technology and
7 modifications thereof shall cease to exist.

8 So in B, there's a capitalized term, Change of
9 Control. If you go up to the top of that page, there's the
10 language that we rely quite heavily on:

11 The terms "Assets," "Change of Control,"
12 et cetera, shall have the respective meanings
13 attributed to such terms in the asset purchase
14 agreement.

15 So importantly, we're talking about a capitalized
16 term, and we're talking about looking to the APA to define the
17 meaning of that provision.

18 So now if we go to Tab 1 and go to Page 41 of the
19 APA. We put some stamps, some bolder numbering stamps on the
20 document. So if you look at the bolder stamps, it's Page 48.

21 THE COURT: I have it.

22 MR. JACOBS: So this is 6.6(c). And it says --

23 THE COURT: Okay. Change of Control.

24 MR. JACOBS: Change of Control. Exactly. But it's
25 even for our purposes even better than that.

1 For purposes of this agreement, a, quote,
2 capital C, Change of -- capital C -- Control,
3 close quote, with respect to one party shall be
4 deemed to have occurred when the conditions that
5 are laid out in that paragraph have been met.

6 And, of course, in this provision, 6.6 (c), there
7 is no two-year limitation, and there is no list of specified
8 acquirers.

9 So that's -- so the way we read it, then, if you go
10 back to the TLA, if a Change of Control occurs as defined in
11 the asset purchase agreement at 6.6(c), then the provisos are
12 no longer existing. And that's the effect we contend of II-B.

13 Now, I think that if you just follow the logic so
14 far you'd have to say that is unambiguously what the TLA
15 provides. I don't think there's room for dispute on that
16 question. Where the dispute arise is because the asset
17 purchase agreement has a different provision governing Change
18 of Control of SCO as it relates to the license that will
19 ultimately be provided by the TLA.

20 And it's at Page 30 or bold Number 37. And this is
21 at 6.3(c), Expansion of Seller's Rights Relating to the
22 License Technology Upon a Change of Control.

23 Until two years from the closing date, that's the
24 two-year limitation. And if you read on, sold assets to a
25 party identified by seller on Schedule 6.3(a) hereof. So

1 that's where you get the list of specified companies. So
2 6.3(c) on a standalone basis, SCO wins on this question in
3 terms of what Change of Control provision applies.

4 So our argument turns on the TLA, and we think it's
5 a pretty clear cross-references to 6.6 trumping the APA and
6 its provision on about what happens on a change of control
7 with respect to what ultimately will become the TLA. And as
8 we noted in our brief, the TLA is later in time than this
9 disputed language, and the law is clear that when there's a
10 contradiction between two agreements which arguably apply to
11 the same subject matter, the second in time controls.

12 But there's really I think a deeper sense in which
13 the TLA is later in time than the asset purchase agreement,
14 and that is that the TLA is an implementation of the
15 provisions of the asset purchase agreement. It is the
16 agreement that is contemplated by the APA. In fact, SCO's
17 response to our statement of facts and in other places, they
18 characterize it as an implementation of the asset purchase
19 agreement.

20 The APA contemplates and requires later execution,
21 later in a sequential sense of what contemplates what. And
22 the TLA is itself that license. The TLA is where you're
23 supposed to look if you want to find out what the terms of the
24 license are. It is the agreement implementing the promise in
25 the APA to enter into a license agreement. And the law is

1 clear that the later agreement controls.

2 There are other doctrines that might be applied.
3 It's the more specific agreement in many respects. But for
4 our purposes, I think the argument that is unassailable is
5 that it is the license that was contemplated by the APA. The
6 APA is not itself a grant of a license. So if you want to
7 find out what the terms of the license are, you go to the TLA.

8 Now, SCO points to cases about multiple documents
9 being read together to comprise an agreement. If you pars
10 those cases closely, we think you will find that they relate
11 to situations in which there are multiple documents and
12 they're not fundamentally inconsistent with each other.
13 There's no deep contradiction in them. And we're just trying
14 to figure out what the entirety of the agreement is.

15 In our case, we have a contradiction. I think both
16 sides agree with that. The TLA goes one place, and the APA
17 goes another place. And depending on which agreement
18 controls, you'll have a different outcome.

19 But that's not those cases. Those cases aren't
20 about a contradiction. The contradiction cases say you look
21 at the second agreement, not the first.

22 Now, there's one other aspect of this, but I
23 think --

24 THE COURT: And your view is this is a legal issue
25 and I ought to decide it.

1 MR. JACOBS: Exactly. It's a legal issue that
2 forensic evidence can't help very much on.

3 Now, the document gives SCO one more argument,
4 which is, that it says --

5 THE COURT: Which document?

6 MR. JACOBS: I'm sorry. The TLA, at
7 Paragraph VIII, the entire agreement clause.

8 By the way, one more point before I miss it. At
9 6.3(c) back in the APA, there is in the heading the words
10 Change of Control. But there's also a clause in the asset
11 purchase agreement that although it uses slightly different
12 language is essentially a heading for our for convenience
13 clause. And it says that it doesn't bear on the
14 interpretation of the agreement. So again, we think that it's
15 clear the TLA is driving the reader towards Section 6.6.

16 So the Entire Agreement clause in the TLA says that
17 both agreements constitute the entire understanding between
18 the parties with respect to the subject matter. And all prior
19 understandings are mooted.

20 So that gives them an argument that you have to
21 read these two agreements together. But we don't think that
22 that clause has the effect that SCO seeks. Number one, it
23 vitiates reliance on parole evidence. It's an entire
24 agreement integration clause, so it has that effect if the
25 agreement is -- if there's an ambiguity, if there's a legal

1 ambiguity.

2 But we don't think there is a legal ambiguity here.
3 There's a contradiction, and the Court as a matter of law, we
4 ask the Court to decide, that it's the TLA that controls in
5 the event of a contradiction. And, hence, there's no
6 ambiguity; and, hence, there is no need to rely on parole
7 evidence.

8 Because of the sequence of these agreements, both
9 chronological and in the legal sense that the asset purchase
10 agreement contains a promise to enter into the technology
11 license agreement, because of that sequence, what SCO needs in
12 the Entire Agreement provision is not there. What SCO needs
13 is a provision that says, in the event of a conflict between
14 the TLA and the APA, the APA shall control.

15 There are provisions like that. It's easy to write
16 a provision like that. It isn't in the technology license
17 agreement, and it isn't in the entire agreement clause.

18 SCO's real argument when you look at their
19 declarations, when you look at what they're saying is that the
20 TLA does not conform the intent of the parties, that the
21 parties intended some other outcome. And in a sense, I think
22 they're saying here, as I think they will say on Monday,
23 implicitly Novell's lawyers at the time slipped one by
24 Santa Cruz. They got one in there. They got a "gotcha" for
25 Novell. And that's not right.

1 But the cause of action that SCO needs, if that's
2 their real theory that the TLA -- if we're right that the TLA
3 points to 6.6 and they want to argue that the TLA does not
4 represent the intent of the parties, the answer is not to ask
5 you to interpret the TLA to mean something it can't mean.
6 It's an action for reformation.

7 We had this discussion in March about how, really,
8 in place after place, we submit, that SCO is actually arguing
9 the elements of reformation, but they didn't plead
10 reformation, and it's too late to amend their pleadings. And
11 besides, Your Honor, the standard of proof and the burden of
12 proof on reformation is clear and convincing evidence, and
13 they can't meet that statement.

14 So we think it's a legal question which document
15 controls. If you decide the TLA controls, we think there's
16 only one outcome, that the provisos in Section IIA(2) are, in
17 the words of Section B, ceasing to exist.

18 If you decide to go on, whether because you want to
19 resolve more issues now or if you disagree with us on this
20 question, then we need to decide the legal effect of those
21 provisos. And this is the question on whether they are a
22 limitation or a covenant.

23 We brought this motion, the causes of action, we
24 have applied the summary judgment motion to our causes of
25 action that depend on the provisos being a covenant. But I

1 want to make sure that you see the TLA in its entire context.

2 SCO has sued Novell for copyright infringement
3 based on Novell's distribution of SuSe Linux. Part of that is
4 off in the arbitration. Incidentally, it looks like we're set
5 for hearing in the arbitration on the interpretation of the
6 UnitedLinux agreements. And we'll stick to a schedule that
7 will have that hearing go forward in December.

8 But setting that aside that for a minute, and just
9 looking at the pleadings here --

10 THE COURT: Which year?

11 MR. JACOBS: This coming year, Your Honor.

12 In the context of this dispute, Novell has asserted
13 the TLA is a defense to SCO's copyright infringement claims.
14 Now, the TLA is undeniably a license to licensed technology.
15 That much I think neither side could dispute. And SCO's view
16 of what licensed technology includes is copyrighted UNIX code.
17 SCO contends that the TLA doesn't immunize Novell's activity
18 and that it can sue for copyright infringement.

19 In order to do that, it must be contending that
20 Novell's actions are outside the scope of the license granted
21 in the TLA. SCO points to the provisions I read to you about
22 competing with an application server offering or not
23 constituting a primary portion of the value. And they say
24 that Linux falls within the proviso. And, therefore, because
25 they say licensed technology including the copyrighted code is

1 in Linux, it's outside the scope of the TLA license.

2 That is precisely the effect of a limitation on the
3 scope of a license. Activities that fall outside the scope of
4 the license are subject to an infringement claim. In this
5 case, SCO's alleged copyright infringement claim. And if that
6 were the full effect of what SCO wanted out of this provision
7 in setting aside our first argument about those provisions the
8 provisos going away, we would not be in disagreement with
9 them. We agree that at one time, at least, that these are
10 limitations on the scope of the license. We agree that the
11 legal effect of that is if we're outside the scope of the
12 license, they have a copyright infringement action.

13 What SCO is arguing for, however, is to have its
14 infringement cake and eat a contract claim, too. The specific
15 causes of action to which this motion is directed, as I
16 mentioned, are breach of contract claims. And they -- in
17 order to have breach of contract claims, they have to treat
18 these provisos as affirmative covenants, not just limitations
19 on the scope of the license. So the issue is, are these
20 covenants?

21 Now, what the Sun v. Microsoft case teaches us here
22 is that language and geography in terms of the way the
23 agreement is laid out actually matters. And these, of course,
24 these provisions are provisos in the grant of a license. So
25 it strongly suggests as a matter of just reading the agreement

1 and how it's laid out that these are limitations on the
2 license.

3 And SCO has to be acknowledging that for purposes
4 of its copyright claim. What they must be saying is that
5 they're both. They're limitations on the scope of the
6 license, and they're affirmative contractual covenants.

7 Brief parenthetical. We never argued that they
8 were conditions. A condition is a different beast. It was
9 imagined in their opposition brief as a way of setting up a
10 straw man, but we're arguing limitation versus covenant. And
11 SCO must be contending that this language is dual purpose and
12 that they don't have to elect a remedy and that they don't
13 have to decide which it is.

14 If you look at the cases or the treatises, and both
15 sides have pointed you to many of them, that's not what the
16 cases teach is going on in these disputes where there's a
17 contract in the form of a license.

18 In the Ninth Circuit case in *Sun v. Microsoft*,
19 which is really in many ways of a lone star, they can remand
20 for a determination whether the contractual language there was
21 a limitation on the license, a covenant or both. They said
22 it's got to be one or the other. They didn't say whole. The
23 issue wasn't squarely presented to them. But there's no case
24 that asks the question whether particular language is both.

25 What causes some confusion in the cases that

1 require some drilling down into the district court decision is
2 that the way these cases work is that if you have a license
3 agreement and it has a covenant and you breach the covenant,
4 the licensor can rescind the license and then sue for
5 copyright infringement.

6 So before rescision, there's a contract claim, say,
7 for unpaid royalties. After rescision, there's a copyright
8 claim. And so you can see both causes of action arising out
9 of a single agreement. But that's because of the rescision.
10 And this is very well settled in the case law and in the
11 treatise.

12 And that's what's going on at the appellate level
13 where SCO cites the appellate decision. We provided you with
14 the district court decisions. You can see that there was a
15 sequence of breach of contract claim for before rescision and
16 copyright infringement claim for afterwards.

17 So what is it? Is it a license limitation or a
18 covenant? SCO doesn't seem to want to tell us what choice it
19 wants to make. But the TLA, we submit again, looking at the
20 plain language points in only one direction. It's a license
21 limitation. You have to look at the geography of the
22 agreement, and importantly, the word that is used in the
23 agreement is restriction. That's used twice at II-A(2) and
24 II-B. Those restrictions are referred to -- those provisos
25 are referred to as restrictions. If you go to the dictionary

1 and look up restrictions for synonyms or definitions, the
2 first word you hit is limitation. So another argument, if you
3 will, another linguistic argument for why these should be
4 treated as limitations and not covenants.

5 And perhaps most importantly of all, what these
6 provisions do is they don't deal with some extra license
7 issues, such as, shall Novell be obligated to put copyright
8 notices on? Or shall Novell be obligated to pay on a per-copy
9 basis? Those could be and most often are treated as
10 contractual covenants. These are -- these provisos here go to
11 the scope of what Novell can use license technology for.
12 Provisos limit that scope and, hence, are limitations on the
13 license and nothing more.

14 Now, if you turn to the Section 16600, which is --

15 THE COURT: That's the California law.

16 MR. JACOBS: That's the California law argument.

17 It really just highlights our basic points, and SCO's
18 responsive briefing on the point underlies our basic argument.
19 If you read this language as a covenant, as a covenant not to
20 compete, then you run head-long into 16600 and its prohibition
21 on covenants not to compete.

22 So when SCO briefed this issue in its opposition,
23 all of a sudden the language changed and these provisions were
24 referred to as limitations on the license. As we said in our
25 brief, we agree. They can only be limitations on the license.

1 They cannot be covenants.

2 We believe that the analysis of the TLA and the
3 case law drive the outcome here that we're asking you to
4 render. At most these are limitations on the scope of the
5 license. By virtue of our first argument, we believe that
6 they have ceased to exist. But if they exist, they are not
7 contractual covenants giving rise to a claim for breach.

8 THE COURT: Thank you, Mr. Jacobs.

9 Mr. Normand?

10 (Time lapse.)

11 MR. NORMAND: Thank you, Your Honor.

12 As Mr. Jacobs said, the issue of whether Novell has
13 breached the APA and the TLA statement is what briefly pointed
14 out the context in which the motion is brought. Novell's own
15 former CEO Mr. Frankenberg testified in deposition, and in his
16 view Novell has breached the APA and the TLA for its
17 distribution of SuSe Linux. That's an issue for a later day.
18 But as I say, I think it adds color to the motion.

19 Now, I would like to start with the issue that
20 Mr. Jacobs finished with, if that's okay with Your Honor.

21 THE COURT: Whatever order pleases you.

22 MR. NORMAND: Novell argues that SCO can't bring a
23 breach of contract claim because the APA and the TLA
24 noncompete clauses are not covenants, as they say, but are
25 instead merely restrictions on the scope of the license. As

1 Mr. Jacobs said, we believe that is one and the same thing.
2 We believe a restriction on the scope of the license, a
3 license limitation, whatever phrase you want to use, is a --

4 THE COURT: Actually he finished with the
5 California argument, but that's all right.

6 MR. NORMAND: Oh, I'm sorry, Your Honor. I'll get
7 to that.

8 THE COURT: All right. So you're actually starting
9 with the second argument, not his third. But that's okay.

10 MR. NORMAND: Very good.

11 THE COURT: Any order you want.

12 MR. NORMAND: I'd like to start with his middle
13 argument.

14 THE COURT: All right.

15 MR. NORMAND: We think it's worth pointing to the
16 dearth of the case law on this issue of Novell. As Mr. Jacobs
17 concedes, they rely almost exclusively on the Sun case, which
18 I'll get to. Novell cites not a single case holding that a
19 plaintiff cannot bring a breach of contract claim, whether for
20 breach of covenant or breach of license restriction, whatever
21 phrase you want to use. Novell cites not a single case
22 holding that restrictions on the scope of a license cannot
23 constitute affirmative covenants. And they cite not a single
24 case holding that a licensee's failure to comply with a
25 license restriction cannot give rise to a claim for breach of

1 contract.

2 Now, the noncompete provisions in the APA and TLA
3 or restrictions on the scope of the license are covenants not
4 to compete. They are affirmative promises. They are the
5 basis for a motion for breach of contract. Williston on
6 Contracts is summarizing --

7 THE REPORTER: I'm sorry. Can you slow down just a
8 tiny bit.

9 MR. NORMAND: Of course.

10 THE REPORTER: Or a lot.

11 MR. NORMAND: At Tab 3 -- I'm trying to get through
12 my oral argument.

13 THE REPORTER: I know.

14 MR. NORMAND: At Tab 3, Your Honor, we summarize
15 Williston, who has says:

16 A promise is a manifestation of an
17 intention to act or refrain from acting
18 in a specified way.

19 Again, that is the basis for the claim for a breach
20 of contract. In this case, SCO provided Novell a license in
21 exchange for Novell's promise not to use the license
22 technology in competition with SCO. And that's set out
23 clearly, Your Honor, in the slides or board Section 1.6 of the
24 APA:

25 Buyer shall execute a license agreement.

1 The license agreement shall provide Seller
2 unlimited, a royalty-free, perpetual, worldwide
3 license.

4 And TLA, sets forth the license restrictions that
5 the APA directs the parties to create.

6 Such composite offering shall not be
7 directly competitive with core application server
8 or offering of SCO.

9 Affirmative promise on Novell's part.

10 Now, Novell's primary argument on the close reading
11 of the APA and TLA in their opposition opening brief, at
12 least, is it that the license restrictions are not set forth
13 in the section of the APA called "certain covenants." We
14 think that argument fails out of the box. There's no
15 precedent that suggests that the only kind of promise that you
16 can for -- breach of contract based on are those promises set
17 up in the covenants section of the contract.

18 The APA and TLA provisions apply only to Novell
19 products incorporating license technology, and, therefore, it
20 makes sense to place these covenants in the sections of the
21 APA and TLA dealing with licensed technology rather than
22 certain covenants.

23 And Novell's interpretations of the APA and TLA
24 assumes that SCO would allow Novell to use the transfer UNIX
25 assets, the license back technology without any contractual

1 obligation on Novell's part to hold up its end of the bargain.

2 Novell's theory is that if Novell breached the
3 promise, we can only sue them for copyright infringement,
4 somewhat defeating the purpose of entering into the contract
5 in the first place. So for all those reasons, we think the
6 plain language reading of whether the license restriction
7 constitutes a promise of the sort that will extend alludes to
8 or covenant is incorrect.

9 Now, Novell cites Sun v. Microsystems as their
10 primary case. For the proposition that contractual provisions
11 must be either limitations on scope of the license or
12 covenants, we think that is fundamentally wrong. We don't
13 think that Sun suggests that.

14 THE COURT: You don't think Sun suggests one or the
15 other as Mr. Jacobs argued.

16 MR. NORMAND: We don't, Your Honor. And
17 to summarize -- our basic approach on that is at Tabs 5 and 7.
18 Let me walk through those briefly.

19 The only issue before the Sun court is whether the
20 plaintiff had properly brought a copyright infringement claim,
21 not whether the plaintiff could bring a breach of contract
22 claim. In fact, the Sun case included both a copyright
23 infringement claim and a breach of contract claim. And as I
24 think as Mr. Jacobs acknowledges, there's no suggestion from
25 the Court that the breach of contract claim was improper or

1 that it couldn't be brought.

2 We summarize at Tab 7, Your Honor, what we think
3 the key language in Sun is.

4 The Court framed the issue as whether the disputed
5 terms limited the scope of the license or were independent
6 contractual covenants, merely separate contractual covenants
7 or contractual covenants that did not limit the scope of the
8 license.

9 We think the case means that license restrictions
10 are covenants. The question in Sun was just whether the
11 license restrictions at issue related to the copyright claim.
12 They would be if in exceeding the scope of the license the
13 defendant was exercising the exclusive rights of copyright
14 ownership. That's the definition of a copyright claim,
15 unauthorized copy.

16 The Sun case didn't address the second question,
17 the one framed here, whether you could also bring a claim for
18 breach of contract on the same basis. In other words,
19 independent or merely separate covenants may have no bearing
20 on the scope of the license while other covenants define the
21 scope of the license grant.

22 Now why does this matter? It matters because there
23 were cases in both respects in our favor. There are cases
24 saying that the conduct in excess or in violation of the scope
25 of license agreement is a basis for breach of contract. And

1 there are cases and authority saying, you can bring both a
2 copyright infringement claim and a breach of contract claim
3 for conduct in excess of the scope of the license agreement.

4 At Tab 8, Your Honor, Ninth Circuit precedent is
5 consistent with our position. The Germaine case from 2005:

6 If defendant was using the song without
7 paying royalties, it was likely both a breach of
8 contract and a violation of the copyright.

9 The Grosso case:

10 Reversing district court's holding that
11 plaintiff could not bring a breach of contract
12 claim in addition to copyright infringement claim.

13 The Bernstein case:

14 Upholding the district court's damage award
15 for breach of contract and copyright infringement.

16 At Tab 9, Your Honor the cases reflecting that we
17 can bring a claim for breach of contract based upon conduct in
18 excess of the scope of the licensing agreement.

19 Kepner-Tregoe case, the Second Circuit --

20 THE COURT: Of course, in all of these cases the
21 language of the controlling document would be important;
22 correct?

23 MR. NORMAND: Absolutely, Your Honor. It's not --
24 I think as both sides agree, it requires assessment of the
25 contract at issue. There's just no overarching principle that

1 you can't bring both. And I think that's the premise of
2 Novell's motion.

3 And, in fact, at Tab 10, Your Honor, we cite the
4 Nimmer Information Law treatise. He explained:

5 Breach of the license creates the potential of
6 liability for contract breach and also the
7 possibility of liability under property rights
8 law.

9 An intellectual property rights law. It goes on to
10 say:

11 Both forms of action may exist in a given case.

12 And acknowledges that an infringement claim can
13 exist in addition to the contract claim.

14 And we cite other cases at that Tab 10, Your Honor,
15 discussing this area of the law.

16 And I was going to emphasize among the other cases
17 reflected in the slides the case summarized at Slide 12, the
18 Second Circuit case Kepner-Tregoe, going through again on
19 particular facts, going through and concluding that the claim
20 for copyright infringement and breach of license agreement is
21 appropriate.

22 We think in short, Your Honor, that the basis for
23 Novell's motion for summary judgment, we think we are entitled
24 to bring both kinds of claims.

25 Now, I should note, Your Honor, that we don't

1 understand Novell to go into the level of detail that gave
2 Your Honor's question suggested, the level of detail. Let's
3 examine the kinds of conduct that constitute a copyright
4 infringement versus the kinds of conduct that constitutes the
5 breach of license agreement. I think it's enough to say that
6 in this case we're not alleging that the exact same conduct is
7 all of the facts relevant for both claims. Our claim of
8 breach of contract involves slightly different facts of
9 copyright infringement. And on that additional basis, there
10 would be no reason we couldn't bring both.

11 THE COURT: Would there be some overlapping facts,
12 however? They wouldn't be completely different sets of fact.

13 MR. NORMAND: That's correct, Your Honor. And I
14 mean, to be candid with you, this is an area of law discussing
15 preemption which we cited in our opposition brief. The
16 preemption cases are relevant. The cases of arising under
17 jurisdiction are relevant. Even upon examination of those
18 cases which are really collateral, there's nothing to say we
19 can't bring both in those cases.

20 Now, Mr. Jacobs' initial argument was the question
21 of the change of control provision between the APA and TLA.
22 Let me make sure I have my slides straight, Your Honor.

23 We think Novell presents a false choice as
24 Mr. Jacobs said between the APA and TLA. I don't think there
25 is a between, and I think the documents made clear that there

1 isn't a between. They're an integrated set of documents. The
2 TLA makes that clear. As a primary matter, the APA says, the
3 parties shall enter into technology license agreement. And
4 the APA directs what the content of the TLA will be. The TLA
5 then refers back to the APA and says, this is the integrated
6 agreement with the APA.

7 There's no suggestion that there is any
8 contradiction between the two. There's every suggestion that
9 the TLA is meant to be incorporated into the APA and they're
10 meant to be read as one integrated document. When read that
11 way, there is no contradiction. We think it's wrong to say
12 you've got to choose between the two of them and that there's
13 some sort of contradiction. They're easily reconciled, and
14 they need to be read together.

15 Now, none of the precedent that Novell cites
16 suggests that the TLA somehow trumps the APA. Precedent
17 really doesn't address these sorts of facts or the second
18 document incorporates the first document or the first document
19 directs the parties to enter into the second document. We
20 don't think there's any reasonable reading of the documents
21 that would state it that way.

22 Now, the APA draws distinction. And I'd like to
23 spend a minute walking through this verbally, Your Honor, and
24 perhaps trying to show on the boards how we believe this
25 works.

1 The APA draws distinction between changes of
2 control Santa Cruz versus changes of control of Novell. It
3 draws the distinction in Section 1.6 on the left, the same
4 section in which it directs the parties to enter into the TLA.
5 The TLA in turn incorporates that same distinction between
6 changes of control for Santa Cruz and changes of control for
7 Novell. How does that work?

8 Buyer shall execute a license agreement.

9 The parties agree that is the TLA. The license
10 agreement shall also provide seller with an unlimited
11 worldwide license.

12 That's the license we talked about there. And that
13 happens:

14 Upon the occurrence of a Change of Control
15 of Buyer described in Section 6.3(c).

16 In the event of a Change of Control of Seller
17 as defined in Section 6.6, certain events shall happen.

18 Santa Cruz. Novell. Capital "C", Change of
19 Control. Capital "C", Change of Control.

20 Define terms as defined in Section 1.6.

21 Section 1.6 attributes meaning, to use the phrase
22 in the TLA, it attributes meaning to the changes of control.
23 In one case Santa Cruz, and in one case Novell.

24 Now, does the TLA preserve this distinction? It
25 does clear as day. It preserves this distinction.

1 In the event of a Change of Control of SCO,
2 as incorporating Section 1.6, the proviso of
3 Subparagraph II-A(2) setting forth restrictions
4 on the sublicenses and/or distribution of licensed
5 technology and modifications thereof shall cease
6 to exist.

7 II-C:

8 In the event of the Change of Control of Novell.

9 Again, preserving the distinction that is reflected
10 in 1.6, these events shall happen.

11 Now, Novell reads Change of Control to mean only
12 the definition of Change of Control in Section 6.6. But we
13 believe that the section of the TLA that Mr. Jacobs alluded
14 to, the section of the TLA on the top of the second page
15 saying, the term of Change of Control shall have the meaning
16 attributed to that term in the APA, is this meaning with
17 respect to Santa Cruz. And we think that's very clear from
18 the documents.

19 Now, under 6.3, the parties agree Novell may obtain
20 its unlimited license only if certain events happen within two
21 years of the closing day. Only if there is a sale of
22 substantially all the assets to one of the Novell's principal
23 competitors identified in the schedule.

24 It's undisputed that that didn't happen. That
25 Santa Cruz/Caldera transaction happened much more than two

1 years after the closing day of the APA. So we think the plain
2 language of these documents read together makes it clear that
3 the TLA was incorporating what the APA said it would. There
4 is no reason to believe otherwise.

5 Now, Novell's interpretation would improperly
6 require the Court to, in summary, ignore the language of
7 Section 1.6; ignore the language of Section of 6.3; ignore the
8 list of the entities in the schedule that's identified in
9 Section 6.3; ignore the integration clause of the TLA; and
10 ignore the fact that the APA record department incorporating
11 an interim to the TLA; and assume that the parties reached a
12 completely different agreement in the TLA than the APA had
13 recommended. We don't think that's a reasonable reading.

14 Now, if the Court were inclined to find some
15 ambiguity on that issue, and we don't think there is, all of
16 the extrinsic evidence is in our favor. If there were an
17 ambiguity, as I think Novell concedes, extrinsic evidence
18 comes in. We cite testimony that we believe is directly
19 relevant to people who negotiated the APA and were with Novell
20 as the TLA was negotiated, that they never heard any
21 inclination and never had any intent that the TLA would be
22 anything other than an incorporation of the APA. There was no
23 discussion according to that testimony of anything different
24 happening. That's admissible extrinsic evidence, and on that
25 basis alone if the Court were to find ambiguity, there would

1 be no basis for summary judgment on this point.

2 Finally, Your Honor, we come to the issue of
3 Section 16600. And I won't dwell on this, because we believe
4 by virtue of its arguments regarding the scope of license
5 restrictions Novell makes this an easy decision. Novell
6 concedes in its reply briefly that a licensor obviously is
7 able to set geographic and temporal and usage boundaries on a
8 license without running afoul on Section 16600. And that
9 concession reflects the case law summarized, Your Honor, at
10 Tab 35.

11 Under California law, as Novell now
12 concedes, clauses restricting a licensee's
13 ability to use the licensor's own licensed
14 property do not violate Section 16600.

15 And California law at Tab 36, Your Honor:
16 Allows the use of noncompetition clauses in
17 employment, supplier-distributor, and
18 franchisor-franchisee context.

19 Finally, I think Novell's concession moots this
20 issue, but Novell raised an argument that this is a different
21 context because Novell and Santa Cruz didn't have any
22 day-to-day involvement. We don't read the case law to suggest
23 such a day-to-day involvement. And as a practical matter,
24 Novell has argued in this case, and to some extent they are
25 correct, that there was an agency relationship between Novell

1 and Santa Cruz. So the relationship between Novell and
2 Santa Cruz clearly falls within what some courts have called
3 in term restriction that do not run afoul from Section 16600.

4 Finally, let me just mention a few other arguments
5 in our brief in this area in California law. Section 16601
6 says where there is a sale of assets and goodwill goes with
7 the assets, there is no problem with a noncompete. We think
8 the record makes clear that the goodwill came over in the APA
9 included assets schedules really couldn't be broader. And
10 Novell's own argument has been only those things specifically
11 enumerated in the excluded asset schedule are excluded.
12 Goodwill is not excluded. We submit in a letter from SCO's
13 auditor saying specifically that goodwill is part of the
14 transaction. That is an admissible document.

15 Secondly, no California law has established that
16 where there is only a partial restraint on a business that
17 doesn't run afoul with Section 16600.

18 That is exactly what happened in this case. Novell
19 agreed to nothing more than not using certain technology in a
20 business that it had just sold to compete with a business that
21 it just sold. There is no question that Novell continued with
22 its million dollar network business and continued in its
23 operating business generally in the noncompete restriction
24 doesn't run afoul with California law on that front.

25 And finally, Your Honor, we made our argument about

1 unjust enrichment just to make a point that California law
2 makes clear that in deciding whether to apply civil code
3 provisions, the Court should not do so in factual fashion.
4 And by virtue of the stay, the kinds of facts that the Court
5 would consider under California law in deciding whether to
6 enforce the noncompete provisions here haven't been developed.
7 So we think it would be inappropriate to make that decision at
8 this time.

9 For those reasons, we ask you to deny Novell's
10 motion.

11 THE COURT: Thank you, Mr. Normand.

12 Mr. Jacobs?

13 MR. JACOBS: I'm trying to go green, Your Honor, so
14 I have a lot of documents on the computer.

15 I'd like to -- I think the arguments are actually
16 very well-briefed, and again the parties have converged in the
17 briefing and the oral argument. I would like to ask Your
18 Honor when you're going through the materials to take a look
19 at the District Court decision in one of the cases SCO relies
20 heavily on. It's this Ninth Circuit decision. They pointed
21 to the Guthy-Renker case. And if you go look at the
22 underlying district court memorandum decision, it's just sort
23 of Black Letter law at this stage.

24 Under Federal and California law --

25 This is at Page 5 of the memorandum decision.

1 Under federal and California law, a material
2 breach of a licensing agreement gives rise to a
3 right of rescission which allows the non-breaching
4 party to terminate the agreement but does not
5 automatically terminate the license. If the
6 non-breaching party then terminates the agreement,
7 any further distribution would constitute
8 copyright infringement.

9 So the way you get two causes of action in the same
10 lawsuit is whether there is a rescission. In the court, they're
11 actually divided up in the claims of various photographs and
12 the failure to attribute or to credit on the various
13 photographs depending on whether it was before and after which
14 form of action lay and whether you had a contract claim or a
15 copyright claim. So it's important to look closely at what's
16 going on in these cases and understand what SCO seems to
17 ignore, which is this rescission element that allows for two
18 causes of action in a single case.

19 I think we do rely heavily on Sun V. Microsoft. It
20 really is the case that says you have to look closely at a
21 contract, and you have to decide whether something is a
22 covenant, in which case you only have a contract claim and you
23 don't have the preliminary injunction irreparable harm
24 presumptions that you'd have if it was a copyright claim. Or
25 you look at it as a limitation on the scope of the license

1 giving rise to a copyright claim. The case sets that question
2 up and asks courts to decide that question based primarily on
3 looking at the language of the agreement and the geography of
4 the agreement.

5 And what Mister -- the former CEO of Novell says
6 ten years later about what he had in his mind ten years before
7 can't trump what is fundamentally a question of law. We
8 actually do have pretty compelling extrinsic evidence on our
9 side because we took the deposition of not an executive who is
10 closely involved in drafting the agreement, but the lawyer on
11 the other side Steve Sabbath. We provided that in our brief.
12 Sabbath says, the right place to look under the TLA to figure
13 out which chain of control provision you should be looking to
14 in Section 6.6, not Section 6.3(c). More particularly, he
15 said, sure looks like it.

16 The asset purchase agreement and the TLA are not to
17 be read together when it comes to deciding all of the
18 questions of what is in the scope of the license. I think
19 that's our fundamental divide on this question. The asset
20 purchase agreement contains a promise entered into the TLA.
21 And the TLA is the TLA. And you look to the TLA to decide
22 what the license terms are.

23 If you pars the TLA the way SCO does and look at
24 the change of control of SCO versus change of control of
25 Novell, it actually would have been very easy to have written,

1 change of control of SCO or of seller or buyer, and change of
2 control of seller shall have the meanings attributed to them
3 in Section 6.3 and Section 6.6, respectively. That language
4 isn't there. Instead there's the single defined term, Change
5 of Control in caps, in quotes, and I think if you look at the
6 asset purchase agreement, that occurs only in one place in
7 Section 6.6.

8 On the 16600 point, I don't think there are --
9 there are the concessions in our briefing that SCO would seek
10 to find. There's a big legal issue in California right now
11 headed to the California Supreme Court about whether there
12 are -- whether limited covenants not to compete are allowed.
13 Our view again is that if this is a limitation on the license
14 but not a covenant, it's a limitation on the license, then we
15 are not running afoul of 16600, whichever way that law
16 ultimately goes, suggesting the benefits of deciding this
17 question in favor of limitation.

18 The last point is this unjust enrichment point.
19 And I'm not really sure where SCO is going with this. It may
20 be that their suggesting to the Court having agreed we should
21 brief this now, maybe this whole issue should be stayed
22 pending the outcome of the arbitration so we can come back to
23 what's at issue with licensed technology. It's a little late
24 for that. We teed it up to Your Honor. If you decide the TLA
25 issues on summary judgment, it will have a big impact on the

1 overall posture of this case and be of substantial benefit to
2 the litigants at this stage of the proceeding. Thank you.

3 THE COURT: Thank you.

4 We'll take a break. Now, who's arguing the third
5 motion when we come back? Mr. Hatch and --

6 MR. KIM: I am, Your Honor.

7 THE COURT: -- and Mr. Kim. All right. Let's try
8 to get back by 10 to.

9 (Recess.)

10 THE COURT: We'll proceed with the third motion
11 today.

12 And Mr. Kim?

13 MR. KIM: Thank you, Your Honor. We've come to the
14 end of a long day, and I'll try to be as simple and clear as
15 possible.

16 THE COURT: I like that. Some people say that's
17 all I can understand is simple and clear.

18 MR. KIM: Well, I wouldn't say that. But it is I
19 think in our view a very simple motion. There are quite a few
20 issues that SCO has raised, so I'll have to run down all of
21 those.

22 THE COURT: All right.

23 MR. KIM: But at the end of the day, we say this is
24 a very simple motion about two claims which just don't belong
25 in the case. And we actually, frankly, are surprised that

1 we're even arguing about these, because these claims are not
2 only clearly improper under the governing law, they're just
3 superfluous. They don't add anything to the case.

4 The claims that I'm talking about are within SCO's
5 Second Claim for breach of contract and the Fifth Claim for
6 unfair competition.

7 THE COURT: Yes.

8 MR. KIM: And does Your Honor have a copy of the
9 complaint in front of you?

10 THE COURT: No. But I know what you're talking
11 about. Go ahead.

12 MR. KIM: Okay. Do you mind if I hand it up to
13 you?

14 THE COURT: Sure. You want me to have it.

15 MR. KIM: Sure. It's just a very small portion.

16 THE COURT: Thank you.

17 MR. KIM: Now, if you look at the breach of
18 contract and unfair competition claims -- first of all, they
19 were added in 2006, two years after the case started. It used
20 to just be a slander of title case. A whole bunch of claims
21 got added. If you look at the Second Claim for breach of
22 contract, which is Page 24. It's got tab on the side.

23 THE COURT: Right. I have it.

24 MR. KIM: If you look at this, there are a whole
25 bunch of different things in here that really are not the same

1 claim. They're jumbled together. The claim that we're
2 concerned with here is Paragraph 99 and specifically
3 Subsection A. The claim is that Novell has breached the
4 covenant of good faith by making false and misleading
5 statements denying SCO's ownership of the UNIX copyrights.

6 That's the claim. That's the portion we'll talk
7 about now.

8 And then if Your Honor looks at Page 28, unfair
9 competition, again there are various claims in there. The
10 only part we're talking about here on Page 28, Paragraph 122
11 is the second sentence:

12 Novell has falsely claimed ownership of SCO's
13 copyrights in UNIX.

14 That's what we're talking about. It goes on, by
15 the way, to say that Novell has misappropriated technology.
16 That is a part that's been stayed. That's not at issue here.
17 The only thing we're talking about here is this, like, one
18 sentence or portion of sentence in the unfair competition
19 claim and the corresponding sentence in the breach of contract
20 claim. Do those state claims under the governing law?

21 Now, we say that these claims actually have to be
22 dismissed for two reasons. The first is that both of them
23 require SCO to prove that Novell's statements were false. In
24 other words, that when Novell said that SCO didn't own the
25 copyrights, that was false because SCO did own the copyrights.

1 Now that's an issue that's been fully briefed and will be
2 argued on Monday.

3 THE COURT: Monday, yes.

4 MR. KIM: So I won't go into it now.

5 The only thing I want to highlight is that there
6 really is no dispute that if Your Honor determines that the
7 copyrights were not transferred to SCO, then these two claims
8 must be dismissed because critical allegation here which is
9 not be provable. And both sides have simply incorporated by
10 reference of other briefs. So I think that is undisputed.

11 So the part I'm going to argue today is that
12 regardless of whether the statements are true or false or even
13 if those statements were false, under the governing law, they
14 simply don't state claims for breach of contract or for unfair
15 competition. They do state claims for slander of title. Of
16 course, we have substantive defenses of slander of title, we
17 referred to one of them today, a lot of reasons that it should
18 be dismissed. But this is just a tag-along claim, duplicative
19 claim that adds nothing to the slander of title claim and that
20 has never been recognized by any court and is it not
21 consistent with the statute.

22 So that's in a nutshell our basic argument. And
23 before I get into details, there's one other point that I
24 really want to highlight. The nature of the claim is quite
25 extraordinary. The claim is not that Novell came into their

1 premise and stole something or not that Novell took some
2 intellectual property and put it in their products and selling
3 it, that's a different claim. The claim is that in the midst
4 of a very public, very heated debate about the SCOSource
5 claim, Novell made statements about its position on copyright
6 ownership and its interpretation of the contracts. I wouldn't
7 be exaggerating if I say that normally a person making a
8 statement about interpretation of a contract is not going to
9 make the headlines, and it's also not something that you're
10 going to bring claim about. There's no claim. People
11 disagree all the time on meanings of contracts, and you don't
12 see thousands of claims being brought. They would be
13 improper.

14 Now, why? Because that's really extraordinary.
15 There's no -- it's just normal that people when people have
16 disputes they should be able to talk about their position.
17 And it's a very extraordinary rule that prevents that. Now,
18 we admit that in the case of slander of title, if SCO is going
19 to be able to overcome all of the defenses, show it's false,
20 malicious, unprivileged, all those things, yes, there would be
21 a claim.

22 But now what's SCO doing? They're trying to bring
23 the same claim under a different theory.

24 THE COURT: But you're saying if they're right
25 about all these other things, these don't matter because

1 they're duplicative; right?

2 MR. KIM: Yeah, exactly. Well, I think there's two
3 possibilities, Your Honor. One is exactly duplicative of the
4 exact same defense, adds nothing at all to the case. Let's
5 just clean up the pleadings and get rid of it. The other
6 possibility, and maybe this is what SCO is trying to get at,
7 I'm not sure. They may say that they don't have to prove it's
8 unprivileged. They don't have to prove malice. They don't
9 have to prove all of that. They're going to be a new body of
10 claims to get around all those defenses. Malice, slander, you
11 don't have to prove special damages. They don't try to do
12 that.

13 And we're going into a really mirky area because no
14 court has ever recognized such a claim. So Your Honor will be
15 opposed with very knowledgeable issues as to whether certain
16 privileged documents would apply. We say they would. They
17 will argue the opposite. We're just in uncharted waters, and
18 there's no reason to go there. Why? Again, no court, no
19 statute are possible. So that's getting to the heart of this.

20 Unfair competition. SCO has said Utah law is what
21 they're relying on. Clear. They've also said they're relying
22 on common law, and they're relying on statutory law. So let's
23 take those one at a time.

24 As to common law, this is one of those dream areas
25 for a lawyer. You do research a lot of times, and you don't

1 find anything on point. Here we have a case that is closely
2 on point. Is it 100 percent on point? No. But it's like
3 95 percent on point. That's Judge Winder's decision in the
4 Proctor & Gamble vs. Haugen case, which was affirmed by the
5 10th Circuit applying Utah law found, first, that basically
6 under Utah law, unfair competition should either be
7 misappropriation or common law. Second, a claim based on
8 allegedly false and defamatory statements did not state a
9 claim for unfair competition and therefore was dismissed. It
10 was just a motion to dismiss.

11 Now, what's SCO's response? Their first argument
12 is that, in fact, Novell's statements about copyright
13 ownership were seizing their property, that somehow by simply
14 saying Novell believes it owns the copyrights, the property
15 had been taken.

16 THE COURT: Or misappropriated.

17 MR. KIM: Or misappropriated. That's just not the
18 way it is. I mean, misappropriation in the normal language
19 means actually taking the property in the case of a physical
20 object taking it, and in the case of intellectual property, it
21 means putting it in your product and selling it. That's not
22 what happened. There was no seizure of property.

23 Simply stating Novell's position didn't change
24 anything. If they own it, if we own it, same. It's all the
25 same. No seizure. No misappropriation. And SCO has tried to

1 cite a bunch of cases which they say cite and support them.
2 If you look at them, every one of those cases where the normal
3 situation where misappropriation where somebody allegedly, you
4 know, they took some trade secrets, put them in their computer
5 program and were selling it, that kind of thing. And that's
6 summarized in our reply brief at Footnote 1, Page 2. We just
7 listed all of their cases and said, this is what it's about.
8 It's not our case. Some of them involved palming-off. And
9 SCO is not arguing that there's any kind of palming-off.
10 We're not trying to sell their product as ours.

11 So really the Judge Winder's decision in Proctor &
12 Gamble is really the most relevant here. They have argued
13 that the Utah Common Law of Unfair Competition goes beyond
14 misappropriation in palming-off. So when we got the
15 opposition paper, I promptly looked at their cases. I was
16 very surprised to find out that they had just really
17 mischaracterized all of those cases. They don't stand for
18 what they said. They've misquoted them. And that's our reply
19 brief at Pages 4 and 5, and I won't repeat what's there.

20 In fact, the P&G case is very clear itself.
21 Judge Winder said, you know, in Utah there's basically two
22 branches of misappropriation -- I'm sorry -- unfair
23 competition, misappropriation and palming-off. The plaintiff
24 here has not plead either. Therefore -- and there's no Utah
25 court that has ever extended unfair competition to defamation

1 in the marketplace. So the Court will not create a new cause
2 of the action under the umbrella of unfair competition, which
3 would be essentially identical to an already existing cause of
4 action, and offer no further protection of commercial finding.

5 The 10th Circuit affirmed in very similar language
6 said, look, no Utah court has gone there, and we're not going
7 there, either.

8 And SCO has said, well, that's a defamation case.
9 It's not slander of title. Sure, that's true. But those are
10 very close, and it's quite common to look at the law. And
11 it's something that's closest case to our case, in particular
12 just making the statements about copyright one should not use
13 misappropriation or palming-off. There's been no claim
14 recognized by that, recognized by any court. And there's no
15 reason to recognize it because it's duplicative.

16 The next issue is the Unfair Competition Act, and
17 this fails for multiple reasons. The first issue is SCO has a
18 really big problem because the Unfair Competition Act was
19 enacted in May 2004. That's when it became effective.

20 And if you look at their complaint, Page 37 has a
21 tab at the top -- I'm sorry -- Page 10. Page 10,
22 Paragraph 37, there's a list of Novell's allegedly false
23 statements. It goes on for three pages. A lot of statements.
24 But you look at the dates. Every single one of those
25 statements is before May 2004. They're between May 2003 and

1 March 2004. And it's very well established in Utah you can't
2 apply statute retroactively unless there's an expressed
3 statement of that. SCO doesn't dispute that. So as pled in
4 their complaint, there is no claim under the Unfair
5 Competition Act because none of these statements happened
6 before then.

7 In its opposition, SCO scrambles around and tries
8 to respond statements that were made after the act became
9 effective, and they pointed to two things. First, this is one
10 of the most amazing things, they pointed to Novell's
11 counterclaim, to its pleading in this case. They pointed,
12 they cited Paragraphs 94 to 98 of our answer in counterclaims
13 and said, you know you assert that you owned the copyrights
14 here.

15 Well, you know, of course pleadings are privileged.
16 And, in fact, SCO argued exactly that point in opposition in
17 support of their summary judgment motion on IBM's unfair
18 competition claims. So I guess when the shoe is on the other
19 foot, it's privileged.

20 But in any event, the second thing that they've
21 relied on is Novell's web page. Now, this is actually kind of
22 an intellectually issue. I found this and said, interesting.
23 I wonder what the law is, so we looked it up. Well, here's
24 the factual situation. This is supported by Ken Brakebill's
25 second supplemental declaration, Exhibits 7 and 8 in

1 Paragraph 10 and 11.

2 The website content that we're relying on which is
3 one page which simply contains links to correspondence that
4 predates the effective day of the act and also provides links
5 to copyright registrations which predate the effective date of
6 the act. That website was posted before the act became
7 effective, and it's just stayed the same since then. So the
8 intellectually interesting question is on the Internet,
9 something is posted and just stays there? Is this a
10 continuing publication even though it's staying there as soon
11 as the act becomes effective law, now we use it?

12 Well, it turns out that no Utah court has addressed
13 this. We found a District of Colorado decision in 2006 that
14 addresses that issue. They considered the vast weight of
15 authority is in favor of saying that -- it was a statute of
16 limitation case, I should mention. But the statute of
17 limitations case, they said, is a web page that simply stays
18 the continuation publication for the purpose of statute of
19 limitation or is it a single publication at the earlier date?
20 And they said, it's a single publication at the earlier date.
21 And we submit that is the correct rule. So this web page was
22 published before the Unfair Competition Act became effective,
23 so they can't rely on it.

24 Now, if Your Honor were to -- if SCO were somehow
25 able to get up beyond these procedural hurdle, they still have

1 a really big problem because the Unfair Competition Act in
2 Utah is very really narrow. It lists four specific categories
3 of unfair competition. The only one they've argued upon is
4 software license violation. And here they say that when
5 Novell said, we think we own the copyrights, not SCO, that
6 violated the technology license agreement. They say it
7 violated Section III, which is a statement that says, SCO
8 shall own the license technology.

9 Well, it doesn't violate Section III. Section III,
10 what they really want to rewrite it to say is, Novell shall
11 make no statements to the public about its understanding of
12 its right under the contract.

13 There's nothing like that, and I would submit that
14 would be a really extraordinary provision in the contract.
15 It's not there. It is true, of course, as we just heard, SCO
16 has alleged breach of a different provision of the TLA
17 noncompete clause, but they haven't even alleged that there
18 was a breach of this Section III, and it's way too late for
19 them to amend their claim to bring in a new claim for alleged
20 breach of the TLA.

21 And I submit, also, the statement SCO owns the
22 license technology does not as they've contended -- they've
23 contended that Novell acknowledges and admitted that they
24 owned the UNIX copyrights. No. That's a totally separate
25 argument. Licensed technology is defined as assets that were

1 transferred.

2 The million dollar question in this case is, what
3 assets were transferred? Our position, of course, is these
4 copyrights were not transferred. Therefore, by saying that
5 they owned the licensed technology -- of course, whatever that
6 licensed technology, which by the way is trade secrets and
7 other sorts of things, that -- you know, they own that, of
8 course. But it's not an admission of anything.

9 Anyway, so in summary, the Unfair Competition Act
10 doesn't apply both because it's not retroactive and because
11 there is no software license violation that was even plead or
12 that can be proven by the facts.

13 Finally, they've talked about the Utah Unfair
14 Practices Act, and they've just tried to confuse the issue.
15 First they suggest that somehow part of the Unfair Competition
16 Act, there's two separate chapters of the statute. Second,
17 they say, well, they must have somehow violated the act. But
18 they haven't listed specific things that violate. There's
19 things like price discrimination and below cost sales. None
20 of those provisions apply here.

21 So, Your Honor, then the last issue is their claim
22 for the breach of the implied covenant of good faith. The
23 good news is they actually, the parties do agree on some
24 things. They agree that California law applies, because now
25 we're in a contract claim. And this is under the APA.

1 California law applies to the contract issues.

2 As to the general standard, the parties have both
3 relied on the same California Supreme Court decision, Foley
4 from 1998. And that's just the general standard. But what it
5 says is the implied covenant of good faith has been developed
6 as a safety valve to fill gaps in the contract in order to
7 implement the intent of the deal. That's what it says.
8 Obviously there's a difference in how we would apply it.

9 SCO says -- well, let me step back a second. SCO
10 says that they win under that standard because we violated
11 their intent of the contract signing. But they haven't cited
12 any provision in the APA that even vaguely suggests that
13 making a statement about what assets were transferred or not
14 is a violation of the APA.

15 So I checked. There's no general confidentiality
16 provision. Just even the contents of the APA are not
17 confidential. Sometimes they are, and sometimes they're not.
18 Are there any confidentiality provisions in the APA? There's
19 exactly one, which is Section 4.5 that says, with regard to
20 due diligence, if the parties do due diligence, the parties
21 will keep those confidential. Makes sense.

22 There's nothing in there saying we can't make
23 statements about the legal interpretation of the contract.
24 Again, that would be most extraordinary to find. And I think
25 again, the extraordinary nature of it is very important for

1 the issue of whether if you are trying to fill a gap. They're
2 not trying to fill a gap. They're trying to fill a chasm. I
3 mean, there's nothing vaguely similar to this.

4 And if you look at the implied covenant cases, the
5 parties have generally addressed it, but there's something
6 that they haven't quite specifically addressed. But you reach
7 a little bit to imply something. That's not our case.

8 Now, what SCO does rely on is the Restatement of
9 the contract Section 205 Common E. And I will admit that if
10 you simply read the comment by itself it tends to suggest
11 SCO's position, because what it says is that a dispute,
12 conjuring up a dispute or kind of taking bad faith
13 interpretation of the contract may be a breach of the
14 obligation of good faith. So that tends to suggests
15 something.

16 But then you have to go look at the examples. And
17 you look at the examples. What are the examples? There are
18 two examples both based on cases, I've looked at both cases.
19 What those stand for is that if you have a dispute about
20 contract and then based on that, you refuse to ship a product
21 or you refuse to accept a product, then there may be a breach
22 of claim. That's obvious. But they don't say that, if I
23 simply tell you, well, you know what, I think I don't have to
24 accept your goods, and then you go ahead and accept the goods,
25 or you say, I'm not going to accept your goods when you ship

1 them one year from now, one year hasn't happened. You haven't
2 taken any conduct. Those cases don't say that simply telling
3 somebody your legal position is going to be a breach of bad
4 faith. And they're very strong policy reasons for not holding
5 that, because when parties have a breach of contract dispute
6 going on, it's normal that they should be able to talk to each
7 other. And when it affects the public as this Linux dispute
8 heavily does and the other party is resulting to public forums
9 and precedent, it's very normal that you should be able to do
10 that. This is the first amendment among other things. A
11 strong public policy in favor of vigorous debate.

12 And fortunately for us California Supreme Court has
13 enforced this policy in the case of Freeman, 11 Cal 4th at 97
14 and 100. What that case did was it rejected, it overruled a
15 prior line of cases that allowed parties to bring a claim for
16 bad faith denial of the existence of the contract. In
17 overruling that line of authority, they said, you know, this
18 is bad, because what it means is every time that you try to
19 defend yourself in a contract breach, you might get sued, not
20 only for breach of contract, but breach of these collateral
21 stuff, and you have a lot of stuff going on.

22 Now, SCO has pointed out that it involved a tort
23 claim and not a contract claim, but we submit exactly the same
24 policy considerations apply here. They already have a claim
25 of slander of title, so why go out and create a new founded

1 claim?

2 Now, finally, one point, SCO argues that Novell's
3 statement deprived them much of the expected value of the APA,
4 and, therefore, they've got to be able to go out, and you've
5 got to imply, Your Honor has to imply a duty that wasn't
6 written down. And it just doesn't hold up. They have
7 submitted no evidence that the APA was signed in 1995. The
8 market was entirely different then.

9 If you look at the APA and you look at the press
10 release, there's no suggestion that the reason Santa Cruz was
11 buying the copyrights because they wanted to go out and sue
12 Linux users. Of course, there was none. What was the
13 purpose? The basic purpose you can look at was for them to
14 develop their UNIX business. They wanted to create a merger
15 product and combine two products lines. They wanted to expand
16 their UNIX business. That's the purpose, and there's been no
17 evidence of that. SCO later had a change of heart, and they
18 have a new business of suing people, Linux people. That was
19 not part of the APA, and it is absolutely not essential to
20 implement the party's intent to sign the APA to imply the duty
21 that simply doesn't exist.

22 So in sum, they're trying to make an extraordinary
23 new claim. The cases and the statutes are clear that they
24 can't do it. And there's also no reason because we already
25 have slander of title and the accompanying claims.

1 THE COURT: Thank you, Mr. Kim.

2 Mr. Hatch?

3 MR. HATCH: First, I constantly hear this comment
4 that SCO's in the business of suing people. I think Mr. Kim
5 may misunderstand. I'm the one who's in the business of suing
6 people as a lawyer. SCO is conducting business and protecting
7 its intellectual property rights. We're talking about clients
8 who are in the business of suing. I think we need to only
9 look at the docket in the Northern District and see that
10 Novell has done its share of suing, as well. So I don't think
11 that's a particularly productive comment.

12 I want to start because this particular motion, it
13 comes to us in a slightly unique procedural posture. Novell
14 has argued its motion almost exclusively as a matter of law.
15 They've disputed none of the facts that we have set forth in
16 our opposition. They've advanced no evidence to support its
17 motion for partial summary judgments, and SCO's allegations
18 stand here undisputed for purposes of this motion. With that
19 in mind, I'd like to take just a second with your indulgence
20 to go a little bit into the history behind the claims as
21 outlined in large part in our papers. But I think it puts it
22 in context of misappropriation here. Basically, and I'm not
23 going to go into the detail, you know, of the whole case but
24 just what is fairly relevant here.

25 In 1995, the Santa Cruz Operation, which we all

1 know is the predecessor of SCO here, purchased the UNIX and
2 Unixware business including all copyrights from Novell.
3 Mr. Normand talked a little bit about that, and, of course,
4 we'll talk about that even more on Monday.

5 2003, SCO developed its SCOSource licensing program
6 to protect its UNIX intellectual property. And that was
7 particularly in response to the rise of Linux in SCO's UNIX
8 market. Soon after SCO announced that licensing program and
9 having filed suit against IBM for breach of its UNIX license,
10 Novell for the first time since 1995, almost eight years later
11 for the very first time claimed that it never sold UNIX
12 copyrights to Santa Cruz, predecessor of SCO.

13 In fact, on the very day that SCO was announcing
14 its most profitable quarter in history, SCO knew that -- I
15 mean, Novell knew that, Novell issued a press release on
16 May 28, 2003, and it's at Tab 2, I believe, in the book that
17 we gave you. They issued a press release claiming that it,
18 not SCO, owned UNIX copyrights. And it was an attempt to
19 affect SCO's stock price.

20 Now, after that happened, SCO reminded the CEO of
21 Novell of Amendment 2 to the asset purchase agreement and that
22 that clarified that the copyrights had been, indeed,
23 transferred to SCO. Novell then publically admitted that it
24 did appear that SCO owned the copyrights. Novell conveniently
25 forgets that part of its history. After talking to their

1 lawyers and others, Novell again shifted its position to once
2 again claim ownership of the copyrights. And it was shortly
3 thereafter we've heard in some of the other hearings that IBM
4 then announced that it was investing \$50 million in Novell,
5 not long after that change in position.

6 Novell became more aggressive then in stating its
7 newly changed position that it was the owner of the
8 copyrights, and it became more aggressive in its attack on
9 SCO. And throughout 2003 and 2004 and continuing to the
10 present, Novell continued to make numerous public claims that
11 it owned UNIX copyrights.

12 Now, facts showed that Novell engaged in this
13 unfair conduct to damage SCO's business. For instance,
14 there's deposition testimony in the case, and I think this is
15 one of the reasons why Novell didn't want to dispute facts and
16 wanted to bring their motion is just something on the law of
17 the pleadings because they didn't want to get into these
18 facts.

19 But there's deposition testimony that Chris Stone,
20 the vice-chairman of Novell at the time, told the press, and
21 this is at Tab 3, told the press that Novell's May 28th, 2003,
22 press release which claimed the claim that Novell owned the
23 copyrights was specifically timed to hurt SCO and its stock
24 price. As a matter of fact, the journalist testified and
25 said:

1 Did Novell executive Chris Stone say
2 anything about the reasons why they were
3 issuing that announcement on that date?

4 He said they were doing it because
5 SCO's earnings were that day.

6 THE COURT: One of the arguments that Novell here
7 is that the claim is duplicative. You've already brought this
8 claim. You've got a slander of title claim, so why do you
9 need another claim?

10 MR. HATCH: Well, that's an interesting argument
11 because that's like --

12 THE COURT: It is an interesting argument, and I
13 want to you respond to it.

14 MR. HATCH: And the response is every one of the
15 claims here have different elements, and they have different
16 aspects, and they pointed them out. And I'm going to go
17 through those as part of my argument.

18 But slander claim, for example, doesn't require
19 that it be a competitor. I can slander the title to your
20 home, but I don't have to be a competitor of yours. Unfair
21 competition requires being a competitor, and the Unfair
22 Competition Act requires misappropriation. I'm going to talk
23 about that.

24 The UPA, the Unfair Practices Act, is older and,
25 frankly, the early Unfair Competition Claim Act in Utah, and

1 I'll talk about that. But it has slightly different elements,
2 as well, as does the common law -- excuse me -- the UCA
3 requires specific conduct. And each one of them has slightly
4 different elements. And we have the ability, if we can show
5 the elements and we can show the facts that support it, to
6 make those claims even though they may be somewhat similar,
7 because a jury may or may not find, they may find on all of
8 them, but they may find that some of the elements support
9 Unfair Competition Act claim, and they may not support one or
10 the other claims. So we have that right.

11 Now, they argue, well, maybe that's not efficient,
12 or what have you. But I think that's the wrong argument at
13 the time. That's not a basis for summary judgment. I know of
14 zero cases that would argue that simply because you have
15 claims that are somewhat similar, they each have their own
16 elements, each of them are a separate cause of action, and you
17 have the right to bring them, that just because they don't
18 want to defend them we don't get to bring them.

19 Now, Novell didn't just make statements. I mean, a
20 lot of what I'm going to go through here and what Novell
21 talked about is that we just -- that they just made
22 statements.

23 Well, they actually did more than that. They
24 actually took action, and they talk about in their briefs
25 about affirmative conduct. Well, Novell went so far as to

1 register the UNIX copyrights in their own name, not too much
2 out of time proximity with receiving the \$50 million from IBM.
3 And they made those comments in Tab 4. They made those
4 representations and registrations with the United States
5 Government under oath.

6 Now, significantly, and one of the things that's
7 glossed over here and one of our allegations is that these
8 registrations were for the same UNIX code that in 1995 Novell
9 had placed when it gave -- when it transferred it to
10 Santa Cruz. Before they transferred it, they don't talk about
11 this, they took the code and they turned it from their name,
12 from Novell, to the Santa Cruz Operation saying that the
13 copyright was held by the Santa Cruz Operation. That's a fact
14 in the case.

15 That alone has to raise a question as to Novell's
16 veracity, that they didn't do any affirmative conduct here.
17 These were merely words alone, and it has to raise a question
18 as to their involvement with IBM.

19 Now, Novell even went so far as to announce in a
20 heavily attended Opensource business conference that it still
21 owned UNIX. And with your indulgence, I'd just like to play a
22 short clip because this gives you some flavor of the evidence
23 that's out there. And it's like ten seconds, maybe less.

24 THE COURT: Go ahead.

25 (Whereupon, the clip was played.)

1 MR. HATCH: This is then Novell's vice-chairman.
2 And you noticed what he just said at the end. He said, we
3 still own UNIX.

4 While he's doing that, in the face of Schedule 1.1A
5 of the APA which specifically indicates that all in this first
6 line, it's hard to read:

7 All rights and ownership of UNIX and Unixware,
8 all versions, all copies including the source code
9 and without limitation.

10 Were being transferred to then Santa Cruz,
11 predecessor of SCO, and then it lists these things.

12 Now, on Monday, we're going to go in some detail
13 about those actual transfer issues and go in a little bit more
14 detail about Amendment 2 and the APA. But in the face of all
15 this, these are the statements that they're saying they're
16 privileged to make.

17 Contrary to their assertions at trial, we're going
18 to show that they lawfully claimed ownership of the
19 copyrights; they made the statements specifically for unfair
20 purposes to hurt SCO's business; they made these statements to
21 support IBM's Linux strategy; and they took affirmative
22 actions consistent with their wrongful statements by putting
23 them on their website, filing for copyright registrations they
24 had no right to file for and then putting those on their
25 website, and making presentations of industry conferences and

1 continued on till today to do that.

2 Now, it's odd I think in several parts in his
3 briefing that Novell says SCO cannot rely on statements
4 outside the second amendment complaint. They don't want us to
5 show these types of things. And they made comments that I
6 just found were a little odd for summary judgment. They say:

7 SCO cannot -- this is Page 6 of their reply.

8 SCO cannot properly rely on statements that
9 were not identified in SCO's second amended
10 complaint.

11 Well, that sounds like a motion to dismiss. Maybe
12 it's a motion for judgment on the pleadings. But that's the
13 basis they are coming to you today because they're saying,
14 they can't win these motions because they didn't plead some of
15 these specific statements, one of which is the website that he
16 talked about where they continue to this day to publish the
17 fact that they own the copyrights, which continues to hurt
18 SCO, and we'll talk about that a little bit more in a minute.
19 And they characterize it in the brief. This is SCO's improper
20 attempt to amend its claim.

21 Well, I've never heard evidence made in discovery,
22 found in discovery somehow as an amendment of the claim and
23 that you're limited somehow to what you have in your
24 complaint. That doesn't make any sense. So let's talk about
25 what we did plead, because I think they played a small game

1 here, as well.

2 First, I think they've agreed that we've asserted
3 common law unfair competition. Now, Novell claims that we
4 failed to plead it properly, and they cite to the Proctor &
5 Gamble case. And they say numerous times in their briefs and
6 today in oral argument they've said, we've done that in an
7 attempt to expand Utah law.

8 Well, that's simply not the case, and it's wrong.
9 In citing Proctor & Gamble, Novell admits, and I think it's
10 pretty clear from the case, that it says, Utah unfair
11 competition encompasses at least two forms of violation. One
12 is passing off and palming, which we're not talking about
13 hear; and the second is misappropriation.

14 Now, while we argue that Utah unfair competition is
15 really broader than that, I don't think we need to for
16 purposes of this motion because at the very minimum, I think
17 it's undeniable that we have alleged misappropriation. And
18 again, Novell's the one that chose to put this motion in the
19 procedural posture of attacking the pleadings. I've seen
20 people bring motions to dismiss which are really summary
21 judgment motions. In large part, this is a motion to summary
22 judgment that they brought as a motion to dismiss.

23 But all we need to do is look at the complaint.
24 They say we didn't plead it, and I think Mr. Kim even cited to
25 it at Tab 16 of the booklet that I gave you, Paragraph 122 of

1 the second amended complaint. As you can see, it clearly
2 talks about Novell misappropriating SCO's UNIX technology.
3 And so we have asserted it.

4 Now, we have only argued that Proctor & Gamble
5 doesn't kick us out here because Proctor & Gamble is a
6 slightly different case. One, it's talking about defamation
7 in the marketplace which we're not talking about here. We're
8 talking about misappropriation of our intellectual property
9 rights. We're make a straight-up traditional argument for
10 that, as a matter of fact. Here we're talking about Novell
11 taking from SCO its goodwill and its unfettered right to its
12 IP and to force exclusivity of its IP. Its goodwill and its
13 unfettered right to the IP.

14 Now, Proctor & Gamble also was a plain defamation
15 case with a party that had no contractual relationship with
16 the opposing party, and that's certainly not the case here.
17 So I think, if anything, the Proctor & Gamble case, which Your
18 Honor is probably far more conversant with it than I am, is
19 actually supportive of SCO's claim here and not a position
20 that Novell has taken.

21 Now, next Novell makes the attempt to say, well,
22 really these are just words, and words alone can't make a
23 misappropriation. Well, we cited cases, and they're in our
24 brief, and they're also on Tabs 8, 9 and 11 that words are
25 enough, and particularly when you're talking about

1 intellectual property, which is an intangible right. And
2 you're talking about goodwill, which is an intangible right.
3 Words can certainly be enough and can destroy it. And I think
4 the Royer case makes that inevitably clear, that if you try to
5 read out that, then people can willy-nilly steal people's
6 intellectual property rights by simple words. And that's not
7 what the courts intend to limit unfair competition claims to
8 be.

9 But we've also alleged that the words here were
10 coupled with actions, because Novell's essentially saying here
11 is, I can say -- I, Novell, can say I own UNIX, but I don't.
12 If I don't, by saying it alone doesn't change the ownership,
13 and so, therefore, that can't be misappropriation.

14 But even for the Court to accept their erroneous
15 assertion, that's not what they did here, because Novell
16 conveniently ignores the fact that it acted on those
17 statements, and they keep saying in their brief that we need
18 to show affirmative action in furtherance of the words. Well,
19 they did. They went out and filed false copyright
20 registrations representing they own the copyrights. That's
21 not mere words. In the context of this case, words are
22 enough. But here Novell's misappropriation is not mere words.

23 They engage in other affirmative conduct in
24 furtherance of their unfair competition. For instance, they
25 went to the public and said they own UNIX and would indemnify

1 the customers who used its products, Suse Linux from SCO
2 lawsuits regarding that use.

3 In Tab 4 of our briefing book, Novell also began --
4 we've also shown that Novell began discussions in marketing
5 essentially with SCO's partners and SCO's potential customers
6 saying that SCO did not own the copyrights.

7 These are affirmative acts. These are acts to go
8 out and destroy someone's business, and that's what Novell
9 did. It's more than just, as I think Novell tried to
10 characterize it, commenting on our interpretation of the
11 contract. These aren't comments only on the interpretation of
12 the contract. These are words that were intended to destroy.

13 Now, I want to turn to the Unfair Competition Act
14 for a second. They've addressed that, and Novell has said
15 that the Utah Unfair Competition Act was not in effect at the
16 time of the statements, and that, therefore, should not be
17 applied retroactively.

18 Again, I think they somewhat misstate our claims,
19 because I think our claims can be fairly characterized as
20 going to the ongoing nature of the unfair competition here.
21 And so -- and in that regard, these statements, some of the
22 these statements having been made, some of the them
23 beforehand, they're still ongoing, and that's the allegations
24 in the complaint. Again, they were the ones that said we
25 didn't plead it properly. Well, we did.

1 If you look at, I think it's Tab 13. Tab 13 I lay
2 out from the second amended complaint Paragraphs 36, 39 and 24
3 in particular that talks about the fact that we are pleading
4 that they have embarked on this, that they made numerous false
5 and misleading representations, that they continue to cause
6 damage to and that they will continue. This is -- you know,
7 we're in a notice pleading state. They've been put on notice.
8 It's been properly pled that this conduct has gone on. And,
9 indeed, we've shown with no other fact, and the reason they
10 wanted -- they say in their brief, Your Honor, they didn't
11 talk about the website in the second amended complaint, so
12 they ought not be able to show that as an ongoing and
13 affirmative continued misrepresentation.

14 Well, that's odd, one, because why should we? Why
15 does that have to be in the complaint? The notice in the
16 complaint is already giving notice of the complaint itself.
17 It isn't there to layout every single fact in the case.
18 That's why we have discovery. That's why we have summary
19 judgment motions. And they don't want us to look at that.
20 And we know now and he's admitted these things are on the
21 website.

22 So that fact alone gets us past summary judgment,
23 even if we show none of the other facts that are in our brief
24 or that I've mentioned in the argument today.

25 So what do they do? They attack, and this one I

1 find really kind of humorous partly because they said we
2 misread cases in other areas in the brief, which I totally
3 disagree with. But here I don't think they could have more
4 plain misreading, because you know what he said, he said, I've
5 done a lot of research, and they've got these cases. And he
6 cited one, really. And they cited to Bloom vs. Goodyear.
7 It's out of the District of Colorado. I'm sure they picked it
8 because it was in our circuit. And they said, it had a first
9 publication on it. And it says that you only count the first
10 day the website goes up, and you can't count it as a
11 continuing violation. Remember that?

12 Well, if you read the Bloom case, and Your Honor
13 I'm sure has, the only thing that the Bloom case is addressing
14 is statute of limitations. When should the statute of
15 limitations run? Well, in a statute of limitations context,
16 that makes a really good point. It says the statute of
17 limitations would begin to run when you first publish it. But
18 it does not stand for and there's absolutely no language in
19 that, and I'm kind of surprised that Novell stretches it that
20 far, to stand for the proposition that it's only the day --
21 the only day we could have been damaged was the first day it
22 was put up.

23 The reality is that every single day that sits
24 there, they know it's damaging us because they know people get
25 on that website, they look at it, and they see that they're

1 still claiming to this day that they own that copyright. And
2 that is a daily damage to my client.

3 And if they wanted to get out of that, if this was
4 some defamatory billboard on the highway and the statute --
5 there was a new statute and they left it up, are they really
6 arguing, no, we put it up before. So I think it's a
7 grandfather clause argument of some sort. It doesn't make
8 sense. It now violates the statute.

9 So we pled enough to get past the summary judgment
10 for certain. And I think that's why they misread these cases
11 because it doesn't stand for that. They haven't retracted it,
12 either. It's still there. I think that says a lot.

13 Now, then they go to, we haven't plead a software
14 violation, and they site to the Klein Becker case, Judge
15 Cassell's decision. And again, as Your Honor has a connection
16 with the prior case. I have one with this because I was
17 actually for once on the winning side of that one. And --

18 THE COURT: Is that rare?

19 MR. KARREBERG: Yes, sir.

20 MR. HATCH: And Novell makes -- Judge Cassell
21 didn't find the logic they tried to put in their brief. Judge
22 Cassell said, you have to show some specific conduct. And
23 that's because the UCA says, you have to show, and it lists
24 certain things, and one of those is a software violation. And
25 Novell says we didn't plead that.

1 That's really quite absurd, because if you go to
2 the second amended complaint, right in the fourth claim for
3 relief, we allege copyright infringement with regards to
4 the -- and specifically refer to the technology license
5 agreement that Mr. Normand had been talking about. And
6 Tab 15, and this is Paragraph 118 from the second amended
7 complaint, you'll notice throughout it's talking about the TLA
8 that we, that SCO granted Novell a nonexclusive license.
9 Novell expressly covenanted not to use those technologies to
10 compete with SCO's core application server, and Novell has
11 infringed and is infringing SCO's copyrights.

12 So they allege that we don't allege a software
13 violation, yet, there it is in Paragraph 118 in the second
14 amended complaint. And they said, well, I guess they could
15 say -- I suppose they could say that's in paragraph -- in
16 Claim Four, and your unfair competition claim is Claim Five.

17 Well, I believe it's the next slide, 16. I mean,
18 it shouldn't be a big point. But Paragraph 121 says, we
19 fully, that:

20 SCO re-alleges and incorporates all prior
21 paragraphs as if fully set forth herein.

22 That's not very novel or unique. But we clearly
23 incorporated that alleged allegation of a software violation
24 in Claim Five for unfair competition. And so I think it's
25 very clear that we've alleged that. They said we haven't, but

1 it's there. They've been given -- they were given this
2 pleading. They're on notice. Again, we're in the context of
3 them saying we didn't plead it in this motion. They've been
4 given notice, and they know it. All right.

5 Lastly, they say we didn't plead the Unfair
6 Practices Act. Now, I'm somewhat confused about this
7 because -- where's that -- Kim gave you a copy of the second
8 amended complaint. It's very interesting because I think this
9 is a straw man argument. They want to interpret our
10 Fifth Claim for relief as simply the Unfair Competition Act
11 and I think in part so they could set up a straw man for their
12 retroactivity argument that I've already pointed out doesn't
13 hold water. And they want to ignore that we're making a claim
14 under the UPA, as well.

15 Well, and part of the problem they say there is the
16 UCA started in 2004. This was the predecessor. If you'd gone
17 and looked for unfair competition and Utah law prior to the
18 enactment of the UCA at the time where most of these
19 statements were made, you would have seen this statute. The
20 UPA. Excuse me.

21 Well, our complaint doesn't say it's just made
22 under UCA, under the Unfair Competition Act. What does it
23 say? It says it's a claim for relief for unfair competition.

24 And let's see. If you go to the very next page to
25 Paragraph 126, and it's also at Tab 12 in our book. It says

1 specifically when it seeks a remedy that we're seeking a
2 remedy under -- available under the applicable unfair
3 competition law.

4 So you might say, well, that's pretty vague. But
5 as you'll recall, Your Honor, we were in here on a motion for
6 more definite statement where they wanted to know specifically
7 what law we were doing because they were concerned by
8 applicable unfair competition law, they wanted to know what
9 that meant, in part, what jurisdiction, because I think it was
10 a fight whether it was California or Utah. And you'll recall
11 we reached a stipulation, and Your Honor issued an order on
12 the stipulation at Docket 250. And if I could just give you a
13 copy.

14 THE COURT: Sure.

15 MR. HATCH: And this is the stipulation. And
16 you'll notice at the very end of the stipulation, it says:

17 Consistent with SCO's representation, SCO's
18 second amended complaint is hereby deemed amended
19 to reflect that SCO's Fifth Claim for relief
20 arises out of Utah statutory and/or common law.

21 Now, it doesn't say just the UCA. They want to
22 read it, and I understand why, I think we all do, but they
23 want to read it as that doesn't mean the UPA. Again, we have
24 a notice pleading statute. They didn't ask for any further
25 clarification. We felt they understood that.

1 And, you know, I have -- just on a whim, I think
2 you saw me during the last argument send a note back and have
3 somebody run back to my office. I had them just -- we're a
4 notice pleading statute, and I know this may be a little, I
5 think Mr. Jacobs said he didn't want to get cute, and I don't
6 want to get too cute, but I said, go get me our index to the
7 Utah Code. And there it is, right under unfair competition,
8 the first statute cited is the UPA, Unfair Practices Act. The
9 second one cited is the UCA, Unfair Competition Act.

10 So I think it is very hard to say we didn't plead
11 that. They could have asked for more if they thought there
12 was something more limited, but instead they decided to make
13 arguments that we didn't plead things when we really did.

14 I think in our brief and in our underlying papers,
15 we've set in our underlying brief and I think the arguments I
16 made setting out the facts very clearly that we've shown
17 unfair practices under UPA. We've shown unfair competition
18 under the UCA and under Utah common law. Each one of them are
19 slightly different elements, and we have a right to go forward
20 with them. You know, and so I think that's completely plead
21 right and it's in the case.

22 Lastly, we talked about good faith and fair
23 dealing. And I find this one interesting, as well. And I
24 think the telling thing about this is they called it kind of a
25 gap filler. And --

1 THE COURT: Actually he called it a chasm filler.

2 MR. HATCH: Chasm filler. And that's fair. I
3 think he did say that. I think the problem is the gap/chasm
4 is of their own making, because what they're essentially
5 saying is, we can enter into a contract, transfer your
6 copyrights, and unless you tell us we can't go out and
7 disparage those copyrights, then we have absolute freedom to
8 do that.

9 Well, I find it amazing because the arguments in
10 the brief and that was made here again today is that, why
11 isn't there a provision saying we can't do that? That is
12 exactly why there is a cause of action for good faith and fair
13 dealing, because it fills in that gap where people don't act
14 reasonably. People, if they buy something are reasonably
15 intending the other party not to walk out the next moment and
16 try to destroy either verbally or in any other way that right.

17 And so I think this is actually a classic case of
18 the need for good faith and fair dealing, which is recognized
19 here. They haven't said that it's a law that isn't
20 recognized. They've tried to make kind of a cutesy argument
21 that, well, there wasn't any clause in the contract that said,
22 we can't -- even though we're selling you a copyright, we
23 can't go out and tell people, but we really didn't. Who would
24 even think of putting that clause in? I mean, that would be
25 kind of bizarre because you would never assume that someone

1 would act with such bad faith that you would have to do that.

2 And I think if Your Honor rules the way they're
3 asking, I think every corporate lawyer certainly in this
4 jurisdiction is going to have to start putting in clauses that
5 say things that are just patently obvious. And I think that's
6 why contracts start to get this big is because people want to
7 make arguments like that instead of acting in good faith with
8 regard to their contract. And so I find it kind of an
9 offensive argument, frankly.

10 And the Foley case. Mr. Kim said we both cite the
11 Foley case. But it kind of states it fairly succinctly when
12 it says:

13 These covenants extend to effectuate the
14 intentions of parties and to protect their
15 reasonable expectations.

16 I think it would be hard-pressed -- I understand on
17 Monday we're going to argue about the ownership of the
18 copyrights. But assuming we own the copyrights as we believe
19 the contracts say, it would be very hard for I think anybody
20 to argue that a reasonable expectation would be that SCO
21 would -- that Novell would walk out the next day and make
22 every effort to destroy that right. It isn't an intellectual
23 property right. It's goodwill. It's in the air. It's
24 intangible to a large degree. And I think that's why their
25 argument is that much more insidious than normal than if it

1 was being made with regard to an actual tangible piece of
2 property, because it's that much easier to destroy that right
3 by words than it is by almost any other means, because who's
4 going to license this stuff? And I think Mr. Normand put up
5 that evidence that people who won't contract with us because
6 they clouded the title.

7 Your Honor, I think -- lastly, I think we talked --
8 we saw the Stone clip. And one of the reasons I played that
9 and given the history at the beginning is that the Restatement
10 Second of Contracts Section 205 Common E that was referred to
11 in our brief and by Mr. Kim, one of the reasons I talked about
12 Mr. Stone in this is the Restatement clearly says it is a
13 violation to assert an interpretation contrary to one's own
14 understanding.

15 Mr. Normand and you will see on Monday virtually
16 every single person that was involved in the negotiations and
17 drafting of these contracts has taken the position that the
18 contracts were transferred to SCO. And the statements that
19 they're now making after they're in bed with IBM, after
20 they're getting money with IBM, after they're in litigation,
21 that they own it and being done, and when they have a product
22 that now competes, that's somewhat insidious, and it's clearly
23 the type of thing that the Restatement is talking about.

24 Thank you, Your Honor.

25 THE COURT: Thank you, Mr. Hatch.

1 Mr. Kim?

2 MR. KIM: Thank you, Your Honor.

3 Counsel raised a number of arguments, many of which
4 I heard for the first time today. I'll try to get through
5 them as quickly as possible.

6 I think it is interesting counsel began, ended
7 where he began which is talking about the facts. This is not
8 a motion about the facts. As counsel has rightly said, it
9 could be considered a motion or judgment on the pleadings or a
10 motion to dismiss. But the purpose of this motion only, we
11 will accept that all the allegations are true. The question
12 is, can they bring another claim where they already have a
13 perfectly good claim (unintelligible).

14 THE REPORTER: I'm sorry?

15 MR. KIM: Slander of title. When they already have
16 a claim for slander of title.

17 So the question at the end is the straw man
18 argument, how can it be that the law would permit people to go
19 out and disparage copyrights and there would be no remedy on
20 that? We're not saying there is no remedy. If they can prove
21 false, malicious, unprivileged, et cetera, et cetera, there
22 may be a claim. Should we go out and create a new claim? No.

23 And it is the implied covenant of good faith, you
24 start with the contract and the parties expectations under the
25 contract. There's not a shred of evidence that would support

1 imposition of what's basically a gag rule about talking about
2 your interpretation of the contract. And again, there's solid
3 policy reasons against that. And let me just make one
4 mention, one, which counsel started out his argument.

5 He went through the facts, about half of his
6 argument was about the facts. And one of the things he said
7 is in May 2003, Novell said publicly for the very first time
8 that they owned the copyrights.

9 Now, Novell will be arguing and has argued and will
10 be arguing on Monday, Novell didn't say anything until
11 May 2003. That means they just admitted the copyrights were
12 transferred. But now they're saying, oh, but, of course,
13 Novell start to talk? That violated something else.

14 You know, you can't have it both ways. That's
15 exactly why parties should be able to talk. Novell's actions
16 were defenseless. SCO started the whole thing. Novell had to
17 put its position on the record. And that's also, by the way,
18 Your Honor, what a duplicate contract registration is. The
19 facts are in the record. Novell registered second. SCO
20 registered its copyrights in the summer of the 2003. Novell
21 registered the same copyrights in the fall of 2003. Those
22 registrations, certainly there's statements in them, but they
23 have absolutely no legal significance as to who owns the
24 copyrights. The copyright office will simply accept the
25 registration. They won't examine the validity. They don't

1 get into disputes. And significantly, if you look at
2 17 USC Section 410(C), it says that:

3 A copyright registration is prima facie
4 evidence of the validity if made within five years
5 of publication of the order.

6 These registrations on both sides were more than
7 eight years later. So the registrations themselves have no
8 legal effect. So effectively there are some (unintelligible)
9 it's just another statement of the defense position. You
10 could be sure that if Novell didn't register its copyrights
11 when it did, SCO would argue, it didn't register its
12 copyrights, so it must have conceded the claim.

13 That's exactly the policy reason why people should
14 be able to take positions on that issue. And by the way,
15 we're not saying that you could never make a claim of any sort
16 based on words alone. For example, false advertising is a
17 well-established branch of the law. It has special rules,
18 special statutes in Utah. They have a special statute I
19 understand. It's separate from unfair competition. False
20 advertising is not part of unfair competition.

21 In fact, in the P&G case, the 10th Circuit reversed
22 the Lanham Act claim. They said that can proceed, but the
23 unfair competition cannot go ahead.

24 Counsel has talked about evidence discovered in
25 discovery, and you should be able to add new statements.

1 Well, what are they talking about? The website, which was up
2 there in 2004. That is not evidence that was discovered in
3 discovery. They knew about that. That's what they want to
4 rely on now.

5 The District of Colorado case that I mentioned, as
6 I mentioned is a statute of limitations case. We could not
7 find a case involving publication retroactive application of
8 the statute. But we think it's very closely on point. We
9 think the single publication rule should apply, and,
10 therefore, they can't retroactively reach out to a website
11 that was published before the effective date.

12 But even if it did, there is absolutely no software
13 violation. And what counsel has done, they said, we pledged a
14 different software violation. We've alleged that you've
15 misappropriated our property and things like that. That's a
16 state claim. That's not at issue here. We're talking about
17 the statement itself, the statement itself doesn't seize
18 anything.

19 Now, there's one thing that counsel said, which is
20 that they have cases for the proposition that words alone can
21 be enough. He said that they cited it in their brief, and
22 it's at Tabs 8, 9 and 11. I invite Your Honor to compare the
23 cases at Tabs 8, 9 and 11 with SCO's brief. None of them are
24 in the brief. The first time I've ever seen those cases was
25 today, so I'm obviously not prepared to talk about those

1 cases. But from a cursory glance at them -- therefore, we
2 object to them. But a cursory glance at them indicates
3 they're really kind of product disparagement type cases. From
4 their brief description I can't tell. They say it's
5 procedurally different than what is involved in the discovery
6 dispute. They don't seem -- there's nothing in there that
7 suggests that the words in this case, a statement about a
8 legal position on the interpretation of a contract would
9 trigger a claim of any sort.

10 The Unfair Practices Act, just to be clear, we have
11 two positions. One, we're not clear that it was on notice,
12 but even if it were, the Unfair Practices Act has a list of
13 probative practices, such as price discrimination and tie-ins,
14 and we're not close to any of those. So it just wouldn't help
15 them, anyway.

16 So I think I'd just like to begin where -- end
17 where I began, I'm sorry, it's the end of the day, which is
18 this is a claim that no court has ever recognized, this kind
19 of claim. There are strong policy arguments why the parties
20 should be able in this kind of dispute to say what their
21 position is. Slander of title could apply if they can prove
22 everything. But there is absolutely no reason to go beyond
23 that. Thank you, Your Honor.

24 THE COURT: Thank you, Mr. Kim.

25 Thank you all. I'll take these motions under

1 advisement. We'll be in recess. I look forward to seeing you
2 all on Monday.

3 (Whereupon, the court proceedings were concluded.)

4 * * * * *

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 STATE OF UTAH)
2) ss.
3 COUNTY OF SALT LAKE)

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

6 That as such reporter, I attended the hearing of
7 the foregoing matter on May 31, 2007, and thereat reported in
8 Stenotype all of the testimony and proceedings had, and caused
9 said notes to be transcribed into typewriting; and the
10 foregoing pages number from 3 through 116 constitute a full,
11 true and correct report of the same.

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

14 And hereby set my hand and seal, this ____ day of
15 _____ 2007.

16
17
18
19
20
21
22
23
24
25

KELLY BROWN HICKEN, CSR, RPR, RMR