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IN THE UNITED STATES DISTRICT COURT**DISTRICT OF UTAH, CENTRAL DIVISION**THE SCO GROUP, INC., a Delaware
corporation,

Plaintiff,

vs.

NOVELL, INC., a Delaware corporation,

Defendant.

Case No. 2:04CV00139

**NOVELL'S SUPPLEMENTAL
SUBMISSION OF MODEL-BASED
JURY INSTRUCTIONS**

Judge Ted Stewart

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INTRODUCTION

Together herewith, Novell is also filing its reply in support of its proposed jury instructions. It is expected that SCO will also be filing a reply in support of its instructions. And each party has previously filed objections to the other's proposed instructions.

The purpose of this submission is to mitigate the burdens imposed on the Court by the parties' other instruction-related submissions in three ways: first, by collecting Novell's and SCO's respective proposed instructions into a single document, for ease of reference and juxtaposition; second, by also collecting pertinent model instructions into the same document, and juxtaposing them with the partisan proposals of both parties; and third, by offering model-based alternatives to both SCO's and Novell's own previous proposals.

With just three exceptions, each major section below has five parts: Novell's proposed instruction(s) on a given topic, SCO's corresponding instruction(s), applicable model instruction(s), a proposed model-based alternative to the parties' previously-proposed instructions, and a brief explanation of any variations in the proposed alternative from the model(s).¹ In almost every case, the model-based alternative either is drawn verbatim and without alteration from the models; or is derived by editing the model only enough to either make it reciprocal or adapt it from the personal defamation to the slander of title context.

¹ The three departures from this general structure are the major sections addressing: the joint instruction articulating the elements for slander of title, which must now be modified in light of the Court's recent order holding that constitutional malice must be proven; disparagement, with respect to which SCO did not propose an instruction; and punitive damages, with respect to which Novell did not propose an instruction (but objected to SCO's).

I. ELEMENTS OF SLANDER OF TITLE (JOINT INSTRUCTION 1)

A. Joint Proposed Instruction

In this case, as I have said, both SCO and Novell have brought claims against each other.

SCO and Novell have each alleged that the other has slandered its title regarding ownership of copyrights over the UNIX and UnixWare computer operating systems.

Slander of title requires you to find that:

- (1) there was publication of a statement disparaging claimant's title,*
- (2) the statement was false,*
- (3) the statement was made with malice, and*
- (4) the statement caused special damages.*

I will now explain these four elements in more detail.

B. Alternative Instruction

In this case, as I have said, both SCO and Novell have brought claims against each other.

SCO and Novell have each alleged that the other has slandered its title regarding ownership of copyrights over the UNIX and UnixWare computer operating systems.

Slander of title requires you to find that:

- (1) there was an unprivileged publication of a statement disparaging claimant's title,*
- (2) the statement was false,*
- (3) the statement was published with constitutional malice, and*
- (4) the publication caused special damages.*

I will now explain these four elements in more detail.

C. Derivation of Alternative Instruction

The proposed alternative improves the original in three respects. First, element (3) is revised in view of the Court's recent order holding that the First Amendment imposes a heightened burden. Second, "statement" is replaced in elements (3) and (4) with "publication," to clarify that liability must be predicated on one or more specific acts of publication rather than the statement per se. And third, "unprivileged" is added to the first element to clarify that lack of privilege is an element of the claim and so must be proven by the party asserting the claim. *See*

West v. Thomson Newspapers, 872 P.2d 999, 1007-08 (Utah 1994) (“To state a claim for defamation, he must show . . . that the statements were . . . not subject to any privilege”); *Dowse v. Doris Trust Co.*, 208 P.2d 956, 958-59 (Utah 1949) (publication “without privilege” is an element of the claim).

II. DISPARAGEMENT (NOVELL'S INSTRUCTION 1)

A. Novell's Proposed Instruction No. 1

The first element requires the party claiming slander of title (also called the "claimant") to prove that defendant's statement was (a) made publicly and (b) disparaged claimant's title or ownership of the UNIX copyrights.

For the statement to be "public," defendant must have communicated the statement to someone other than claimant.

For the statement to be "slanderous," it must disparage the claimant's title or ownership of the UNIX copyrights. In deciding whether a public statement by defendant disparaged the claimant's title, you should not view individual words or sentences in isolation. Rather, each statement must be carefully examined in the context in which it was made, giving the words their most common and accepted meaning. You should also consider the surrounding circumstances of the statement, and how the intended audience would have understood the statement in view of those circumstances.

For the statement to be "slanderous," it must also be an objective assertion of fact about copyright ownership that is capable of being proven to be true or false. A subjective opinion or inference that is based on true facts is not slanderous. A statement is not slanderous if the context makes clear that the speaker is expressing a subjective view or an interpretation or theory, rather than an objectively verifiable fact.

SCO did not propose a disparagement instruction, and Novell has not located any model. Novell's response to SCO's objections to Novell's proposed instruction are set forth in Novell's accompanying reply. However, Novell submits that the first three paragraphs of its previously-proposed instruction should be revised (keeping the fourth paragraph unchanged), to eliminate the word "defendant" and in one instance substitute "publication" for "statement," as follows:

The first element requires the party claiming slander of title (also called the "claimant") to prove that the party accused of slander made a public statement that disparaged claimant's title or ownership of the UNIX copyrights.

For the statement to be "public," it must have been communicated to someone other than the claimant.

For the statement to be "slanderous," it must disparage the claimant's title or ownership of the UNIX copyrights. In deciding whether a public statement disparaged the claimant's title, you should not view individual words or sentences in isolation. Rather, each statement must be carefully examined in the context in which it was made, giving the words their most common and accepted meaning. You should also consider the surrounding circumstances of the publication, and how the intended audience would have understood the statement in view of those circumstances.

III. FALSITY (NOVELL’S INSTRUCTION 2, SCO’S INSTRUCTION 1)

A. Novell’s Proposed Instruction No. 2

The second element requires the party claiming slander of title to prove that defendant’s statement disparaging the ownership of the UNIX copyrights was false because the claimant actually owned the UNIX copyrights at the time the statement was made. If a statement is true, it cannot be the subject of a claim for slander of title. You must decide whether the accused statement was true or false. Thus, you must decide which company owned the copyrights at the time the statement was made. If you determine that defendant owned the UNIX copyrights, you cannot find that defendant is liable for slander of title.

As the party claiming slander of title, the claimant bears the burden of proving by a preponderance of the evidence that defendant’s statement was false – in other words, that the claimant is the owner of the UNIX copyrights.

B. SCO’s Proposed Instruction No. 1

The first element of a claim for slander of title is that the defendant has made a false statement claiming to own the property at issue. There are several statements at issue that the plaintiff contends are false statements.

Among the conduct that you are entitled to regard as “statements” are the parties’ filing of copyright registrations. The filing of such registrations does not mean that the filing party actually owns the copyrights identified in the registrations.

You must determine whether, in the various statements at issue in this case, and taken in context, the defendant intended to convey the message that it owns the UNIX and UnixWare copyrights.

You may determine that the plaintiff intended to convey that message even if the defendant has couched its statements in the form of an opinion, such as by conveying its “opinion” or “belief.” That is because an expression of opinion or belief may often imply an assertion of objective fact.

You must also determine whether the defendant’s statements were false. “False” means that the statement is either directly untrue or that an untrue inference can be drawn from the statement. You are to determine the truth or falsity of the statement according to the facts as they existed at the time defendant made the statements.

The statement, to be true, must be substantially true. A statement is considered to be true if it is substantially true or the gist of the statement is true.

C. Model Jury Instruction: Model Utah Jury Instruction (“MUJI”) 1st 10.4²

The first essential element of the plaintiff’s case requires the plaintiff to prove that the publication contained a materially false statement of fact. “False” means that the statement is

² MUJI instructions referenced herein are reproduced in Ex. A hereto.

either directly untrue or that an untrue inference can be drawn from the statement. You are to determine the truth or falsity of the statement according to the facts as they existed at the time the defendant made the statement.

A true statement cannot be the basis of a defamation claim, even if it is annoying, embarrassing, or reflects upon the plaintiff's reputation or uses inflammatory, caustic and irritating terms.

The statement, to be true, need not be absolutely, totally or literally true, but must be substantially true. A statement is considered to be true if it is substantially true or that the gist of the statement is true. When a statement is so near the truth that fine distinctions must be drawn on words pressed out of their ordinary usage to sustain any claim of falsity, you are to consider the statement as being true.

D. Model-Based Alternative to Partisan Instructions

The second element of a claim for slander of title is falsity of the statement that disparages title. "False" means that the statement is either directly untrue or that an untrue inference can be drawn from the statement. You are to determine the truth or falsity of the statement according to the facts as they existed at the time the statement was made.

A true statement cannot be the basis of a defamation claim, even if it is annoying or uses inflammatory, caustic and irritating terms.

The statement, to be true, need not be absolutely, totally or literally true, but must be substantially true. A statement is considered to be true if it is substantially true or that the gist of the statement is true. When a statement is so near the truth that fine distinctions must be drawn on words pressed out of their ordinary usage to sustain any claim of falsity, you are to consider the statement as being true.

E. Derivation of Model-Based Alternative

The proposed alternative tracks the model in every respect except:

- The opening sentence of the first paragraph and the second paragraph have been tailored to the slander of title context; and
- The third sentence of the first paragraph has been modified to make it mutual.

IV. CONSTITUTIONAL MALICE (NOVELL'S INSTRUCTION 3, SCO'S INSTRUCTION 7.1)

A. Novell's Proposed Instruction No. 3

The third element requires the party claiming slander of title to prove that defendant's statement disparaging the ownership of the UNIX copyrights was made with "constitutional malice."

To show constitutional malice, the claimant must prove by clear and convincing evidence that defendant either knew the statement was false or acted with reckless disregard for the truth when it made the statement.

To find that defendant acted with reckless disregard for the truth or falsity of the statement, there must be sufficient evidence for you to conclude that defendant published the statements with a high degree of awareness of probable falsity.

You must not confuse "constitutional malice," as I have defined it here, with more common definitions of malice, such as ill will or hatred. Hostility, disapproval or other forms of ill will do not as such establish constitutional malice; a person making a public statement may despise someone but nevertheless state only what he believes to be the truth.

The claimant must prove constitutional malice by clear and convincing evidence. Clear and convincing evidence is a more exacting standard than proof by a preponderance of the evidence, which only requires you to believe that a party's claim is more likely true than not true. Clear and convincing evidence, on the other hand, leaves no substantial doubt in your mind that the constitutional malice is highly probable.

B. SCO'S Proposed Instruction No. 7.1³

I will also ask you to determine whether the plaintiff has shown by clear and convincing evidence that the defendant has acted with what is called "actual malice."

A defendant has acted with actual malice when it published its statement either knowing that the statement was false or else was acting in reckless disregard of whether its statement was false, which means that the defendant acted with a high degree of awareness of the probable falsity of the statement, or that, at the time the statement was made, the defendant had serious doubts that the statement was true.

C. Model Jury Instruction: MUJI 1st 10.7

Because the plaintiff is a public official or a public figure, the plaintiff must prove that the defamatory statement was published with: (1) knowledge that it was false; or (2) reckless disregard of whether it was true or false, which means that the defendant acted with a high degree of awareness of the probable falsity of the statement, or that, at the time the statement was transmitted, the defendant had serious doubts that the statement was true.

³ SCO's proposed instruction no. 7 has been superseded by the Court's recent order holding that constitutional malice must be proven. (See Dkt. 762.)

In determining whether the defendant published the statement knowing the statement to be false or with reckless disregard for the truth, you should take into account all the facts and circumstances. You may consider whether the statement was fabricated or the product of the defendant's imagination. You may also consider that the defendant knew about the source of the information and whether there were reasons for the defendant to doubt the informant's veracity, whether the information was inherently improbable, or if there were other reasons for the defendant to doubt the accuracy of the information.

[In determining whether there was knowing falsehood or reckless disregard for the truth, however, it is not enough for you to find that the defendant acted negligently, carelessly, sloppily or did not exercise good judgment in researching, writing, editing or publishing the statement.] [An extreme departure from the standards of investigating and reporting ordinarily adhered to by responsible publishers does not, standing alone, constitute knowledge of falsity or reckless disregard for the truth.] [Failure to investigate does not, in itself, establish knowing falsehood or reckless disregard for the truth.] [The reliance on one source standing alone does not constitute knowledge falsehood or reckless disregard for the truth, even if other sources would be readily available, and even if, in applying reasonable reporting care, you believe those other sources should have been contacted.]

[Knowing falsehood or reckless disregard as to the truth or falsity does not require a finding of spite, ill will, hatred, bad faith, evil purpose or intent to harm.]

The mere fact that a mistake may occur does not evidence knowing falsehood or reckless disregard for the truth. Reckless disregard for the truth or falsity requires a finding that the defendant had a high degree of awareness that the statement was probably false, but went ahead and published the statement anyway. The test is not whether the defendant acted as a responsible publisher would have acted under the circumstances. While exceptional caution and skill are to be admired and encouraged, the law does not demand them as a standard of conduct in this matter.

[Unless you find by clear and convincing evidence, under all the circumstances, that the defendant acted knowing the statement to be false or with a high degree of awareness of its probable falsity, there can be no liability.]

D. Model-Based Alternative to Partisan Instructions

Because this controversy involves matters of public concern, each party must prove, by clear and convincing evidence, that the other published a defamatory statement with constitutional malice, or in other words, that the statement was made with: (1) knowledge that it was false; or (2) reckless disregard of whether it was true or false, which means that the defendant acted with a high degree of awareness of the probable falsity of the statement, or that, at the time the statement was transmitted, the defendant had serious doubts that the statement was true.

Corporations can only act through the individual people who represent them. So to show that a corporation acted with constitutional malice, what must be proven is that some particular person, acting for the corporation, published a defamatory statement that he or she knew was false, or with reckless disregard for its truth or falsity.

In determining whether a statement was published with knowledge of its falsity or reckless disregard for its truth, you should take into account all the facts and circumstances. You may consider whether the statement was fabricated or the product of the person's imagination. You may also consider that the person knew about the source of the information and whether there were reasons for the defendant to doubt the informant's veracity, whether the information was inherently improbable, or if there were other reasons for the person to doubt the accuracy of the information.

In determining whether there was knowing falsehood or reckless disregard for the truth, however, it is not enough for you to find that some person representing the corporation acted negligently, carelessly, sloppily or did not exercise good judgment in researching, writing, editing or publishing the statement. An extreme departure from the standards of investigating and reporting ordinarily adhered to does not, standing alone, constitute knowledge of falsity or reckless disregard for the truth. Failure to investigate does not, in itself, establish knowing falsehood or reckless disregard for the truth. The reliance on one source standing alone does not constitute knowledge falsehood or reckless disregard for the truth, even if other sources would be readily available, and even if, in applying reasonable care, you believe those other sources should have been consulted.

Knowing falsehood or reckless disregard as to the truth or falsity does not require a finding of spite, ill will, hatred, bad faith, evil purpose or intent to harm.

The mere fact that a mistake may occur does not evidence knowing falsehood or reckless disregard for the truth. Reckless disregard for the truth or falsity requires a finding that the person making the statement had a high degree of awareness that the statement was probably false, but went ahead and published the statement anyway. The test is not whether the person acted as a responsible publisher would have acted under the circumstances. While exceptional caution and skill are to be admired and encouraged, the law does not demand them as a standard of conduct in this matter.

Unless you find by clear and convincing evidence, under all the circumstances, that a particular person representing the corporation published a statement knowing the statement to be false or with a high degree of awareness of its probable falsity, there can be no liability.

"Reckless disregard" is a higher standard than "negligence" or lack of ordinary care. If the statement was objectively reasonable then it cannot have been made with constitutional malice.

E. Derivation of Model-Based Alternative

With the exception of the second and last paragraphs, discussed below, the alternative comprises the complete model, modified only as noted:

- The first paragraph is modified to: include the constitutionally-mandated standard of proof, as required by *Addington v. Texas*, 441 U.S. 418, 432-33 (1979); and

refer back to “constitutional malice,” the term used in the alternative to the general elements instruction proposed above.

- The first, third, fourth, sixth, and seventh paragraphs are modified to (1) make the instruction mutual and (2) accommodate the principle set forth in the second paragraph (see below).

The second paragraph comprises instruction on a legal principle not incorporated in the model instruction because the model contemplates an individual rather than a corporate defendant. The principle is that to establish corporate liability for a tort requiring a culpable state of mind—i.e., recklessness, knowledge, or intent, rather than mere negligence—it is necessary to show that some one person acting in the corporation’s behalf had the culpable state of mind. It is not enough, e.g., that one corporate representative published a statement that another corporate representative knew to be false. The principle is recognized in *Woodmont, Inc. v. Daniels*, 274 F.2d 132, 137 (10th Cir. 1959) (“while in some cases, a corporation may be held constructively responsible for the composite knowledge of all of its agents, whether acting in unison or not, we are unwilling to apply the rule to fix liability where, as here, intent is an essential ingredient of tort liability”) and numerous other cases.⁴

⁴ See, e.g., *Matrix Capital Management Fund v. BearingPoint*, 576 F.3d 172, 182 (4th Cir. 2009) (“To the extent a plaintiff alleges corporate fraud, the plaintiff ‘must allege facts that support a strong inference of scienter with respect to at least one authorized agent of the corporation.’”); *Teamsters Local 445 v. Dynex Capital, Inc.*, 531 F.3d 190, 195 (2d Cir. 2008) (“To prove liability against a corporation, of course, a plaintiff must prove that an agent of the corporation committed a culpable act with the requisite scienter, and that the act (and accompanying mental state) are attributable to the corporation.”); *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 708 (7th Cir. 2008) (“To establish corporate liability for a violation of Rule 10b-5 requires ‘look[ing] to the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve it or its making or issuance, or who furnish information or language for inclusion therein, or the like) rather than generally to the collective knowledge of all the corporation’s officers and employees acquired in the course of their employment.’”) (quoting

As noted above, with the exception of the last paragraph, the entire model-based alternative is either taken from the form or reflects the well-established principle that to establish a culpable state of corporate mind it is necessary to prove that some individual acting for the corporation acted with that state of mind. The last paragraph is different. This paragraph states the principle that reckless disregard for the truth is a higher standard than negligence (or even gross negligence), and thus a finding that a statement is objectively reasonable precludes a finding of “reckless disregard” or constitutional malice. The Tenth Circuit endorsed this principle by holding that “actual malice” (*i.e.*, “knowledge of falsehood or reckless disregard for the truth”) is a “higher standard” than “recklessness or gross negligence.” *Ball Corp. v. Xidex Corp.*, 967 F.2d 1440, 1445 (10th Cir. 1992). The Tenth Circuit applied this principle by holding that a finding that there was a “reasonable basis” for an allegedly tortious statement “is incompatible with a finding of recklessness or gross negligence as to the truth.” *Id.*; *see also Dial One of the Mid-South, Inc. v. BellSouth Telecommunications, Inc.*, 269 F.3d 523, 526-27 (5th Cir. 2001) (“lesser standard” of “objective reasonableness” should apply to Lanham Act claims directed against statements that are *not* of “public concern,” because there is “no constitutional mandate to protect this type of speech under the *heightened* actual malice standard”) (emphasis added); *cf. Rogers v. United States*, 422 U.S. 35, 47 (1975) (“objective interpretation embodies a negligence standard we should be particularly wary of adopting such a standard for a statute that regulates pure speech”).

The conclusion that objective reasonableness precludes a finding of constitutional malice is also supported by the principle that “an objectively reasonable effort to litigate cannot be sham

Southland Securities Corp. v. INSpire Ins. Solutions, Inc., 365 F.3d 353, 366 (5th Cir. 2004)); *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1435 (9th Cir. 1995) (“there is no case law supporting an independent ‘collective scienter’ theory”).

regardless of subjective intent.” See *Professional Real Estate Inv., Inc. v. Columbia Pictures Ind., Inc.*, 508 U.S. 49, 57, 113 S. Ct. 1920 (1993). Although this principle has been articulated in the context of the First Amendment right to petition under the *Noerr-Pennington* doctrine, the same principle should apply in the context of the “constitutional malice” standard since it protects similar First Amendment rights.

V. DAMAGES (NOVELL'S INSTRUCTIONS 4 & 6, SCO'S INSTRUCTION 10)

A. Novell's Proposed Instructions

1. Novell's Proposed Instruction No. 4

The fourth element requires the party claiming slander of title to prove that defendant's statement disparaging claimant's ownership of the UNIX copyrights caused special damages to claimant. The claimant cannot prevail on its slander of title claim unless it proves it suffered actual economic damage as a direct and immediate result of the slanderous false statement. The law does not assume that economic damage always occurs as a result of an act slandering one's title to property. For this reason, it is necessary for the party claiming slander to prove that the false statement caused it economic injury, called "special" damages.

The burden is on the party claiming slander of title to establish that the harm complained of resulted from the false statement and not from other factors. In other words, the party claiming slander must show that if not for the false statement, it would not have suffered any harm.

Unless the party claiming slander can prove a specific monetary loss flowing from the slander, then you must find that there is no damage. These "special" damages must be shown and their amount must be proven and not merely estimated. A decline in stock price is not an appropriate claim for special damages.

2. Novell's Proposed Instruction No. 6

I will now instruct you about awarding damages. This instruction is given as a guide for calculating what damages should be if you find that SCO or Novell is entitled to them. However, if you decide that neither party is entitled to recover damages, then you must disregard this instruction.

If you decide that one party slandered the other party's title to the UNIX copyrights, you must decide how much money will fairly and adequately compensate the slandered party for that harm.

Both SCO and Novell claim damages in the form of legal costs incurred to defend their alleged ownership of the UNIX copyrights in the face of slanderous statements allegedly made by the other party.

In addition, SCO (but not Novell) claims damages in the form of lost profits. To recover damages for lost profits, SCO must prove it is reasonably certain it would have earned profits but for Novell's conduct.

If you find that Novell did not publish a slanderous statement with constitutional malice or solely out of spite or ill will but did publish a slanderous statement to persons that did not have a legitimate interest in the statement, then Novell is responsible only for the portion of lost profits that results from publishing the statements to persons that did not have a legitimate interest in the statements.

To decide the amount of damages for lost profits, you must determine the gross amount SCO would have received but for Novell's conduct and then subtract from that amount the expenses SCO would have had if Novell's conduct had not occurred. In addition, the amount of damages must be reduced by the value of any licenses SCO will still be able to sell once its title to the copyrights is clear. If the current licensing value of the copyrights is greater than or equal to the value of the copyrights before any slander by Novell then SCO has no recoverable damages.

The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

B. SCO's Proposed Instruction No. 10

The final element of a claim for slander of title is that the defendant's statements have caused the plaintiff to suffer "special damages."

A defendant's conduct has "caused" the plaintiff's damages where the defendant's conduct was a substantial factor in causing such damages.

The special damage rule requires the plaintiff to establish pecuniary loss that has been realized or liquidated, as in the case of specific lost sales. Damages are ordinarily proved in a slander of title action by evidence of a lost sale or the loss of some other pecuniary advantage. Absent a specific monetary loss flowing from a slander affecting the saleability or use of the property, there is no damage.

Plaintiff's pecuniary loss may be established by proof that the loss has resulted from the conduct of a number of persons whom it is impossible specifically to identify.

C. Model Jury Instructions

1. MUJI 1st 10.11

If you find that the plaintiff has established all the elements of the plaintiff's case, as those elements have been defined for you, then you should consider the issue of damages.

In considering damages, if any, you should consider those pecuniary losses and general damages which the plaintiff has shown by the preponderance of the evidence to have sustained that were proximately caused by the publication of the false statements.

Pecuniary loss is that loss which is actual, such as a loss of income, or those damages of a readily and easily quantifiable amount that [are attributed to] [were incurred because of] the actions of other persons. Loss of income created by feelings of grief, sadness, anger or otherwise that may have inhibited the plaintiff's capability or desire to work are not, as such, pecuniary losses for these purposes.

General damages are those that are the natural and necessary result of an act, and as such, do not include specific pecuniary loss such as an award for loss of salary, income, employment, opportunity for employment, or anything else in the area of actual monetary loss.

In considering general damages, you may consider the plaintiff's injured feelings, humiliation and tarnished reputation, impairment of standing in the community, anxiety, shame, mortification, and mental anguish and suffering, taking into account the nature of the statements, the extent of their publicity, and the character, station in life, and influence of the respective parties to the lawsuit. You may also take into account whether there will, with reasonable certainty, be any such injuries in the future to the plaintiff. Considering all of such matters, it is for you to determine such amount as in your judgment will be just and reasonable compensation for the plaintiff for any injury and damage sustained.

If you award the plaintiff general damages, you may award those damages which flow from the false and defamatory statements of the defendant but not those which may have occurred as a result of any other actions of the defendant, including any other statements referring to the plaintiff that are not false, defamatory, or not made with actual malice. You may not award damages that are the result of the plaintiff's own activities or any other person's activities. In determining what amount of damages, if any, to be awarded, you may also consider the plaintiff's own reputation.

2. Judicial Council of California ("CACI") 3903N⁵

To recover damages for lost profits, [name of plaintiff] must prove it is reasonably certain [he/she/it] would have earned profits but for [name of defendant]'s conduct.

To decide the amount of damages for lost profits, you must determine the gross amount [name of plaintiff] would have received but for [name of defendant]'s conduct and then subtract from that amount the expenses [including the value of the [specify categories of evidence, such as labor/materials/rents/all expenses/interest of the capital employed]] [name of plaintiff] would have had if [name of defendant]'s conduct had not occurred.

The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

D. Model-Based Alternative to Partisan Instructions

If you find that either party has established all the other elements for slander of title, as those elements have been defined for you, then you should consider the issue of damages.

In considering damages, if any, you should consider those economic losses which have shown by the preponderance of the evidence to have been proximately caused by the publication of the false statements.

Economic loss is that loss which is actual, such as a loss of income, or those damages of a readily and easily quantifiable amount that were incurred because of the actions of other persons.

If you award damages, you may award those damages which flow from the false and defamatory statements but not those which may have occurred as a result of any other actions, including any other statements that are not false, defamatory, or not made with actual malice.

⁵ CACI instructions cited herein are reproduced in Ex. B hereto.

You may not award damages that are the result of the party's own activities or any other person's activities.

To recover damages for lost profits, a party must prove it is reasonably certain it would have earned profits but for the other party's conduct.

To decide the amount of damages for lost profits, you must determine the gross amount that would have been received but for the slander of title and then subtract from that amount the expenses that would have been incurred if the slander had not occurred.

The amount of the lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

If you find that an otherwise privileged statement was not published solely out of spite or ill will but was published to persons that did not have a legitimate interest in the statement, then you may only award damages for the portion of lost profits that results from publishing the statements to persons that did not have a legitimate interest in the statements.

E. Derivation of Model-Based Alternative

The proposed alternative combines Utah's model instruction for defamation damages with California's model for lost profits (Utah does not have a model for lost profits). Novell's proposal takes all of the Utah model, except for those portions relating to general damages and reputational injury, modified only as necessary to make the instruction reciprocal (and replace "pecuniary" with the more familiar "economic"); and all of the California model, modified only as necessary to make the instruction reciprocal. The only paragraph not taken from one of those models is the last paragraph, which instructs the jury on a pertinent point of law not addressed by either model, viz., that if a privilege is abused only by excessive publication, then only damages attributable to the excessive publication may be awarded. *See* Restatement (Second) of Torts § 604 cmt. c ("When a communication is made at the same time to persons who are within the defendant's conditional privilege, and to other persons who are not within it, it may be possible to sever the harm done by the one from that done by the other. The defendant may then be subject to liability only for that part of the total harm that is found to have resulted from his

communication to the improper persons, and not for his communication to those as to whom it is privileged.”).

VI. PRIVILEGES (NOVELL'S INSTRUCTION 5, SCO'S INSTRUCTIONS 8 & 9)

A. Novell's Proposed Instruction No. 5

If you decide that SCO owns the UNIX copyrights, that Novell published statements slandering SCO's title with constitutional malice, and that SCO suffered special damages as a result, then you must decide if Novell was privileged to make those statements. If a privilege applies to a statement, and the publisher of the statement has not abused the privilege, then the publisher cannot be held liable for making the statement.

Novell claims several different privileges. You must decide whether those privileges apply; and, if so, whether Novell abused those privileges. SCO bears the burden of proving that each of Novell's statements either was not privileged, or that Novell abused any applicable privilege.

First, Novell claims that statements it made in its applications for copyright registration were protected by Novell's right to petition the government. Novell's applications were protected by this privilege unless Novell's applications were baseless and Novell filed those applications without regard to whether it was entitled to registration.

Second, Novell claims that other statements were protected by the litigation privilege, the recipient's interest privilege, and the rival property claimant's privilege.

Taking those in order, a party to litigation is privileged to publish slanderous statements during a lawsuit and even before a proposed lawsuit, so long as the statements have some relation to the lawsuit. Statements published by Novell before or during this lawsuit, that had some relation to this lawsuit, are protected by the litigation privilege unless Novell abused that privilege. The litigation privilege is abused if the statement is published to persons who have no connection to the judicial proceeding because they do not have an adequate legal interest in the outcome of the proposed litigation.

Next, a party is privileged to publish slanderous statements that affect a legitimate interest of the recipient or audience. A legitimate interest may be, for example, a business interest, a financial interest, or a property interest. Statements published by Novell that affected a legitimate interest of the recipients of the publication were protected by the recipient's interest privilege unless Novell abused that privilege. The recipient's interest privilege is abused if the statement was made with constitutional malice, if the statement was made solely out of spite or ill will, or if the statement was published to persons that did not have a legitimate interest in the statement.

Finally, a party is privileged to publish slanderous statements asserting that it owns property, such as copyrights. Novell was privileged to assert ownership of the copyrights unless it abused that privilege. The rival claimant's privilege is abused if the person claiming ownership does not believe that it owns the property.

B. SCO’S Proposed Instructions

1. SCO’S Proposed Instruction No. 8

A defendant to a claim for slander of title may assert what are called “privileges” to have made the statements at issue. The defendant has the burden of proving that a privilege applies.

That is, a publisher of statements may have what is called a “conditional” or “qualified” privilege to make those statements. There are several privileges which may be applicable.

The first privilege is the absolute privilege for litigation.

The purpose of this privilege is to promote candid and honest communication between the parties and their counsel in order to resolve disputes. Accordingly, the privilege generally applies to a party to a private litigation. In order to find that this privilege applies, you must conclude that a party made its statements as part of candid and honest communication in order to resolve a potential or pending lawsuit between the parties.

The second privilege is the “legitimate interest” privilege.

The purpose of this privilege is to permit a party to publish a statement where the recipient of the statement is one to whom the publisher is under a legal duty to publish the matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct. In order to find that this privilege applies, you must conclude that a party was under a legal duty to publish its statements to the public or conclude that its publications of its statement to the public was within the generally accepted standards of decent conduct.

The third privilege is the “rival claim” privilege.

The purpose of that privilege is to permit a rival claimant to disparage another's property by asserting an inconsistent legally protected interest in itself. The statement must be made honestly and in good faith.

2. SCO’S Proposed Instruction No. 9

Although you may find that the foregoing privileges exist, where the disparaging statement was published maliciously or in bad faith, the defendant has published the matter without privilege to do so.

That is, no privilege applies if a party acted with malice or otherwise transcended the scope of the privilege.

A defendant transcends the scope of the privilege if it excessively publishes the statement at issue or acts inconsistent with the purpose of the privilege. A statement is excessively published if it is published to more persons than the scope of the privilege requires to effectuate its purpose.

C. Model Jury Instruction: Delaware Pattern Jury Instructions § 11.17⁶

I have determined, as a matter of law, that [defendant's name] was privileged to publish false and defamatory communications. But a person with this privilege may not abuse it. You must determine whether [defendant's name] abused [his/her/its] privilege. If you find that [he/she/it] did, you may return a verdict in favor of [plaintiff's name] and against [defendant's name].

The privilege that applies to [defendant's name] is [__state privilege__]. This privilege is abused, however, if [defendant's name] made or published the false and defamatory communication intentionally, that is, with knowledge of its falsity; or recklessly, that is, disregarding whether it was true or false. The privilege is also abused when asserted outside [defendant's name]'s performance of [his/her/its] duties or functions that give rise to the privilege.

D. Model-Based Alternative to Partisan Instructions

If a privilege applies to a statement, and the publisher of the statement has not abused the privilege, then the publisher cannot be held liable for making the statement.

The parties claim several different privileges. You must decide whether those privileges apply; and, if so, whether they were abused those privileges. The party asserting the privilege bears the burden of proving the circumstances under which the privilege was made, and the party alleging slander bears the burden of proving the privilege was abused.

The first privilege is the litigation privilege. A party to litigation is privileged to publish slanderous statements during a lawsuit and even before a proposed lawsuit, so long as the statements have some relation to the lawsuit. Statements published before or during this lawsuit, that had some relation to this lawsuit, are protected by the litigation privilege unless the privilege was abused. The litigation privilege is abused if the statement is published to persons who have no connection to the judicial proceeding because they do not have an adequate legal interest in the outcome of the proposed litigation.

Next, a party is privileged to publish slanderous statements that affect a legitimate interest of the recipient or audience. A legitimate interest may be, for example, a business interest, a financial interest, or a property interest. Statements that affect a legitimate interest of the recipients of the publication are protected by the recipient's interest privilege unless the privilege is abused. The recipient's interest privilege is abused if the statement was made solely out of spite or ill will, or if the statement was published to persons that did not have a legitimate interest in the statement.

Finally, a party is privileged to publish statements contesting another party's claim to own property, such as copyrights. The rival claimant's privilege is abused if the person claiming ownership does not believe that it owns the property.

⁶ Reproduced in Ex. C hereto.

E. Derivation of Model-Based Alternative

Neither Utah nor California has a model privileges instruction. The only model Novell could find was from Delaware. That model assumes that the court decides whether the privilege applies. The instruction originally proposed by Novell adapted the model to this Court's ruling that the jury will decide whether privileges apply. The proposed alternative updates Novell's original proposal to reflect the Court's intervening ruling on the application of the *Noerr-Pennington* doctrine to applications for copyright registration and SCO's contention that it, too, has invoked privilege. Novell submits that to the extent the proposed alternative still differs from SCO's proposed instruction, the alternative is better for reasons articulated in Novell's objection to SCO's instructions and reply in support of its own instructions.⁷

⁷ This submission is made without waiver of Novell's exceptions to the Court's rulings that application of privilege is a question of fact and that the *Noerr-Pennington* doctrine does not protect applications for copyright registration.

VII. CONTRACT INTERPRETATION (NOVELL'S INSTRUCTION 7, SCO'S INSTRUCTION 4)

A. Novell's Proposed Instruction No. 7

In deciding what the terms of a contract mean, you must decide what the parties intended at the time the contract was created.

The starting point for your interpretation must be the actual words used in the contract, which are given their usual and ordinary meaning. Any type of evidence other than the words themselves is "extrinsic evidence."

B. SCO'S Proposed Instruction No. 4

With respect to your consideration of the amended Asset Purchase Agreement, and other agreements at issue here, where contract terms are clear, they should be given their plain and ordinary meanings.

You should interpret a contract to give meaning to all of its provisions, instead of leaving a portion of the writing useless or inexplicable. You should not interpret a contract to render one of its terms meaningless.

You should interpret a contract as a whole, with each clause helping to interpret the other.

C. Model Jury Instructions

1. CACI 314

[Name of plaintiff] and [name of defendant] dispute the meaning of the following term contained in their contract: [insert text of term].

[Name of plaintiff] claims that the term means [insert plaintiff's interpretation of the term]. [Name of defendant] claims that the term means [insert defendant's interpretation of the term]. [Name of plaintiff] must prove that [his/her/its] interpretation of the term is correct.

In deciding what the terms of a contract mean, you must decide what the parties intended at the time the contract was created. You may consider the usual and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract.

[The following instructions may also help you interpret the terms of the contract:]

2. CACI 317

In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

D. Model-Based Alternative to Partisan Instructions

In deciding what the terms of a contract mean, you must decide what the parties intended at the time the contract was created. You may consider the usual and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract.

With respect to your consideration of the agreement at issue here, where contract terms are clear, they should be given their plain and ordinary meanings.

In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

E. Derivation of Model-Based Alternative

The proposed alternative consists of is the central paragraph of CACI 314, followed by SCO's first paragraph (with only the confusing reference to other agreements excised), followed by the whole of CACI 317.

VIII. EXTRINSIC EVIDENCE (NOVELL'S INSTRUCTION 8, SCO'S INSTRUCTION 5)

A. Novell's Proposed Instruction No. 8

Extrinsic evidence may only be considered to interpret ambiguous language. Language that is not ambiguous must be given its usual and ordinary meaning, without regard to any extrinsic evidence.

Even when extrinsic evidence is used to interpret ambiguous language, the interpretation must be consistent with the language used in the contract. Even ambiguous language cannot be given an interpretation that is inconsistent with the words used.

One type of extrinsic evidence is testimony or documents showing what the people who were negotiating the contract said or did or understood at the time of the transaction. However, evidence that one party thought the language had a certain meaning is not relevant unless that understanding was somehow communicated to the other side.

Another type of extrinsic evidence you may consider to interpret ambiguous language is the parties' "course of performance," which is how the parties interpreted and applied the terms of the contract after it was created but before any disagreement between the parties arose. However, you may not consider the parties' course of performance, by itself, conclusive as to the meaning of the contract.

B. SCO'S Proposed Instruction No. 5

With respect to who owns the property at issue, you should consider what is called the "extrinsic evidence" of the intent of the parties to the amended Asset Purchase Agreement. The "extrinsic evidence" is the evidence of what parties to a contract intended apart from the language they used in the contract.

Extrinsic evidence can aid you in determining the circumstances under which the parties negotiated a contract.

The evidence of the business negotiators' intent concerning the Asset Purchase Agreement and Amendment No.2 is relevant. Such evidence may take the form of witness testimony or documentary evidence of what they said or did or understood at the time of the transaction.

Another type of extrinsic evidence is called the parties' "course of performance."

Course of performance is how, as a practical matter, the parties' interpreted and applied the terms of the contract in the years after the contract was signed.

Indeed, the practical construction the parties placed upon the combined Asset Purchase Agreement and Amendment No.2 is the best evidence of their intention.

That is because parties are far less likely to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and

when one of them then seeks a construction at variance with the practical construction they have placed upon it.

Another type of relevant extrinsic evidence is the customs or practices within a particular field or industry. You may consider the testimony of either laypersons or experts in assessing any such customs or practices.

C. Model Jury Instructions

1. CACI 315

You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning.

2. CACI 318

In deciding what the words in a contract meant to the parties, you may consider how the parties acted after the contract was created but before any disagreement between the parties arose.

D. Model-Based Alternative to Partisan Instructions

You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning.

In deciding what the words in a contract meant to the parties, you may consider how the parties acted after the contract was created but before any disagreement between the parties arose.

E. Derivation of Model-Based Alternative

The proposed alternative consists of CACI 315 followed by CACI 318.

IX. UNCLEAN HANDS (NOVELL'S INSTRUCTION 9)

The Court has ruled the jury will not be instructed on unclean hands.

X. COPYRIGHT (NOVELL'S INSTRUCTIONS 10, 11, 12; SCO'S INSTRUCTION 6)

A. Novell's Proposed Instructions

1. Novell's Proposed Instruction No. 10

Copyright is the exclusive right to copy. Upon obtaining a copyright, an author automatically acquires certain rights that are inherent in the very nature of a copyright. Specifically, the copyright owner obtains the following six exclusive rights of copyright:

- (1) the right to make additional copies, or otherwise reproduce the copyrighted work;*
- (2) the right to recast, transform, adapt the work, or otherwise prepare derivative works based upon the copyrighted work;*
- (3) the right to distribute copies of the copyrighted work to the public by sale or other transfer of ownership;*
- (4) the right to perform publicly a copyrighted work;*
- (5) the right to display publicly a copyrighted work; and*
- (6) the right to perform a sound recording by means of digital audio transmission.*

It is the owner of a copyright who may exercise these exclusive rights to copy. The term "owner" may include the author of the work, an assignee, or a licensee. In general, copyright law protects against production, adaptation, distribution, performance, and display of substantially similar copies of the owner's copyrighted work without the owner's permission. An owner may enforce these rights to exclude others in an action for copyright infringement. Even though one may acquire a copy of the copyrighted work, the copyright owner retains rights and control of that copy, including uses that may result in additional copies or alterations of the work.

2. Novell's Proposed Instruction No. 11

The various rights included in a copyright are divisible and any of the exclusive rights comprised in a copyright may be transferred or licensed (on an exclusive or non-exclusive basis) to other parties.

3. Novell's Proposed Instruction No. 12

If the owner of a copyright seeks to transfer or sell ownership of that copyright, that transfer of copyright ownership must be in writing and signed by the party from whom the copyright is transferred. The purpose of this requirement is to protect copyright holders from people or companies who mistakenly or fraudulently claim transfers of copyright.

B. SCO'S Proposed Instruction No. 6

With respect to who owns the property at issue, and your consideration of the amended Asset Purchase Agreement, you should consider the nature of a copyright.

Copyright is the exclusive right to copy. The owner of a copyright has the exclusive right to make and distribute copies of the copyrighted work, to display publicly the copyrighted work, and to license the right to use the copyrighted work to other people. The owner of a copyright also has the exclusive right to bring claims in court to enforce the copyright against people who are infringing on the copyright. The owner can also license that right to someone else, but only through an express, exclusive license.

You therefore should also consider the issue of a “license” to use copyrighted material. There are different types of licenses. One distinction is between “express” and “implied” licenses.

An “express” license is found in a contract that clearly states that one party to the contract has a “license.”

An “implied” license is found in a contract that does not use the word “license,” but from whose terms you can conclude that one party has the right to use the copyrighted material.

Implied licenses usually are found where one party has created a work at the other’s request and handed it over, intending that the other copy and distribute it.

Another distinction, which is related to the difference between an “express” and an “implied” license, is the difference between an “exclusive” and a “non-exclusive” license to use copyrighted material.

An exclusive license means that only the exclusive licensee can use the copyrighted material, whereas an implied license means that several licensees can use the copyrighted material.

The distinction between an “exclusive” and a “non-exclusive” license to use copyrighted material is relevant for two main reasons.

First, an implied license can only be non-exclusive.

Second, an implied licensee, because he is a non-exclusive licensee, cannot bring lawsuits to enforce the copyrights against people who may be violating them.

C. Model Jury Instructions

1. Ninth Circuit 17.1⁸

Copyright is the exclusive right to copy. This right to copy includes the exclusive right[s] to:

- (1) [[authorize, or make additional copies, or otherwise] reproduce the copyrighted work in [copies] [phonorecords]];*
- (2) [[recast, transform, adapt the work, that is] prepare derivative works based upon the copyrighted work];*

⁸ Ninth Circuit Model Civil Jury Instructions cited herein are reproduced in Ex. D hereto.

- (3) *[distribute [copies] [sound recordings] of the copyrighted work to the public by [sale or other transfer of ownership] [or by [rental or lease or lending]]];*
- (4) *[perform publicly a copyrighted [literary work,] [musical work,] [dramatic work,] [choreographic work,] [pantomime work,] [motion picture] [or] [specify other audiovisual work]]];*
- (5) *[display publicly a copyrighted [literary work,] [musical work,] [dramatic work,] [choreographic work,] [pantomime work,] [pictorial work,] [graphic work,] [sculptural work,] [the individual images of a motion picture] [or] [specify other audiovisual work]]; and*
- (6) *[perform a sound recording by means of digital audio transmission].*

It is the owner of a copyright who may exercise [this] [these] exclusive right[s] to copy. The term “owner” includes [the author of the work] [an assignee] [an exclusive licensee]. In general, copyright law protects against [production] [adaptation] [distribution] [performance] [display] of substantially similar copies of the owner’s copyrighted work without the owner’s permission. An owner may enforce the[se] right[s] to exclude others in an action for copyright infringement. [Even though one may acquire a copy of the copyrighted work, the copyright owner retains rights and control of that copy, including uses that may result in additional copies or alterations of the work.]

2. Ninth Circuit 17.11

[In this case, the [plaintiff] [defendant] does not claim to be the [author] [creator] [initial owner] of the copyright at issue. Instead, the [plaintiff] [defendant] claims the copyright by virtue of an exclusive license from the work’s [author] [creator] [initial owner] and that the [plaintiff] [defendant] is now the exclusive licensee of the copyright.]

A copyright owner may [transfer] [sell] [convey] exclusively to another person any of the rights comprised in the copyright. [To be valid, the [transfer] [sale] [conveyance] must be in writing.] The person to whom this right is transferred is called a licensee.

[An exclusive licensee has the rights to exclude others from copying the work [to the extent of the rights granted in the license]]. An exclusive licensee is entitled to bring an action for damages for copyright infringement of the right licensed. [A nonexclusive licensee has a right to exclude others who do not have a right to copy the work.]

D. Model-Based Alternative to Partisan Instructions

Copyright is the exclusive right to copy. This right to copy includes the exclusive rights to:

- (1) *reproduce the copyrighted work in copies;*
- (2) *prepare derivative works based upon the copyrighted work; and*
- (3) *distribute copies of the copyrighted work to the public by sale or other transfer of ownership.*

It is the owner of a copyright who may exercise these exclusive rights to copy. The term “owner” includes an exclusive licensee. In general, copyright law protects against production, adaptation, and distribution of substantially similar copies of the owner’s copyrighted work without the owner’s permission. An owner may enforce these rights to exclude others in an action for copyright infringement.

A copyright owner may transfer exclusively to another person any of the rights comprised in the copyright. To be valid, the transfer must be in writing. The person to whom this right is transferred is called a licensee.

An exclusive licensee has the rights to exclude others from copying the work to the extent of the rights granted in the license. An exclusive licensee is entitled to bring an action for damages for copyright infringement of the right licensed. A nonexclusive licensee has a right to exclude others who do not have a right to copy the work.

E. Derivation of Model-Based Alternative

The proposed alternative consists entirely of the model instructions, omitting only optional bracketed portions not relevant to this case.

XI. FINDINGS (NOVELL’S INSTRUCTION 13)

Novell requests that the jury be instructed that Judge Kimball granted summary judgment to Novell on the issue of copyright ownership, as that fact constitutes evidence directly probative of Novell’s reasonableness and, thus, indirectly probative of its subjective good faith. Novell understands, however, that the Court has ruled the jury will not be instructed with respect to prior judgments and findings.

XII. PUNITIVE DAMAGES (SCO’S INSTRUCTION 11)

A. SCO’s Proposed Instruction No. 11

You are also entitled to award the plaintiff "punitive damages" if you deem them to be appropriate.

Before any award of punitive damages can be considered, the plaintiff must prove by clear and convincing evidence that the defendant published a false statement knowing it was false or in reckless disregard of whether it was true or false, and that the defendant acted with hatred or ill will towards the plaintiff, or with an intent to injure the plaintiff, or acted willfully or maliciously toward the plaintiff.

If you find that plaintiff has presented such proof, you may deem it proper for punitive damages to be awarded, in which case you should specify the amount. In determining the amount, you may award such sum as in your judgment would be reasonable and proper as a punishment to the defendant for its wrongs, and as a warning to others not to commit similar wrongs.

B. Model Instruction: MUJI 10.12

Before any award of punitive damages can considered, the plaintiff must prove by clear and convincing evidence that the defendant published a defamatory falsehood about the plaintiff, knowing it was false or in reckless disregard of whether it was true or false, and that the defendant acted with “personal malice” toward the plaintiff. Personal malice means that the defendant acted with hatred or ill will towards the plaintiff, or with an intent to injure the plaintiff, or acted willfully or maliciously towards the plaintiff.

If you find that the defendant published a defamatory falsehood about the plaintiff, knowing it was false or with reckless disregard of whether it was true or false, and acted with personal malice, you may award, if you deem it proper to do so, such sum as in your judgment would be reasonable and proper as a punishment to the defendant for such wrongs, and as a wholesome warning to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind that they are only for the purpose just mentioned and are not the measure of actual damage.

C. Model-Based Alternative to Partisan Instruction

Before any award of punitive damages can considered, there must be proof by clear and convincing evidence that a defamatory falsehood was published by someone acting in behalf of one of the corporate parties who knew the statement was false or published it in reckless disregard of whether it was true or false, and acted with “personal malice” toward the other party. Personal malice means that the person acted with hatred or ill will towards the other party, or with an intent to injure the other party, or acted willfully or maliciously toward the other party.

If you find that someone acting in behalf of either party published a defamatory falsehood about the other, knowing it was false or with reckless disregard of whether it was true or false,

and acted with personal malice, you may award, if you deem it proper to do so, such sum as in your judgment would be reasonable and proper as a punishment to the defendant for such wrongs, and as a wholesome warning to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind that they are only for the purpose just mentioned and are not the measure of actual damage.

D. Derivation of Model-Based Alternative

Novell objects to the giving of any instruction on punitive damages. But if an instruction is given, it should track the form, except as necessary to make it reciprocal.

DATED: March 8, 2010

Respectfully submitted

By: /s/ Sterling A. Brennan

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