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

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THE SCO GROUP, INC., a Delaware  
corporation,

Plaintiff,

vs.

NOVELL, INC., a Delaware corporation,

Defendant.

Case No. 2:04CV00139

**NOVELL'S MEMORANDUM IN  
SUPPORT OF ITS RULE 50(a)  
MOTION AT THE CLOSE OF ALL  
EVIDENCE**

Judge Ted Stewart

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AND RELATED COUNTERCLAIMS.

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## INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 50(a), Novell moves for judgment as a matter of law on SCO's slander of title claim because all evidence has now been submitted, and "a reasonable jury would not have a legally sufficient basis" to find for SCO in view of that evidence and the applicable burden of proof, even after drawing all reasonable inferences in SCO's favor.<sup>1</sup> See Fed. R. Civ. 50(a); *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1244 (10th Cir. 2009); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986) (clear and convincing evidence requirement for constitutional malice applies to directed verdict). Novell is entitled to judgment as a matter of law for numerous independent reasons.

First, SCO has failed to present sufficient evidence of constitutional malice because:

- SCO has presented no evidence that Novell knew that its statements were false or had a high degree of awareness of probable falsity;
- Novell's alleged failure to investigate and ill-will cannot establish constitutional malice as a matter of law; and
- Novell's statements were objectively reasonable as a matter of law, which precludes a finding of constitutional malice;
- The law of the case bars SCO from establishing constitutional malice.

Second, Novell's statements were not objectively verifiable and were constitutionally protected opinions on a complex legal issue on which reasonable persons could differ.

Third, Novell's statements were not reasonably susceptible to a disparaging meaning as a matter of law when viewed in context.

Fourth, Novell's statements were protected by the rival claimant's privilege, the recipient's interest privilege, and the *Noerr-Pennington* doctrine.

Fifth, SCO has failed to present sufficient evidence that Novell's statements were false.

Sixth, SCO has failed to present sufficient evidence of special damages.

Finally, the Tenth Circuit's limited mandate bars SCO's claim.

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<sup>1</sup> Novell does not repeat the "reasonable jury" standard below in discussing SCO's failure of proof, but this should be understood as included, where applicable.

## STATEMENT OF FACTS

SCO's slander of title claim is based on four publications: (1) Novell's May 28, 2003 press release; (2) Novell's December 22, 2003 press release and related website postings; (3) Novell's September and October 2003 copyright registrations; and (4) Chris Stone's March 2004 trade show remarks. The jury has heard from the following people who were responsible for, or approved of, these statements: Joseph LaSala, Novell's general counsel from July 2001 through mid January 2008; Chris Stone, Novell's senior vice president in corporate development from 1997 to 1999 and who returned to Novell in 2002 as vice chairman; and Jack Messman, Novell's CEO at the time the press releases were issued. As summarized below, each testified that they believed the statement that Novell was the owner of the copyrights to be true at the time. The testimony also shows that Novell published the press releases and applied to register the copyrights to protect its business interests, not to harm SCO.

### **1. Novell's May 28, 2003 Press Release**

Mr. LaSala was responsible for preparing the May 28 letter. (1892:12-1893:4.) He testified that he believed then that the APA did not transfer the copyrights to SCO. (1897:2-9.) He first reviewed the APA around February 2003, after SCO announced its SCOSource campaign and sought documentation to support its claim of ownership. (1884:11-1885:4.) After reviewing, Mr. LaSala concluded that "Novell was the rightful owner of the UNIX copyrights, and that they had not transferred to SCO" as a result of the APA. (1885:5-10.) Mr. LaSala had a conversation about the copyright issue with Mr. Stone and Mr. McBride in mid-May, and Mr. McBride requested that Novell amend the APA so SCO could get the copyrights. (1887:22-1888:20.) At that time, Mr. LaSala was aware of an unexecuted copy of Amendment No. 2, but he believed it had "no legal effect" on the copyright ownership issue because it was not executed. (1889:4-1890:1.) Mr. LaSala also directed a lawyer for Novell to see if there was an executed copy, and no executed copy was located within the law department files. (1890:2-17.) It was eventually located in the tax department. (1960:22-25.) The press release was issued on May 28 because that is when it was ready, and "all were comfortable with . . . the position," not in order to impact SCO's earnings announcement. (1893:12-21; 1961:15-19 (no connection

between release of letter and SCO's earnings release date).) Mr. LaSala testified that letter was motivated by a desire to protect Novell's interests. (1894:1-15.)

Mr. Messman testified that at the time of this press release, Novell believed it owned the UNIX copyrights, and wanted to report its position to the public to protect Novell's interests. (2256:21-24; 2259:2-4; 2285:12-2286:5.) He also testified that the timing of the May 28 press release on the day of SCO's earnings announcement was a coincidence, and that neither he nor anyone else at Novell knew that Amendment No. 2 had been executed at that time. (2253:20-23; 2276:20-23; 401:6-23.)

Mr. Stone testified that the May 28 press release was issued in response to SCO's May 12 letter accusing Linux users of infringing UNIX. (1635:22-1636:19.) Mr. Stone testified that he had previously seen an unsigned copy of Amendment No. 2 (1597:4-16), and that Novell's legal staff took steps to see whether Amendment No. 2 had been executed. (1597:21-24.) However, even after reviewing a signed copy of Amendment No. 2, after the May 28 press release was issued, Mr. Stone believed the copyrights had not transferred. (1637:24-1638:2.) The press release was put out on May 28 because that is when it was done. (1636:20-21.) Mr. Stone did not find out about SCO's May 28 earnings announcement until later that day. (1604:17-1605:3.)

SCO presented testimony of Maureen O'Gara that Mr. Stone purportedly told her that Novell intentionally timed its May 28 press release to coincide with SCO's earnings announcement. (1652:14-1654:5.)<sup>2</sup> Even if this evidence could support an inference that Mr. Stone was motivated by spite or ill will, it provides no support for a finding of constitutional malice – i.e., that Mr. Stone's statements were knowingly false or made with reckless disregard for the truth. There is no evidence that Messrs. Stone, LaSala, and Messman did not honestly believe the statement of ownership in the May 28, 2003 press release to be true.

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<sup>2</sup> Mr. Stone testified that he did not tell Maureen O'Gara that Novell was issuing a press release on May 28 (1602:11-14), or that Novell was intentionally putting it out on that date to impact SCO's earnings release. (1602:17-25; 1637:12-15.)

## **2. Novell's December 22, 2003 Press Release and Website Postings**

Mr. LaSala testified that the December 22, 2003 statement that “Novell believes it owns the copyrights in UNIX” was true. (1934:8-21.) Novell also allowed the public to “see both sides of the argument,” by making copies of Novell’s correspondence and SCO’s reply available on its website with the press release. (1934:22-1936:17.) When asked to address his understanding of Amendment No. 2, Mr. LaSala said he believed it arguably granted certain copyrights to SCO, “those that it would need to exercise the rights that it had acquired” under the APA, but he also believed that SCO has never demonstrated to Novell the need for a copyright to exercise any of those rights. (978:16-25.)

Neither Mr. LaSala nor Mr. Stone was aware that SCO was announcing its earnings on December 22, 2003. (1622:10-13; 1980:12-14.) In fact, Mr. LaSala had just learned that SCO had an earnings release on December 22 the day before his testimony at trial. (1981:7-9.) Even if the coincidence of these events could support an inference that Novell acted out of spite or ill will (personal malice), it does not prove that the statements were knowingly false or made with reckless disregard for the truth (constitutional malice).

Mr. Messman testified that the purpose of the December 22 press release was to put the information on Novell’s website so that the public, in particular the Linux community, could see it and “make their own judgments.” (2287:19-2288:7.) Mr. Messman testified that the timing of the December 22 press release on the same day as SCO’s earnings announcement was a coincidence. (2277:15-17.) There is no evidence that Novell representatives responsible for the December 22, 2003 press release did not honestly believe its statements of ownership, in the press release and attached correspondence, to be true.

## **3. Novell's September and October 2003 Copyright Registrations**

Mr. LaSala testified that Novell applied to register the copyrights in September and October 2003 in furtherance of Novell’s business interests, not to harm SCO. (1923:24-1924:6.) There is no evidence that Novell did not honestly believe it owned the copyrights.

#### **4. Mr. Stone's March 2004 Trade Show Remarks**

Mr. Stone testified that his statement at the March 4 trade show that Novell still owned UNIX was true. (1593:2-4; 1625:25-1626:2.) He clarified that he was referring to UNIX copyrights and patents. (1593:5-22.) There is no evidence that Mr. Stone did not honestly believe this statement to be true. In his testimony, Mr. Messman corroborated the truth of Mr. Stone's statement. (2281:4-11.) As recited in the Court's Jury Instruction 28, "a statement is considered to be true if it is substantially true or the gist of the statement is true."

There is no evidence that Mr. Stone's remarks at the open source business conference were intended to harm SCO. To the contrary, Mr. Stone testified that his speech was intended to champion the open source technology movement because it provided a "much more open and freer model of developing software applications." (1624:21-1625:2.) He further testified that SCO's assertion that there was UNIX in Linux was affecting Novell's ability to promote Linux in the open source movement as business for Novell, and that he was concerned it was "harming Novell's future business." (1625:3-1625:17.) Like Novell's other ownership claims, Mr. Stone's remarks were intended to protect Novell's business, not injure SCO. SCO has presented no evidence to rebut this testimony.

## **I. SCO'S CLAIM FOR SLANDER OF TITLE FAILS**

SCO has failed to introduce evidence sufficient to prove its slander of title claim. *See First Sec. Bank of Utah, N.A. v. Banberry Crossing*, 780 P.2d 1253, 1256-57 (Utah 1989).

Accordingly, Novell is entitled to judgment as a matter of law.

### **A. SCO Has Not Shown Constitutional Malice**

Novell is entitled to judgment because SCO failed to prove constitutional malice by clear and convincing evidence. Because the “clear and convincing evidence” standard applies to constitutional malice, the element must fail even if there is some evidence to support an inference of malice if that evidence is not clear and convincing. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986) (clear and convincing evidence requirement for actual malice element applies at directed verdict stage); *Mackey v. Burke*, 751 F.2d 322, 325 (10th Cir. 1984) (the question is “not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party”).

#### **1. The Standard for Constitutional Malice**

Constitutional malice requires SCO to prove by clear and convincing evidence that Novell (i) knew its statements about copyright ownership were false or (ii) acted with reckless disregard for the truth when it made those statements. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280-81 (1964). As recognized by the Court’s jury instructions, “reckless disregard” means that Novell published its statements with “a high degree of awareness of ... probable falsity,” or that Novell “in fact entertained serious doubts as to the truth of [its] publication.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Supreme Court jurisprudence establishes several important principles, including that constitutional malice (a) is subject to “independent” judicial review; (b) focuses on the state of mind of the persons responsible; (c) is a difficult standard that is *not* met by a failure to investigate or ill-will; and (d) cannot be shown by minor inaccuracies.

**a. Constitutional Malice is Subject to Independent Review**

The Supreme Court held in *New York Times* that judges should conduct an “independent review” to determine if the evidence is sufficient to show “constitutional malice.” 376 U.S. at 284-85 (citations omitted). The Supreme Court later held that a finding of constitutional malice is *not* subject to the deferential “clearly erroneous” standard on appeal but is rather subject to “independent” review. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 (1984). Although these cases focused on appellate review, the principle of “independent” judicial review applies with equal force to district courts. Indeed, the Supreme Court has held that “whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.” *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989). Thus, this Court should apply its independent judgment to determine if SCO has presented “clear and convincing” evidence of constitutional malice.<sup>3</sup>

**b. Constitutional Malice Focuses on the State of Mind of the Persons Responsible for the Publication**

The Supreme Court held in *New York Times* that whether a corporation acted with constitutional malice depends on “the state of mind” of the persons responsible for the publication at issue. 376 U.S. at 287. The plaintiff argued that the Times “knew” the publication was false because news stories in its own files showed that certain points were inaccurate. The Supreme Court rejected this argument, holding that:

The mere presence of the stories in the files does not, of course, establish that the Times “knew” the advertisement was false, since *the state of mind required for actual malice would have to be brought home to the persons* in the Times’ organization *having responsibility for the publication* of the advertisement.

*Id.* (emphasis added).

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<sup>3</sup> Novell contends that “independent review” overrides the deferential standard normally applied to a Rule 50 motion, but believes that it is entitled to JMOL under either standard.

**c. Constitutional Malice is a Difficult Standard That is Not Met by Failure to Investigate or Ill-Will**

Constitutional malice is a difficult standard to meet and is *not* satisfied by evidence of an alleged failure to investigate. In *St. Amant v. Thompson*, 390 U.S. 727, 730, 733 (1968), the Court emphasized that “reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing”; rather, “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *Id.* at 731. The Court emphasized that “[f]ailure to investigate does not in itself establish bad faith,” citing *New York Times*. *Id.* at 733. Ill-will is also not sufficient to show constitutional malice. *Old Dominion Branch No. 496*, 418 U.S. 264, 281 (1974) (citations and internal quotation marks omitted).

**d. Constitutional Malice Cannot be Shown by Minor Inaccuracies**

In *New York Times*, the Court held that there was no constitutional malice even though the responsible employee admitted that he knew that the statement that plaintiff had “padlocked” a college dining hall to retaliate against protestors was incorrect. *See* 376 U.S. at 257, 286. The Court emphasized that the employee’s belief that the publication was “substantially correct” was “at least a reasonable one, and there was no evidence to impeach the witness’ good faith in holding it.” *Id.* at 286; *see also Bose*, 466 U.S. at 512; *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-517 (1991).

**2. SCO Presented No Evidence That Novell Knew Its Statements Were False or Had a High Degree of Awareness of Probable Falsity**

SCO’s slander of title claim is based on four publications. (*See* section II, *supra*.) As to each, SCO has failed to meet its burden of presenting “clear and convincing” evidence of constitutional malice. Indeed, SCO has presented *no evidence at all* that the responsible Novell employees knew that the statements were false or had a high degree of awareness of probable falsity. To the contrary, Mr. LaSala, Mr. Stone and Mr. Messman each testified they believed the statement that Novell was the owner of the copyrights to be true at the time. (*See id.*) There is no evidence that Novell representatives responsible for the press releases and applications for copyright registrations did not honestly believe the statements of ownership to be true.

### **3. Novell's Alleged Failure to Investigate and Purported Ill-Will Cannot Prove Constitutional Malice**

SCO bases its constitutional malice argument solely on inferences from *other* factors that do not bear directly on whether the responsible Novell employees knew that the statements were false or had a high degree of awareness of probable falsity. SCO contends that Jack Messman failed to conduct an adequate investigation. (12:11-17.) However, failure to investigate does not in itself establish bad faith. Further, Novell's legal department searched for an executed copy of Amendment No. 2 and did not find one. (1597:21-24; 1890:2-17.) Mr. Messman had no reason to check with former Novell employees about the original APA since the language was clear and he attended the board meeting approving it on the understanding that copyrights were *not* transferred. (426:9 to 428:5.)

SCO also contends that Novell sought to harm SCO by deliberately timing its press releases to coincide with SCO's earnings reports, relying on the testimony of Maureen O'Gara. (32:20-33:12.) Mr. Stone testified that he did not tell Ms. O'Gara this and she could supply no corroboration. Further, as described above, Mr. Stone, Mr. LaSala and Mr. Messman all testified that the timing of the May 28 and December 22 press releases were coincidental. The testimony also shows that Novell published the press releases and applied registered the copyrights to protect its business interests, not to harm SCO. Moreover, even if the jury were to believe Ms. O'Gara's testimony, "impos[ing] liability on the basis of the defendant's hatred, spite, ill will, or desire to injure" would be "clearly impermissible," since "ill will toward the plaintiff, or bad motives, are not elements of the *New York Times* standard." *Old Dominion Branch No. 496*, 418 U.S. at 281 (citations and internal quotation marks omitted).

Finally, SCO has suggested that Novell had an economic interest in asserting ownership of the UNIX copyrights to assist IBM. (20:15-16; 31:5.) However, an economic interest would not even establish ill-will, let alone reckless disregard. Companies generally act to promote their economic interests, but that does not constitute "clear and convincing" evidence of deliberate falsehood or reckless disregard of the truth.

**4. SCO Cannot Prove Constitutional Malice Because Novell's Statements Were Objectively Reasonable as a Matter of Law**

SCO cannot prove constitutional malice for the further reason that Novell's statements about copyright ownership were objectively reasonable. A reasonable basis for the statements at issue precludes a finding of constitutional malice. In *New York Times*, the Court held that there was no constitutional malice because the responsible employee's belief that the publication was "substantially correct" was "*at least a reasonable one*, and there was no evidence to impeach the witness' good faith in holding it." 376 U.S. at 286 (emphasis added). In *Bose*, the Court held that the statement that loudspeaker sound wandered "about the room" was not made with constitutional malice even though the intended meaning was that the sound wandered "across the wall," because it was "'one of a number of rational interpretations' of an event that 'bristled with ambiguities' and descriptive challenges for the writer." 466 U.S. at 512 (emphasis added).

That an objectively reasonable statement cannot have been made with constitutional malice is supported by the principle that constitutional malice is a *higher* standard than negligence, so that negligence alone "is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *New York Times*, 376 U.S. at 288. The Tenth Circuit has held that constitutional malice is a "higher standard" even than "recklessness or gross negligence." *Ball Corp. v. Xidex Corp.*, 967 F.2d 1440, 1445 (10th Cir. 1992). The Tenth Circuit thus held 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.*<sup>4</sup>

Here, it is clear that Novell had an objectively reasonable basis for its statements about copyright ownership. Judge Kimball granted summary judgment that neither the APA nor

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<sup>4</sup> See also *Dial One of the Mid-South, Inc. v. BellSouth Telecomm., Inc.*, 269 F.3d 523, 526-27 (5th Cir. 2001) ("lesser standard" of "objective reasonableness" applies to Lanham Act claims against statements not of "public concern," because there is "no constitutional mandate to protect this type of speech under the heightened actual malice standard") (emphasis added); *c.f. Prof'l Real Estate Inv., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 57 (1993) ("an objectively reasonable effort to litigate cannot be sham regardless of subjective intent" in *Noerr-Pennington* context).

Amendment No. 2 transferred copyright ownership. Although the Tenth Circuit reversed, it did *not* conclude that Novell’s position was frivolous or unfounded. On the contrary, the Tenth Circuit held that Novell had “powerful arguments” to support its position. *SCO Group*, 578 F.3d at 1215. The Tenth Circuit also held that the original Asset Purchase Agreement, without Amendment No. 2, “unambiguously excludes the transfer of copyrights.” *Id.* at 1210.

The only genuine dispute identified by the Tenth Circuit — and the reason for the reversal — was the uncertainty over whether the copyrights were “required” for Santa Cruz to exercise its rights and were thus transferred by Amendment No. 2. *Id.* at 1217-19. The Tenth Circuit concluded that summary judgment was improper because the evidence of whether the copyrights were “required” was subject to “conflicting, reasonable interpretations.” *Id.* at 1218. Thus, Novell’s position on copyright ownership was “at least a reasonable one,” *see New York Times*, 376 U.S. at 286, and was “‘one of a number of possible rational interpretations’ of an event that ‘bristled with ambiguities.’” *See Bose*, 466 U.S. at 512. Therefore, Novell’s statements could not have been made with constitutional malice as a matter of law.

Further, Novell’s position was reasonable, independent of the prior court rulings. Novell had a reasonable basis for concluding that the original Asset Purchase Agreement did not transfer copyrights, given that Schedule 1.1(b) expressly excluded “all copyrights” from the transfer. Indeed, Darl McBride admitted that a reasonable person could conclude that “the UNIX copyrights were excluded” in view of “the express language excluding the copyrights” in the original APA. (1075:7-13.)

Similarly, a reasonable person could conclude that Amendment No. 2 did not transfer the UNIX copyrights because the copyrights were not “required” for Santa Cruz to exercise its rights as to the business that it acquired from Novell. Darl McBride admitted that the UNIX copyrights were *not* required for SCO to run its UnixWare and OpenServer software business, since SCO could “run our business...without the copyrights, just like HP, IBM, all of the other licensees of UNIX can run their businesses as well.” (1225:24-1226:1.) McBride asserted that the

copyrights were needed for SCO's new business of licensing — and, if necessary, suing — Linux users (1226:1-10), but SCO presented no evidence that suing Linux users was part of the business contemplated by the APA. Indeed, SCO presented testimony that the APA was intended to enable Santa Cruz to develop a new version of UnixWare that could compete with Microsoft Windows. (91:7-13; 92:20-93:1 (Frankenberg); 224:23-225:25 (Thompson); *see also* 429:2-10 (Messman).)

In sum, both the prior court rulings and the evidence at trial establish that Novell had an objectively reasonable basis for asserting that the APA did not transfer the UNIX copyrights because (1) the original APA expressly excluded “all copyrights” from the transfer; and (2) Amendment No. 2 was limited to copyrights that were “required” for Santa Cruz to exercise its rights, and SCO's own witnesses have admitted that it did not need the copyrights to run the software business that the APA was intended to promote. Therefore, as a matter of law, Novell could not have acted with constitutional malice in making objectively reasonable statements.

##### **5. The Law of the Case Precludes SCO From Establishing Constitutional Malice**

The law of the case and collateral estoppel preclude SCO from disputing Judge Kimball's summary judgment rulings that (1) “there is no evidence that Novell's public statements [on copyright ownership] were based on anything but its good faith interpretation of the contracts”; and (2) “there is no evidence to demonstrate that Novell's position [on copyright ownership] was contrary to its own understanding of the contractual language or objectively unreasonable” given the history of the dispute between the parties. (Novell's Motion In Limine No. 4 at 1-2, Dkt. No. 631 (quoting Summary Judgment Order at 64, 65, Dkt. No. 377); Novell's Motion for Further Ruling on Motion In Limine No. 4, Dkt. No. 775.). SCO could have challenged these rulings in its appeal, but admittedly failed to do so.

This Court previously held that when an issue arises in the context of two different claims, that issue is not “identical” for the purpose of collateral estoppel. (Order at 2, Dkt. No. 781.) Novell respectfully disagrees. That an issue arises in the context of a different claim

does not preclude application of collateral estoppel. On the contrary, the Tenth Circuit has held that collateral estoppel bars a party from “relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim.” *Moss v. Kopp*, 559 F.3d 1155, 1161 (10th Cir. 2009) (emphasis added); see also *Ag Servs. of Am., Inc. v. Lundell*, 231 F.3d 726, 732-33 (10th Cir. 2000) (“once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action”) (emphasis added), *reh’g denied*, 235 F.3d 559 (10th Cir. 2000).

Because Judge Kimball’s prior rulings are law of the case, SCO is precluded from arguing that Novell’s statements about copyright ownership were not based on Novell’s “good faith interpretation of the contracts” or were “contrary to its own understanding of the contractual language or objectively unreasonable given the history of the dispute between the parties.” As a result, SCO cannot show constitutional malice.

#### **B. Novell’s Statements are Not Objectively Verifiable**

Novell’s statements are protected statements of opinion under the First Amendment because they do not assert a fact that can be objectively proven true or false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).<sup>5</sup> The Utah Supreme Court has held that the Utah Constitution provides similar, but independent, protection to “expressions of opinion.” *West v. Thomson Newspapers*, 872 P.2d 999, 1017-18 (Utah 1994). Whether Novell’s statements constitute protected opinion is a question of law. *Id.* at 1004, 1021; *Milkovich*, 497 U.S. at 20; *Jefferson County Sch. Dist. No. R-1 v. Moody’s Investor’s Servs., Inc.*, 175 F.3d 848, 853 (10th Cir. 1999).

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<sup>5</sup> Novell’s statements indisputably relate to matters of public concern. Where the speech relates to a matter of public concern, courts have not distinguished between media and non-media defendants. See Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill*, ‘Defamation and Privacy under the First Amendment,’ 100 Colum. L. Rev. 294, 326 (2000).

Novell's ownership statements are not susceptible to proof by objective evidence within the meaning of these cases. As the Tenth Circuit held, "conflicting evidence" is present in this case such that the question of ownership "could legitimately be resolved in favor of either party." *SCO Group*, 578 F.3d at 1215.<sup>6</sup> Here, the Court should view the proposition that reasonable people could differ as to whether the APA transferred copyrights as a "clear sign" that Novell's statements are constitutionally protected.

The context reinforces the conclusion that Novell's statements were constitutionally protected opinion. *See West*, 872 P.2d at 1018 (constitutional test for distinguishing fact from opinion depends not only on whether the statement is objectively verifiable, but also on "the full context" and "the broader setting"). Novell's statements were in the context of a heated debate concerning SCO's widely-publicized claims that all Linux users were infringing SCO's alleged rights in the UNIX copyrights. Given that Novell expressly stated that it was replying to SCO's public assertions, the audience would have understood that each side was asserting its own position on the dispute, rather than an objectively verifiable fact. *See Mast v. Overson*, 971 P.2d 928, 932-34 (Utah Ct. App. 1998) (statements not defamatory as a matter of law when made in "ongoing heated debate" in reply to public "assertions of wrongdoing"); *Partington*, 56 F.3d at 1154 (where an author "fairly describes the general events involved," statements offering personal perspectives concerning "ambiguities and disputed facts . . . should generally be

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<sup>6</sup> *See also TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1196 (10th Cir. 2007) ("[d]ifferent people will make different judgments"); *Partington v. Bugliosi*, 56 F.3d 1147, 1158 (9th Cir. 1995) (negative statements about lawyer's performance "generally cannot be proved true or false," because "[r]easonable minds can and do differ as to what strategy should be adopted in a trial"); *Moldea v. New York Times Co.*, 22 F.3d 310, 316-17 (D.C. Cir. 1994) (criticism of "sloppy journalism" not actionable because "reasonable minds can and do differ as to how to interpret a literary work" and "where the question of truth or falsity is a close one, a court should err on the side of nonactionability"); *ZL Techs. Inc. v. Gartner, Inc.*, Case No. 09-02393, 2009 U.S. Dist. LEXIS 102681, at \*26-27 (N.D. Cal. Nov. 4, 2009) (dismissing defamation claim because "the fact that 'reasonable minds can and do differ' as to the appropriate conclusions to be drawn from a given set of circumstances is not evidence that the conclusion is provably false, but instead a clear sign that the conclusion constitutes constitutionally protected opinion").

protected by the First Amendment;” otherwise, “there would be no room for expressions of opinion by . . . figures closely involved in a public controversy.”).

**C. Novell’s Statements Are Not Disparaging as a Matter of Law**

Novell demonstrated that its statements after May 28, 2003 were not reasonably susceptible to a disparaging meaning because their caveats and context made clear that they were *not* unqualified factual assertions of ownership. For example, Novell’s June 26, 2003, letter stated that Amendment No. 2 “raises as many questions as it answers,” and its August 4, 2003, letter stated that Amendment No. 2 does not transfer copyrights “[u]nless and until SCO is able to establish that some particular copyright is ‘required’ for SCO to exercise its rights under the APA. . . .” (Motion In Limine No. 5 at 3, Dkt No. 632.) Novell’s December 22, 2003 press release and Chris Stone’s March 2004 trade show comments must be viewed in the context of these prior qualified statements. (Motion In Limine No. 6 at 2-3, Dkt. No. 651.)

The Court denied Novell’s motion on the ground that “each statement is capable of a disparaging or other injurious meaning.” (Order at 6, Dkt. No. 710.) Novell respectfully disagrees. The Utah Supreme Court has held that whether a statement is defamatory requires the court to “weigh competing definitions and make sense of context,” and thus “leaves no room for indulging inferences in favor of the nonmoving party.” *O’Connor v. Burningham*, 165 P.3d 1214, 1221-22 (Utah 2007); *see also West*, 879 P.2d at 1008-11 (statement that politician “manipulated” the press potentially defamatory but not defamatory when read in context). Under this test, Novell’s statements are not disparaging as a matter of law.

**D. Novell’s Statements are Privileged**

A claim for slander of title requires that the alleged slanderous statements be made “without privilege.” *Dowse v. Doris Trust Co.*, 208 P.2d 956, 958 (Utah 1949). There is no basis to find Novell liable based on any statements of copyright ownership by Novell because all such statement were privileged under both the rival claimant’s and the recipient’s interest privileges. Moreover, the record will not support a finding that Novell abused either privilege.

## 1. Rival Claimant's Privilege

A rival's claim to property is privileged. Restatement (Second) of Torts ("Rest.") § 647. Novell's statements of copyright ownership are rival claims to a property interest and are protected as such.

SCO bears the burden of proving that Novell lost this privilege by making the claim in bad faith. Rest. § 647 cmt. b (rival claimant's privilege "permits the publisher to assert a claim . . . provided that the assertion is honest and in good faith, even though his belief is neither correct nor reasonable). As shown above, the record is void of evidence showing that Novell did not believe its assertions of copyright ownership. That Novell further evaluated its claim after May 28, 2003, will not support a finding that Novell lost the rival claimant's privilege. See *Ferguson v. Williams & Hunt, Inc.*, 221 P.3d 205, 216 (Utah 2009) ("[w]hile there may be questions about the adequacy of Defendants' investigation and what, in hindsight, may appear to have been a premature and possibly even erroneous conclusion, the evidence does not satisfy the standard of abuse required for the conditional privilege").

## 2. Recipient's Interest Privilege

"The law has long recognized that a publication is conditionally privileged if made to protect a legitimate interest of the . . . recipient." *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 58 (Utah 1991). Because SCO has not presented sufficient evidence to find abuse of this privilege, the Court should apply the recipient's interest privilege as a matter of law. See *Thomas v. Pacificorp*, 324 F.3d 1176, 1181 (10th Cir. 2003) (affirming summary judgment because if plaintiff fails to present sufficient evidence of abuse "there is no issue to be submitted to the jury").

Novell's statements of copyright ownership are protected under this privilege because they were made to protect a legitimate interest of the recipients. Novell's statements were in response to demand letters sent by SCO to Novell and 1,500 other companies, which demanded that the recipients pay licensing fees. (1635:22–1636:24.)<sup>7</sup> Novell's statements notified

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<sup>7</sup> Stating in part: "We were very concerned that he [McBride] was damaging an industry . . . I was receiving no fewer than 250 e-mails a day on this topic, 30 to 35 phone calls from  
(Footnote continues on next page.)

potential purchasers that SCO was asking for licensing fees based on copyrights that Novell believed SCO did not own. *See id.*; *Flotech, Inc. v. E.I. Du Pont de Nemours & Co.*, 814 F.2d 775, 780 (1st Cir. 1987) (affirming summary judgment that recipient’s interest privilege applies to broad publication when publisher is “fulfilling an arguable duty to prevent what it perceived to be consumer fraud”).

The recipient’s interest privilege may be lost when privileged statements were made *solely* out of malice. *See Brehany*, 812 P.2d at 59; Rest. § 603 cmt. a (“if the publication is made for the purpose of protecting the interest in question, the fact that the publication is inspired in part by resentment or indignation at the supposed misconduct of the person defamed does not constitute an abuse of the privilege”). Since, as previously shown, Novell believed its claim to copyright ownership, Novell cannot be found to have published its claims of copyright ownership *solely* out of malice. Conversely, Novell has established that its statements were published at least in part to protect Novell’s interests and hence not solely out of malice. (*See* 1894:1–5 (“Q: What was the reason for putting out the letter and responding to Mr. McBride? . . . A: It was totally motivated to protect Novell’s interests.”).)<sup>8</sup>

### **3. Copyright Applications Were Privileged**

In addition to being covered by the rival claimant’s privilege described above, Novell’s copyright registration applications are government petitioning activity that is privileged under *Noerr-Pennington*.<sup>9</sup> Novell’s applications for copyright registration were privileged government petitions because they were examined and could have been rejected by the Copyright Office.

Unlike recordation of a property interest, copyright registration occurs only “after examination” by the Copyright Office. 17 U.S.C. § 410(a). The Register of copyrights has

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(Footnote continued from previous page.)

shareholders, from customers, from employees, from business partners, you know, Novell, why are you so quiet, what aren’t you saying something.”

<sup>8</sup> *See also* 1635:22–1636:24, 1912:17, 1920:11–14, 1923:24–1924:4.

<sup>9</sup> The Court denied Novell’s motion on this point (Order at 2, Dkt. No. 725), but wished to be advised of further authority meriting revisitation.

authority to refuse copyright application if the application seeks registration of non-copyrightable subject matter. 17 U.S.C. § 410(b). Refusal by the Copyright Office is afforded deference and is often upheld in court. *See Norris Indus., Inc. v. Int'l Tel. & Tel. Corp.*, 696 F.2d 918, 922 (11th Cir. 1983) (noting that “The Supreme Court has accorded deference to the Register’s drawing of the line between ornamental and useful articles” in determining what constitutes copyrightable subject matter); *Batjac Prod., Inc. v. Goodtimes Home Video Corp.*, 160 F.3d 1223 (9th Cir. 1998) (upholding refusal to register copyright); *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987) (same). Thus, by applying for copyright registration, Novell was petitioning the government for more than the performance of a legally required ministerial duty as in the case of recordation; Novell was petitioning the government for relief that could have been refused.

Novell cannot lose *Noerr-Pennington* immunity on the basis that it a “sham” petition because for the reasons stated above, Novell’s position was not objectively baseless. *Prof'l Real Estate Inv., Inc.*, 508 U.S. at 57 (“an objectively reasonable effort to litigate cannot be sham regardless of subjective intent”).

#### **E. SCO Has Not Shown the Statements Were False**

Novell is entitled to judgment as a matter of law because SCO cannot prove that it owned the copyrights as of the dates Novell made its allegedly slanderous statements. First, SCO did not show by a preponderance of the evidence that the APA, as amended, transferred the copyrights. Second, no transfer occurred because Amendment No. 2 is a promise to sell rather than a sale. Third, any purported transfer is also invalid under 17 U.S.C. § 204(a).

#### **1. No Evidence Showing Copyrights Transferred Under APA**

##### **a. The Tenth Circuit Has Already Held That The Original APA Unambiguously Excluded Copyrights**

The original APA “unambiguously excludes the transfer of copyrights.” *SCO Group*, 578 F.3d at 1210. As the Tenth Circuit reasoned, the APA “explicitly provides that ‘Notwithstanding [those assets listed on the Asset Schedule], the Assets to be so purchased shall not include those assets (the “Excluded Assets”) set forth in Schedule 1.1(b).’” *Id.* “Schedule

1.1(b), in turn, explains straightforwardly that ‘all copyrights’ were excluded from the transaction.” *Id.* The copyright exclusion portion of the original APA is unambiguous as a matter of law. (*See* Asset Purchase Agreement (Novell Trial Ex. A1).)

**b. Properly Construed, the Amended APA Did Not Transfer Copyrights**

The Tenth Circuit ruled that “the contractual language of Amendment No. 2 concerning the transfer of copyrights is ambiguous.” *SCO Group*, 578 F.3d at 1210. To resolve this ambiguity, the Tenth Circuit allowed the admission of extrinsic evidence of two types: (1) evidence regarding the intent of Amendment No. 2 itself, and (2) evidence of the “business negotiators’ intent concerning the [original APA] transaction.” *Id.* at 1210-11. The latter category of extrinsic evidence was admitted to test the theory that Amendment No. 2 was intended to “clarify the parties’ original intent as to the transfer of copyrights.” *Id.* at 1210.

SCO elicited testimony from certain APA negotiators indicating that it was their intent for the UNIX copyrights to transfer to Santa Cruz under the APA. (*See, e.g.*, 90:2-4 [Frankenberg], 241:24–242:3 [Thompson], 351:20-22 [Chatlos], 518:19 – 519:1 [Levine], 676:12 – 677:4 [Mattingly].)<sup>10</sup> But SCO failed to proffer any credible evidence that Amendment No. 2 itself was intended to revise the APA to effectuate the purported intent of those negotiators.

The only probative evidence regarding the parties’ intent in entering into Amendment No. 2 demonstrates that the copyrights did not transfer. Both Jim Tolonen, the Novell executive who signed Amendment No. 2, and Alison Amadia, the in-house attorney who represented Novell in the negotiation and drafting of Amendment No. 2, testified that Amendment No. 2 was not intended to transfer the copyrights. (2119:21-2120:6; 2123:2-13; 2036:15-22; 2038-1-3.)

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<sup>10</sup> Novell believes this testimony should have been excluded under the parol evidence rule, because it was introduced for the improper purpose of contradicting the unambiguous language of the APA. (*See* Novell’s Motion to Strike Testimony, Dkt. 828.)

The APA negotiators proffered by SCO had no involvement with Amendment No. 2, and there is no evidence to indicate that the amendment was designed to effectuate their purported intent.

The only other individuals with knowledge of Amendment No. 2 were Steve Sabbath and Kim Madsen of SCO. Mr. Sabbath's testimony on the subject was contradictory. On the one hand, he testified that Amendment No. 2 was intended to confirm the transfer of copyrights to Santa Cruz under the APA. (910:16-911:10.) Yet, in an earlier declaration submitted by Mr. Sabbath, he acknowledged that "much of the UNIX System V intellectual property" was not transferred. (927:4-13, 928:1-18.) Mr. Sabbath's testimony on this subject is unreliable. As for Ms. Madsen, she admitted that she was not the author of Amendment No. 2 and had no specific recollection of discussions with Mr. Sabbath regarding the amendment. (802:17-22.) She offered no clear testimony indicating that Amendment No. 2 was intended to revise the APA to confirm that copyrights had been transferred.

Because the only credible testimony on Amendment No. 2 confirms that the amendment was not intended to transfer copyrights, a reasonable jury could not interpret it otherwise.

**c. SCO Has Not Shown That UNIX Copyrights Were Required For SCO's Software Business, As Specified in Amendment 2**

Based on the Tenth Circuit's ruling, the only ambiguous contractual language presented to the jury for interpretation is "what copyrights are 'required' for SCO to exercise its rights" with respect to the acquisition of UNIX and UnixWare technologies. *The SCO Group*, 578 F.3d at 1210; Amendment No. 2 (Novell Trial Ex. N8.) As previously mentioned, the only credible testimony regarding Amendment No. 2 came from Mr. Tolonen and Ms. Amadia, both of whom confirmed that the amendment was not intended to transfer copyrights.

Additionally, Mr. McBride admitted that SCO could run its software business without owning the copyrights. (1225:2-1226:10.) In other words, as he later confirmed, SCO could develop and license its UnixWare products without ownership of the copyrights. (1231:16-19.) Mr. McBride testified that SCO was unable to "run [its] business for the licensing side" without the copyrights. (1226:2-3.) However, SCO did not acquire as part of its "rights" under the APA the right to execute new UNIX licenses without Novell's consent. (APA, § 4.16(b) (Novell Trial

Ex. A1.) The SCOsource licensing campaign was thus beyond the scope of the software business SCO acquired. Thus, there is no evidence that the copyrights were “required” for SCO’s business.

**d. SCO’s Parol Evidence Regarding the Original APA Is Inadmissible and Irrelevant**

SCO has relied heavily on parol evidence of former Novell employees and other witnesses that the original APA was intended to transfer the UNIX copyrights to SCO. That evidence is both irrelevant and inadmissible for several reasons, and thus cannot overcome Novell’s showing that it is entitled to judgment as a matter of law.

First, the evidence at trial established that Novell’s Board of Directors approved the APA on the understanding that it did *not* transfer the UNIX copyrights. The resolution of Novell’s Board is conclusive as to the intent of Novell, a Delaware corporation, in entering into the APA, because “[t]he board of directors acting as a board must be recognized as the only group authorized to speak for ‘management’ in the sense that under this section they are responsible for the management of the corporation. *Campbell v. Loew’s, Inc.*, 36 Del. Ch. 563, 569, 134 A.2d 852, 856 (1957); *see* 8 Del. C. § 141 (2010) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation”). Therefore, testimony as to former Novell employees as to Novell’s alleged intent is legally irrelevant and cannot change the intent that is unambiguously reflected in the Board resolution.

Second, the Tenth Circuit found such parol evidence to be admissible not because the original APA was ambiguous, but rather because it *might* support an inference that Amendment No. 2 was intended to “clarify the parties’ original intent as to the transfer of copyrights.” *See The SCO Group*, 578 F.3d at 1210. However, as discussed above, the only probative evidence presented at trial regarding the intent of Amendment No. 2 was that of Jim Tolonen and Alison Amadia, both of whom testified that there was *no* intent to transfer copyrights.

Third, although SCO presented testimony about the purported intent of the original APA, those witnesses generally had no knowledge about Amendment No. 2, and thus could not present competent testimony about the critical issue of the meaning of that amendment.

Finally, SCO's parol evidence is legally irrelevant and should be stricken for the reasons in Novell's Motion to Strike Testimony (Dkt. No. 828.)

**2. No Transfer Occurred Because Amendment No. 2 Is a Promise To Sell, Not a Sale.**

The APA is a promise to sell, not a sale, as is clearly set forth in Section 1.1(a): "On the terms and subject to the conditions set forth in this Agreement, Seller *will* sell ... and Buyer *will* purchase ... Seller's right, title and interest in and to the assets ... [emphasis added]." "It is crucial to distinguish between a contract *of sale* and a contract, or promise, *to sell*." *Lulich v. Robin*, 466 So. 2d 780, 785 (La. App. 1985). "An agreement to sell is a different thing from a sale, and ... no mere promise to sell hereafter amounts to a present sale." *Smith v. Fort*, 71 N.C. 43, 53 (1874). Here, as in *Cagan v. Intervest Midwest Real Estate Corp.*, 774 F. Supp. 1089, 1098 (N.D. Ill. 1991), "[b]y its own terms the Contract did not reflect a currently-closed sale, but rather a promise to sell in return for a promise to buy."

**a. Novell's Delivery of a Bill of Sale on December 6, 1995 Did Not Transfer any Copyrights**

The sale promised by the APA was effected not on September 19, 1995, when it was signed; but on December 6, 1995, when Novell fulfilled its obligation to "deliver to Buyer ... bills of sale." (APA at p. 5, § 1.7(b)(iii) (Novell Trial Ex. A1); *see* Bill of Sale (Novell Trial Ex. W5).) "[A] bill of sale" is "[a] transfer in writing," Cal. Civ. Code § 1053, and it "takes effect, so as to vest the interest intended to be transferred ... upon its delivery by the grantor," Cal. Civ. Code § 1054.

The bill of sale delivered by Novell on December 6, 1995 states that Novell "does hereby transfer ... to Buyer ... all of the Assets." As of that date, the APA still expressly identified "All copyrights" as Excluded Assets. (APA at Schedule 1.1(b), § V.A. (Novell Trial Exhibit A1))

Therefore, Novell's delivery of the bill of sale on December 6, 1995 did not transfer any copyrights.

**b. Novell's Execution of Amendment No. 2 on October 16, 1995 Did Not Transfer any Copyrights**

Novell did not transfer any copyrights when it delivered the Bill of Sale transferring the purchased Assets on December 6, 1995, because at that time "All copyrights" were still listed in the Excluded Assets schedule of the APA. SCO's theory must be that by amending the APA's schedule of Excluded Assets on October 16, 2006, Novell reached back in time to change what it had transferred by delivering the Bill of Sale ten months earlier. That theory is foreclosed by the express language of Amendment No. 2, under which the amendment first became effective "[a]s of the 16th day of October, 1996." The Bill of Sale, by contrast, fulfilled its office by "vest[ing] the interest intended to be transferred" in whatever the Assets then were on December 6, 1995, the date it was delivered. *See* Cal. Civ. Code § 1054. An amendment that did not become effective until October 16, 1996, cannot change what happened on December 6, 1995, the date the Bill of Sale was delivered and vested title.<sup>11</sup>

**3. Any Purported Transfer Is Invalid under Rule 204(a)**

Under 17 U.S.C. § 204(a), a transfer of copyright is "not valid" without a written instrument. To constitute a valid transfer, a writing must identify with reasonable certainty the specific subject matter and the essential terms of the transfer. *Lyrick Studios, Inc. v. Big Idea Prods., Inc.*, 420 F.3d 388, 393-96 (5th Cir. 2005), *cert. denied*, 547 U.S. 1054 (2006); *Saxon v. Blann*, 968 F.2d 676, 680 (8th Cir. 1992); *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991). These courts have thus required an "instrument of conveyance" or a "note or memorandum of the transfer," as the text of Section 204(a) mandates. 17 U.S.C. § 204(a). Here, Amendment No. 2 fails to identify which

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<sup>11</sup> The Tenth Circuit considered and rejected different arguments. The Tenth Circuit decided that Section 204(a) of the Copyright Act does not require a bill of sale. *SCO Group*, 578 F.3d at 1214. The present point has nothing to do with statutory requirement but rather is one of contract interpretation, to which the nature of the assets is irrelevant.

copyrights, if any were “required for SCO to exercise its rights with respect to the acquisition of UNIX and UnixWare technologies.” Indeed, the Tenth Circuit concluded that the writings were so ambiguous that a jury trial was necessary to determine which copyrights, if any, were transferred by the writings at issue in this case. Because the writing requirement has not been met, Novell is the owner of the copyrights and its statements are not false.<sup>12</sup>

**F. SCO Has Not Shown that Novell’s Statements Caused SCO Special Damages**

**1. SCO Has Failed to Adequately Prove Entitlement to Special Damages**

There is no basis on which to find that Novell caused SCO’s damages. In order to prove special damages for specifically identified customers, the damages must be proven with specificity. *See Cont’l Nut Co. v. Robert L. Berner Co.*, 393 F.2d 283, 286–87 (7th Cir. 1968) (affirming JNOV because plaintiff failed to prove “the dollar value of lost sales to specific customers” and “the jury was left to speculate” as to the amount of special damages, which must be “proved with that specificity which shows the loss of profit attributable to patronage withheld by the particular customer”). Further, damages must be proven to a reasonable degree of certainty. *Loughridge v. Chiles Power Supply Co.*, 431 F.3d 1268, 1280-81 (10th Cir. 2005); *see also CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 995 (7th Cir. 2002) (an injured party does not have “carte blanche to provide wild guesses at its damages. A reasonable estimate . . . must be grounded in some record evidence, not numbers pulled from thin air.”). Special damages must also be “proven by specific evidence as to the time, cause and amount.” *Cont’l Cas. Co. v. Sw. Bell Tel. Co.*, 860 F.2d 970, 976 (10th Cir. 1988). The only identified customers for whom SCO apportioned a specific dollar amount for damages were Hewlett Packard (“HP”) and Google. However, the evidence of record does not support SCO’s determination of damages with regard to these two potential customers.

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<sup>12</sup> On March 4, 2010, Novell filed a petition for writ of certiorari with the Supreme Court of the United States, seeking review of the Tenth Circuit’s ruling that Section 204(a) does not require any particularity as to which copyrights a written document purports to transfer. *SCO Group*, 578 F.3d at 1212-13.

**a. SCO Failed to Produce Sufficient Specific Evidence Regarding its Failed License Attempt With HP**

SCO failed to present more than a mere scintilla of evidence that it is entitled to lost profits with regards to a potential SCOsource deal with HP. SCO's former CEO, Darl McBride, testified that, due to Novell's actions, SCO lost out on a potential SCOsource license with HP valued at \$30 million. (1035:13-1036:7.) McBride's testimony regarding the potential HP deal is uncorroborated and without support in the testimony or documents of record. As such, McBride's testimony fails to rise above the minimum requirement that a plaintiff provide more than a mere scintilla of evidence in support of its argument. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.") Further, McBride's testimony is directly controverted by documents in the record. For example, an internal HP email outlined ten (10) reasons why HP should not enter into a SCOsource license with SCO. (Novell Trial Ex. D20.) Tellingly, in the ten reasons listed in the email, Novell is not mentioned. Thus, Novell is entitled to judgment as a matter of law on this point.

**b. SCO Failed to Produce Any Specific Evidence Regarding its Failed License Attempt with Google**

SCO presented absolutely no specific, reasonable evidence regarding lost profits from Google. The purported dollar amount of SCO's alleged lost sale to Google was based exclusively on "numbers pulled from thin air." McBride testified that SCO had a number of discussions with Google regarding the SCOsource licensing program, and that Google "wanted a severe volume discount." (1202:21-23.) SCO's initial price of \$699 per server was eventually dropped to \$100 per server. (1049:19-22, 1202:23-25.) McBride claims that Google has "over 500,000 servers running Linux." (1202:12-14.) However, the record offers no support for McBride's claim. These unsupported and uncorroborated figures are then used by McBride to calculate SCO's revenue on the Google sale at \$50 million. (1203:1-5.) As such, this evidence is wholly insufficient to support a claim for special damages on the Google lost sale.

Moreover, Google's letter regarding the SCOSource makes no mention of Novell and its ownership claim. (1325:15-1326:16; Novell Trial Ex. F27.) In fact, instead of mentioning Novell, Google cites a lack of infringement and SCO's failure to address previous requests for more information. (Novell Trial Ex. F27.) Thus, SCO has not shown that Novell was a substantial factor in Google's decision to not take a SCOSource license. McBride's testimony is nothing more than a wild guess at lost revenue and Novell is therefore entitled to a judgment as a matter of law.

**c. SCO Has Failed to Prove Special Damages for Any Other Specifically Identified Customers**

SCO is unable to prove the amount of monetary harm attributable to any other specific customers mentioned at trial.<sup>13</sup> Dr. Botosan gave testimony regarding SCO's lost profits based only upon a market of unidentified purchasers. (1354:7-13; 1356:5-12; 1357:13-1359:3; 1361:8-1362:17.) Dr. Botosan gave absolutely no testimony regarding the amount of SCO's lost profits attributable to specific customers, but relied upon an unidentified mass that she derives from internal SCO and external forecasts. (1353:12-16.) No other testimony showing loss of profit attributable to any particular customer was offered.

A reasonable jury has no legally sufficient basis to award special, lost profit damages for the specific customers identified during trial because the record is void of any evidence showing the amount of damage attributable to these specific customers. The jury cannot pull damages numbers from thin air. *See CSC Holdings*, 309 F.3d at 995. The jury must have a basis to calculate damages to a reasonable degree of certainty, and there is no such basis in the record.

**d. SCO Would Have Lost Sales to Unidentified Purchasers Despite Novell's Conduct**

A reasonable jury has no legally sufficient basis on which to find that Novell was the sole cause of SCO's lost sales to unidentified purchasers. Under the Court's jury instruction, SCO

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<sup>13</sup> The other potential customers specifically mentioned by name during trial were: Ford, Cisco, Nasdaq, Getronics, CVS, Raytheon, Pixar, Merrill Lynch, Morgan Stanley, Sherwin Williams, Dell, GE, Sprint, Regal Entertainment Group, Masco, Verizon, and Oracle.

must “eliminate other causes” attributable to SCO’s lost sales of unidentified customers. The record shows that SCO failed to do this, and no reasonable jury could find otherwise.

The record is replete with evidence that SCO would have suffered the complained-of damages even if Novell had never published any statements. McBride admitted that there were a variety of factors which influenced potential licensees’ decisions to not take a SCOsource license. (1208:1-4.) The evidence indicates that numerous other factors influenced the decision by Linux users to forego the purchase of a SCOsource license.

For example, evidence before the Court indicates a primary factor that influenced the purchasing decision was the failure of SCO to conclusively establish the presence of infringing Unix code in Linux. (*See* 328:18-24; *see also* 332:8-12, 1114:12-22; Novell Trial Ex. P12; SCO-EX-0227.) Another factor that influenced potential licensees’ refusal to take SCOsource license was fear that being a SCOsource licensee would be detrimental to the potential licensee’s business due to the poor reputation of SCO within the Linux community. (326:11-19; *see also* Novell Trial Ex. D20.) Other cited reasons for not taking a SCOsource license include reassurances from the Linux community that any offending Unix code would be quickly removed and replaced with noninfringing code, (*see* 2500:1-3), the fact that SCO distributed the offending code under the auspices of the General Public License, (*see* SCO-EX-0188; *see also* 2500:3-4), other companies offering indemnification programs, (*see* 1545:23-1546:1; *see also* SCO-EX-0394; 1459:7-11), and industry analysts recommending against taking a SCOsource license, (*see* 2504:8-13).

Because SCO failed to “eliminate other causes,” a reasonable jury has no legal basis on which to find that SCO would have lost sales to unidentified purchasers despite Novell’s conduct. Novell is, therefore, entitled to judgment as a matter of law.

## **2. No Basis for An Award of Damages Based Upon Less Than All of Novell’s Allegedly Slandering Statements**

SCO has alleged that Novell slandered title through several distinct statements made on separate occasions. If the Court finds as a matter of law that Novell is not liable for slander of

title on any one of these occasions then there is no legally sufficient basis on which to award damages for any remaining slanderous statements.

SCO's sole evidence of damages, provided through the opinion of Dr. Botosan, fails to allocate damages attributable to each of Novell's allegedly slanderous statements. (1362:7–17, 1370:23–1371:7, 1374:4–12.) Instead, Dr. Botosan's opinion assigns the damages wholesale to all of Novell's statements. (*Id.*) Thus, if the Court holds that even one of Novell's statements cannot be the basis for slander of title as a matter of law, then there are no reasonably certain grounds to attribute damages to Novell's remaining statements. *Cal. Fed. Bank v. U.S.*, 395 F.3d 1263, 1268 (Fed. Cir. 2005) (citing cases and stating “the causal connection between the breach and the loss of profits must be ‘definitely established.’”) (emphasis added); *see also Loughridge*, 431 F.3d at 1280-81; *CSC Holdings*, 309 F.3d at 995; *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042, 1045 (Utah 1984). In the case that even one of Novell's statements is not slanderous as a matter of law, then there are no legally sufficient grounds to award SCO damages, and Novell is entitled to judgment as a matter of law.

### **3. No Basis for An Award of Damages Because Lost Profits Evidence Fails to Account for All Incremental Costs**

A reasonable jury has no legally sufficient grounds on which to award damages because SCO's evidence of lost profits fails to take into account incremental costs. *See S.C. Anderson, Inc. v. Bank of Am.*, 24 Cal. App. 4th 529 (1994) (failure to account for operating expenses or costs resulted in failure to present sufficient evidence of lost profits); *see also Carlson Disribt. Co. v. Salt Lake Brewing Co.*, 95 P.3d 1171 (Utah 2004) ¶¶ 18 & 24.

The evidence of record shows that SCOSource licenses are SVRX licenses to which Novell is owed 95% of royalties flowing therefrom. The SCOSource program was dependent on copyrights based on the UNIX code before execution the APA, (241:19–242:4), and SCO was required under the APA to remit 95% of all royalties from pre-APA UNIX to Novell. (651:25–653:7.) Any award to SCO for lost profits of SCOSource licenses would necessarily incur the incremental cost of a remission of 95% to Novell. (145:10–146:13.) Dr. Botosan—SCO's only witness to give testimony as to the monetary amount of damages—failed to take account of the

remission of 95% of SVRX royalties, including SCOsource royalties, to Novell. (1371:15–1374:12.) Her damages analysis is defective as a matter of law and therefore cannot be a legally sufficient basis for an award of lost profit damages to SCO.

SCO’s sole evidentiary basis of lost profits is defective, a reasonable jury has no legally sufficient basis to award damages, and thus, Novell is entitled to judgment as a matter of law.

#### **4. SCO Can Be Awarded No Special Damages After June 9, 2004**

There is no legally sufficient basis on which to find Novell liable for special damages after June 9, 2004. On Monday, March 22, the Court stated that “the time frame that matters is the year 2003 and early 2004 prior to the first ruling by Judge Kimball in June 2004” (1793:24–1794:2.) Therefore, damages allegedly suffered by SCO after June 9, 2004 are not at issue in this case. The relevant time period on which the jury may calculate damages begins in 2003 and ends on June 9, 2004. Thus, a reasonable jury has no basis on which award damages to SCO after June 9, 2004.

On March 23, 2004, Novell moved to strike SCO’s evidence of damages for the time period after June 9, 2004 on the basis that evidence of damages after June 9, 2004 is irrelevant. (Dkt. No. 823.) The Court denied the motion. However, evidence of damages after June 9, 2004 remains irrelevant to damages. Specifically, Dr. Botosan’s testimony relating to damages allegedly sustained in 2005, 2006, and 2007 is irrelevant because it clearly falls outside the Courts’ order of March 22. Additionally, on these grounds, Novell was denied the opportunity to answer such testimony with evidence that any such damages have other causes. Since Dr. Botosan’s testimony is a legally insufficient basis upon which a reasonable jury may find damages after June 9, 2004, Novell is entitled to judgment as a matter of law that SCO suffered no damages caused by Novell after June 9, 2004.

#### **G. The Tenth Circuit’s Limited Mandate Bars SCO’s Slander of Title Claim**

Novell demonstrated in its Motion In Limine No. 1 (Dkt No. 627) that the Tenth Circuit’s limited mandate precludes SCO’s slander of title claim. The Court denied this motion on the ground that “Plaintiff appealed and prevailed, while Defendant did not.” (Order at 9, Dkt.

No. 674.) Novell respectfully disagrees. While SCO did appeal, it indisputably did *not* argue for reversal of the judgment on its slander of title claim, and the Tenth Circuit consequently did *not* address this issue or purport to reverse this judgment. Therefore, SCO's claim is barred.

## **II. EVIDENCE DOES NOT SUPPORT AN AWARD OF PUNITIVE DAMAGES**

In order to award punitive damages, the jury must first find two forms of malice: (1) knowledge of falsity or reckless disregard of falsity (constitutional malice), and (2) hatred, ill will, or intent to injure (personal malice).<sup>14</sup> (Court's Instruction No. 38; MUJI 10.12.) The evidence in the record cannot support a reasonable jury finding that SCO has shown both constitutional malice by clear and convincing evidence. (*See* section II.A.) The Court should therefore grant Novell's motion for judgment as a matter of law, and dismiss SCO's punitive damages claim. *Tabor v. Metal Ware Corp.*, 2009 U.S. Dist. LEXIS 9689, at \*10 (D. Utah Feb. 6, 2009) (dismissing punitive damages claim on summary judgment where the plaintiff failed to establish malice or reckless indifference by clear and convincing evidence).

## **III. CONCLUSION**

For the reasons set forth above, Novell respectfully requests that the Court rule as a matter of law no reasonable jury could find for SCO on its claims for Slander of Title or punitive damages.

DATED: March 26, 2010

Respectfully submitted

By: /s/ Sterling Brennan

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<sup>14</sup> The sufficiency of SCO's evidence of personal malice was briefed in Novell's Rule 50(a) Motion at the Close of Plaintiff's Case. (Dkt. No. 829.) The Court denied the motion, finding that SCO had presented sufficient evidence by which the jury could find personal malice by clear and convincing evidence. (Order at 4, Dkt. No. 830.)