that AIX 5L, quote, can be used with both IBM PowerPC processors and the merging Intel IA64 Itanium chips and that AIX 5L, the allegedly infringing product, included a SVR-4 compatible printing subsystem, the allegedly infringed product.

What's more, Your Honor, SCO contends that it should be allowed to amend because it just discovered evidence of the alleged infringement after it says the deadline passed for amending the pleadings. And SCO attaches to its opening brief and it includes in the book that it provided the Court today six documents, and it references IBM's AIX For Power code. And Mr. Normand said by my count today no less than five times, IBM produced these documents for the very first time after the deadline passed for amended pleadings. That's false. Three of the six documents, which Mr. Normand refers to, were produced before the deadline for amending the pleadings. Three of the six.

And when it comes to the scheduling order, Your Honor, I have a handout which lays out the chronology. It may make more sense to talk about it there in greater detail. It shows the dates on which it was produced and a cover letter of their production. Let me take one example. This is Exhibit 6 of SCO's opening brief, a piece of this allegedly newly discovered evidence. It deserves special mention.

The document was produced, Your Honor, not among

millions of pages of paper, as counsel would have the Court believe. It was produced on a single CD with less than a box of documents on November 11, 2003, nearly three months before the deadline for amending the pleadings. SCO's newly discovered evidence, Your Honor, is not so new.

On this record, I would respectfully submit that there is no basis for SCO's proposed amendment. SCO fails to establish good cause. It fails to satisfy the requirements of 15(a), and it certainly fails to establish compelling circumstances, again let alone extremely compelling circumstances, as this Court's June 10, 2004, order requires. In fact, Your Honor, SCO cannot establish a good cause. To quote the Court on deadlines, which is cited in our papers, the good cause standard primarily considers the diligence of the party seeking the amendment.

This party, which had these documents in its files for years, has acted with anything, we respectfully submit, but diligence. The courts, Your Honor, have refused to find -- putting aside the Court's June 10 order, the courts have refused to find good cause under circumstances no different than these. And I direct the Court to Pages 10 and 11 of the book where we cited a number of cases where the court commonly refused to permit pleadings after the deadline for amendment of pleadings.

In the Sipp case, for example, the 10th Circuit

affirmed its denial of a motion to file less than a year after the original complaint. This motion was filed 19 months after the original complaint and only two months after the expiration of deadline of any pleadings. This motion was filed nine months after the deadline for amending the pleadings.

And the Court can see for itself the results of the Brown, Schwinn, Doelle and Proctor & Gamble case. Of course, I know the Court is familiar, I know, with the Proctor & Gamble case.

The Court need not reach Rule 15(a) --

THE COURT: I'm a lot more familiar than I ever wanted to be with Proctor & Gamble.

MR. MARRIOTT: The Court need not reach 15(a) because SCO can't satisfy Rule 16(b), Your Honor. But if the Court does reach 15(a), the result there is the same. And Page 13 in our book, we lay out a number of cases in which courts have declined under Rule 15(a) to allow it in because it was untimely.

In the Frank case, for example, the 10th Circuit affirmed a denial of a motion to amend when the plaintiff's motion was filed four months after the Court's deadline for amending pleadings. And the plaintiff knew or should have known of the proposed claim long before that date.

Now, Your Honor, SCO offered by my count three

reasons to explain its delay. First of all, Your Honor, it seeks to dismiss the documents, to which I've just referred as ambiguous. In its papers, it says that the AIX 5L reference might not really be AIX For Power, it might be AIX for IA64 only. It says also that the SVR, that is the System V technology, might not have been SVR-4, which it contends IBM doesn't have a license to, but it might just have been SVR-3, which it acknowledges IBM had a license to.

The documents, Your Honor, which I've just reviewed and which we highlight in some limited way on Page 14 are abundantly clear that the references here are not to AIX for IA64 only, but to AIX For Power. And the documents make abundantly clear that the technology issue is not just SVR-3, but it's SVR-4. And I won't read them all to Your Honor, but you can see them on Page 14.

Now, SCO contends, Your Honor, that it didn't know about this evidence. And for that proposition, it relies upon the declaration that it submits from one of its employees, Mr. Jay Peterson. And respectfully, Your Honor, Mr. Peterson's declaration isn't worth much. It is based on speculation, it is based on improper legal conclusion, and it lacks foundation. Mr. Peterson is in no position to testify what people in the Santa Cruz Operation, Inc., many years ago as a collective group knew or did not know. Mr. Peterson can speak to what Mr. Peterson knows and what Mr. Peterson doesn't

know. And what Mr. Peterson knows and doesn't know, frankly, is of little consequence in the face of the evidence here that both the Santa Cruz Operation, Inc., and SCO knew that AIX For Power included SVR-4 code. Mr. Peterson's professed ignorance cannot be reconciled with the documentary evidence before the Court.

Now, finally, Your Honor, SCO suggests that in its papers, that it can't be charged here with the responsibility and the knowledge of its alleged predecessor in interest in the Santa Cruz Operation, Inc. It can't have it both ways, Your Honor. From the beginning of this litigation, the SCO grouping has pretended that there is no distinction between it and the Santa Cruz Operation, its predecessor in interest.

And I direct, Your Honor, for example to Page 15 of the book. In SCO's initial complaint, it alleged that it performed the activities undertaken by the Santa Cruz Operation, Inc. It blurred the distinction, it said, quote:

> From and after September 1995, SCO dedicated significant amounts of funding and a large number of Unix software engineers, many of whom were original AT&T Unix software engineers, to upgrading UnixWare for high-performance computing on Intel processors, close quotes.

It says:

> In furtherance of Project Monterey, SCO

expended substantial amounts of money and dedicated a significant portion of SCO's development team to completion of the project.

Your Honor, in 1995, the SCO Group didn't exist. In 1995, its predecessor Caldera Systems, Inc., didn't exist. Santa Cruz Operation, Inc., and the SCO Group are not, not withstanding its prior contentions, the same company. They are nevertheless predecessors in interest, Your Honor. And the law is abundantly clear, we laid the cases out at Page 16 in the book, that a party is charged with the knowledge what its predecessor in interest knew or should have known.

Even if, Your Honor, even if they didn't know what the documents included, even if you credited Mr. Peterson's declaration, even if they were allowed selectively to identify themselves with the Santa Cruz Operation, Inc., the proposed amendment here is untimely and shouldn't be allowed. A proposed claim is untimely if the moving party should have known about the claim.

And you can see the cases that support that proposition in 17. Frank v. US West, 10th Circuit, said, quote:

> It is well-settled in this circuit that the untimeliness alone is a sufficient reason to deny leave to amend, especially when the party

filing the motion has no adequate explanation for the delay.

Las Vegas Ice, Your Honor, reaches the similar result.

The law is clear here, that the SCO Group had a duty to investigate. Those cases are laid out at Page 18. SCO's own cases, Your Honor, indicate, as laid out in Page 19, that, in fact, it had a duty to investigate.

A party who fails to comply with its duty to investigate is charged with knowledge of the facts constituting the infringement, as indicated in the cases laid out at Page 20.

The most basic of public investigations, the most basic of internal investigations would have shown, indeed, I submit did show that IBM included SVR-4 code in its AIX For Power product years ago. They knew it, Your Honor, and this claim is untimely both under Rule 15, Rule 16 and certainly this Court's order of June 10th.

The second point, Your Honor, the last point which I intend to make, is that the proposed claim here is not a claim which may properly be brought in this court. Section 22.3 of the JDA, and I refer you to Page 21 of the book, provides, quote:

Any legal or other action related to a breach of disagreement must be commenced no

later than two years from the date of the breach in a court cited in the state of New York.

It is undisputed that this proposed claim is a legal or other action. It is equally undisputed, notwithstanding -- it is equally clear, Your Honor, that the proposed claim here is related to a breach of disagreement.

I refer you to the next slide, Page 22 of the book, wherein SCO in the proposed amended complaint and in its opening brief on this motion acknowledge that the proposed claim is a claim relating to a breach of the agreement. SCO's proposed third complaint says, quote:

> IBM converted SCO's copyrighted code for IBM's own use in violation of the specific restrictions of the parties' Joint Development Agreement.

SCO's opening brief states that IBM, quote, ignored the JDA's restrictions in violation -- I apologize, Your Honor. It states that IBM ignored the JDA's restrictions on its use of SCO's SVR-4 code and released an Itanium product that did not satisfy the conditions of a product release.

You know, SCO obviously didn't bring the claim in New York. That is reason enough under this provision for this claim not to be included in this case. It offers in its papers, Your Honor, two arguments as to why that shouldn't be the case and said barely a word about it today.

The first argument Mr. Normand mentioned today is -- the only argument that Mr. Normand mentions today is that Section 22.3, which we just read, is inapplicable. They took the opposite position, Your Honor, in their opening brief, the opposite position. In their opening brief, they acknowledge that that section applied here. They brought it up in their opening brief.

The law is clear, Your Honor, that a court generally refuses to consider arguments raised for the first time in a reply brief, which this argument of inapplicability is; and in any event, it is a reversal of position, which the courts also decline to consider. And the authorities for that proposition are set out at Slide 23.

Pickering v. USX Corp., refusing to rule on arguments raised for the first time in reply memorandum.

Weaver v. University of Cincinnati, stating that the Court would address only the merits of defendants' original contention where defendants shifted their argument in their reply brief.

Even if, Your Honor, they hadn't conceded the applicability in their prior papers of Section 22.3, even if that were true, and it's not, that section plainly applies here, Your Honor, a contract must be construed to give meaning to all the terms. That Section 22.3 is an important term of the contract. Cases to that effect are laid out at Tab 24.

Courts have construed, Your Honor, language comparable to the related-to language here to include non-contract claims, such as SCO's proposed copyright claim.

At Page 25, you'll see, for example, the Turtur decision, Your Honor, Second Circuit, holding that, quote, rising out of or related to, close quote, language to apply to a tort as well as a contract claim.

In the Ward case, the Court found that the, quote, scope of a relating-to language is broad and intended to cover a much wider scope of disputes, not just those arising under the agreement itself.

Courts, Your Honor, have even interpreted more restrictive language, like "arising under" as opposed to "related to" to encompass claims of the kind here used in the forum selection clause. And those cases are laid out in Page 26.

In Monsanto, Your Honor, the Court held, the Federal Circuit, held that if patent claims were subjected to forum selection clause applicable to, quote, all disputes arising under the contract.

Second, Your Honor, SCO contends that IBM ought not be allowed to enforce this amending provision here because IBM has waived its rights to the provision. Two arguments they make. First one is the argument was waived because IBM failed to assert the defense in its responsive pleadings. That's