

# **APPENDIX A**

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

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

BEFORE THE HONORABLE DALE A. KIMBALL

May 31, 2007

MOTION HEARING  
VOLUME I

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

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

10 MR. JACOBS: That's correct.

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

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

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

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

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

1 different or independent test.

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

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

11 Tab 26, Professor Pisano testifies that he has:  
12 Concluded that Novell's conduct had a  
13 substantial impact on SCO's ability to sell the  
14 SCOSource Intellectual Property License for Linux.

15 And at Tab 27, University of Utah accounting  
16 Professor Christine Botosan testifies that she has concluded:  
17 Novell's statements reduced SCO's profits  
18 from its SCOSource licensing program.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24               THE COURT: Thank you, Mr. Jacobs.

25               Do you want to take a short break between each

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

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

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

24 THE COURT: Thank you, Mr. Kim.

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

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

3                   (Whereupon, the court proceedings were concluded.)

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

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

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

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

14 And hereby set my hand and seal, this \_\_\_\_ day of  
15 \_\_\_\_\_ 2007.

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KELLY BROWN HICKEN, CSR, RPR, RMR