

1           In the Stone v. Morton case, Judge Boyce granted a  
2 protective order preventing plaintiffs from deposing one of  
3 Morton International's vice-president in light of his lack of  
4 knowledge of facts relative to the action because the  
5 plaintiff had not exhausted other methods of discovery.

6           The Evans v. Allstate case, the Court precluded  
7 depositions of Allstate's chairman, president, CEO, as well as  
8 chief financial officer and senior vice-president where,  
9 quote, Allstate has already provided adequate information or  
10 the information can alternatively be obtained from other  
11 sources without apex officers.

12           In Harris v. Computer Associates, the Court  
13 precluded a deposition of an executive computer associate.  
14 And in doing that, the Court observed, quote, when a  
15 vice-president can contribute nothing more than a lower-level  
16 employee, good cause is shown not to take the deposition,  
17 close quote.

18           In Baine v. General Motors, the Court quashed a  
19 deposition of a GM vice-president for failure to show the  
20 information sought could not be obtained from other witnesses,  
21 interrogatories and a 30(b)6 deposition.

22           In Mulvey v. Chrysler, the Court found, quote, an  
23 orderly discovery process is best served by resorting to  
24 interrogatories at this time, without prejudice to a  
25 subsequent deposition, close quote.

1                   And finally, Your Honor, in the Hughes v. General  
2 Motors, the Court denied a motion to take the deposition of  
3 GM's president because it found no good cause in that  
4 situation.

5                   The cases, Your Honor, on which SCO relies are, I  
6 respectfully submit, distinguishable. Mr. Eskovitz mentioned  
7 the Travelers case. It was specifically an antitrust case.  
8 And the Court granted deposition, Your Honor, only after at  
9 least once deferring the deposition until other depositions in  
10 the discovery had been taken.

11                   In summary, Your Honor, respectfully, we believe  
12 Mr. Palmisano's deposition ought not be allowed and certainly  
13 not ought to be allowed now, and if it ever were to be  
14 allowed, it ought to be limited to three hours. Thank you,  
15 Your Honor.

16                   THE COURT: Thank you, Mr. Marriott.

17                   Mr. Eskovitz, you get to reply.

18                   MR. ESKOVITZ: Thank you, Your Honor.

19                   Your Honor, significantly during Mr. Marriott's  
20 argument, we didn't hear any attempt to dispute all of the  
21 materials that were presented to the Court, many of which come  
22 from IBM's own mouth concerning Mr. Palmisano's personal  
23 involvement in spearheading, improving, implementing IBM's  
24 Linux strategy. That's a critical fact that distinguishes  
25 this case from many, in fact, all of the cases that

1 Mr. Marriott and a litany of cases that Mr. Marriott has  
2 discussed in his argument and cited in his brief. And  
3 although Mr. Marriott again repeats the idea that the strategy  
4 is not relevant to any of the issues in this case because it  
5 is not an element to any of the issues, he ignores the fact  
6 that the intent or motive of the company is an element of  
7 SCO's tort claim for unfair competition. And even if it's not  
8 an element, it still is relevant, it's obviously important to  
9 the contract claims, to SCO's damages claims, to punitive  
10 damages under SCO's tort claim.

11 So just to, you know, brush aside this testimony as  
12 irrelevant because it's not an element of a claim, which, in  
13 fact, it is, kind of misses the boat here. So the two really  
14 undisputable facts that I think dictates Mr. Palmisano's  
15 deposition in this case is that he personally spearheaded the  
16 strategy, and the strategy is relevant.

17 And the Travelers case is right on point here  
18 because it talks about the importance of high-level executive  
19 depositions when, in fact, that corporate strategy is at  
20 issue. When the corporation's intent or motive in  
21 implementing a strategy is at issue, what Mr. Palmisano  
22 decided or why Mr. Palmisano decided it is the most probative  
23 evidence of IBM's intent in this case.

24 If Mr. Marriott claims that under our standard,  
25 under our standard, there would be -- every case would lead to

1 a deposition of a high-level executive, and that certainly is  
2 not the case. In fact, I would suggest that under  
3 Mr. Marriott's standard, there would never be an instance in  
4 which a high-level executive could be deposed, not even when  
5 the strategy that they approved is at issue in this case could  
6 that executive be deposed under IBM's standard.

7 To the contrary, the cases in which Mr. Marriott  
8 relies on, and I'll go through on particular ones, if the  
9 Court is interested in them, but they're all distinguishable  
10 on the basis that the executives did not have any relevant  
11 information. They were termination cases where the executives  
12 had nothing to do with the termination or the role of  
13 supervising an employee. They're not the kind of cases where  
14 the corporate strategy or corporate intent or motive with  
15 respect to strategies are at issue.

16 And Mr. Marriott on the one hand says, you know,  
17 we've already deposed a lot of senior executives at IBM, and  
18 on the other hand says, we should go depose more of them. We  
19 have got a limited number of depositions in this case.  
20 Mr. Palmisano is the person who spearheaded and executed this  
21 policy. We've already asked Mr. Wladawsky-Berger and Mr. Frye  
22 a number of questions, and they pointed the finger at  
23 Mr. Palmisano as the person who made the decision, as  
24 Mr. Wladawsky-Berger put in the *New York Times* article, as  
25 Sam's Bet. This is Mr. Palmisano's strategy.

1                   And significantly, and this is a point that IBM  
2 ignores in its papers and ignores in its argument, this is  
3 Mr. Palmisano's bet while he was the vice-president at IBM  
4 before he became IBM's CEO chairman. The fact that IBM has  
5 now elevated him to these positions should not shield him from  
6 discovery on the decisions that he made while he was the  
7 person spearheading their computer server group. And I think  
8 that point IBM has lost in the shuffle is important for the  
9 Court's consideration, as well.

10                   Mr. Marriott made a number of arguments. And if  
11 the Court is interested, I can discuss them in detail, about  
12 the law that is applicable. I think even under IBM --

13                   THE COURT: You don't need to discuss them.

14                   MR. ESKOVITZ: The burden obviously shouldn't  
15 depend on who filed the motion and doesn't depend obviously on  
16 the cause of actions that are at issue. It's the relevance of  
17 the corporate motivation and corporate intent with respect to  
18 strategies to the claims in the case, whatever they are.

19                   And, frankly, Your Honor, I was blown away by  
20 Mr. Marriott's argument that a different standard ought to  
21 apply for the two CEOs in this case because of the size of the  
22 parties involved. I respectfully suggest just as IBM intends  
23 to depose Mr. McBride on issues of damages on SCO's business  
24 model and other issues, just for the same reason  
25 Mr. Palmisano should be subject to deposition, particularly

1 since these were decisions that he made before he became IBM's  
2 CEO and chairman.

3 THE COURT: Thank you.

4 MR. BSKOVITZ: Unless the Court has questions.  
5 Thank you.

6 THE COURT: Thank you.

7 Let's move to the motion for leave to file amended  
8 complaint. Who's going to argue that?

9 MR. NORMAND: I will, Your Honor.

10 THE COURT: Mr. Normand?

11 MR. NORMAND: Yes.

12 Good afternoon, Your Honor. May it please the  
13 Court, I'm Ted Normand.

14 The SCO Group has sought leave to file a third  
15 amended complaint to add a new claim of copyright  
16 infringement. The facts forming the basis for the new claims  
17 are based on documents that we requested before the amendment  
18 deadline in this case that IBM produced after the amendment  
19 deadline. I'd like to describe those basic facts very  
20 quickly, Your Honor.

21 In the late 1990s, SCO's predecessor in interest,  
22 Santa Cruz Operation, owned the source code in Unix System V  
23 Version 4 or SVR-4. IBM gained access to that source code  
24 through a joint development arrangement in Santa Cruz called  
25 Project Monterey. Under Project Monterey a project to create

1 an AIX For Itanium Product that could operate on a new  
2 hardware --

3 THE REPORTER: Could you speak up a little more?  
4 I'm sorry.

5 THE COURT: She's having trouble hearing you.

6 THE REPORTER: Just speak up a little more. You're  
7 dropping your voice, and I'm having trouble hearing you.

8 MR. NORMAND: With that access, Your Honor, to the  
9 SVR-4 source code, IBM copied over 200,000 lines of source  
10 code into different versions of IBM's AIX For Power products.  
11 And the point of our claim is IBM did so without  
12 authorization, and that the documents we've uncovered in the  
13 last six to eight months showed that IBM knew it was copying  
14 without authorization.

15 We've set out a basic chronology of those facts in  
16 tab binders that Your Honor has. And I will try to walk the  
17 line that Your Honor described in terms of describing the  
18 documents that we've submitted in the binder that form the  
19 basis of the new complaint. And I'd like to walk through  
20 those very quickly, Your Honor.

21 THE COURT: Okay.

22 MR. NORMAND: Tab 2, Your Honor, an IBM internal  
23 e-mail shows that IBM knows that if it cancelled Project  
24 Monterey, it would not have the rights to the SVR-4 code that  
25 it put into its product.

1                   Tab 3, Your Honor, IBM internal e-mail shows that  
2 IBM knows that it could use the SVR-4 code only on the AIX For  
3 Itanium products, not on the AIX For Power products into which  
4 IBM copied code.

5                   Tabs 4 and 5 need to be read together, Your Honor.  
6 IBM internal e-mail pointing out that compilers are not  
7 included in the PRPQ. PRPQ is an acronym for "Program Request  
8 For Pricing Quote." It's a reference to the draft AIX For  
9 Itanium product that IBM was creating through Project  
10 Monterey.

11                   Internal IBM e-mail in response to that e-mail. In  
12 response to the assertion that the compiler would not be  
13 included in a PRPQ.

14                   I think the compiler must be available in  
15 some form, or SCO won't buy it.

16                   Tab 6, internal IBM e-mail. IBM is concerned that  
17 if they don't call the PRPQ a generally availability product,  
18 they won't have the rights to use the SVR-4 code.

19                   MR. MARRIOTT: Your Honor, I apologize for  
20 interrupting. My concern is just that we've moved to quoting  
21 from the documents, which as they themselves indicate marked  
22 confidential under the protective order.

23                   THE COURT: Well, you can read -- why don't you  
24 characterize it rather than quote it.

25                   MR. NORMAND: Yes, Your Honor. I was making an



1 effort to paraphrase the documents.

2 Tab 7, Your Honor, IBM internal e-mail drawing a  
3 distinction between the internal position that IBM has reached  
4 with respect to Project Monterey and the external position  
5 that IBM should take to the world on whether Project Monterey  
6 is continuing.

7 These documents and others like them, Your Honor,  
8 form the basis for our proposed amendment. In response, IBM  
9 has not even attempted to oppose the merits of the claim.  
10 Instead, IBM has raised several procedural road blocks why we  
11 should not be able to bring the amendments, and I think  
12 they're wrong in each count.

13 First, there is no undue burden to IBM. As the  
14 Supreme Court has noted, Rule 15 is designed to facilitate the  
15 amendment of pleadings except where prejudice to the opposing  
16 party would result.

17 There is no prejudice here. Indeed, IBM's main  
18 argument in its opposition brief was that the addition of  
19 SCO's claim would interfere with what IBM called its  
20 entitlement to a prompt resolution of the litigation. The  
21 magistrate's court discovery orders from January and from  
22 yesterday I think have mooted that part of IBM 's undue  
23 prejudice argument. And this Court, of course, denied summary  
24 judgment motions and ruled that no summary judgment will be  
25 filed until after the close of fact discovery.

1 IBM's other argument for its claim of undue burden  
2 was that SCO's proposed claim required additional discovery.  
3 As an initial matter, Your Honor, the adverse party's burden  
4 of undertaking discovery does not constitute undue burden for  
5 purposes of Rule 15. And that is particularly true here where  
6 SCO will not need to take substantial new discovery on its  
7 claim where given the new period for fact discovery in this  
8 matter, which we think should be extended even further in  
9 light of the magistrate's court's order from yesterday, IBM  
10 would have more time to take discovery in SCO's new copyright  
11 claim than it would have had before the amendment deadline.  
12 And where given the new period for fact discovery, SCO's  
13 pursuit of the new claim will not prolong discovery. In each  
14 of those respects, there's no undue burden to IBM.

15 In addition, Your Honor, the subject matter of  
16 Project Monterey specifically is already involved in the case,  
17 has been for sometime and has been with respect to at least  
18 three separate claims. First, Project Monterey is involved in  
19 this case by virtue of SCO's own contract and copyright. SCO  
20 will show that IBM not only misappropriated source code in AIX  
21 that IBM licensed, but that it misappropriated source code  
22 that it had not licensed and contributed such source code to  
23 Linux. IBM ignores this point in its briefing.

24 The second way that Project Monterey is already  
25 part of the case, Your Honor, is our claim for unfair

1 competition, which Mr. Eskovitz mentioned. In that claim, we  
2 allege that IBM was engaged in a course of conduct that was  
3 intentionally and foreseeable calculated to undermine and/or  
4 destroy the economic value of Unix by misappropriation of  
5 source code, including specifically in Project Monterey. And  
6 that's at Tab 8 of the binder, Your Honor.

7 By way of example and in response to IBM's  
8 interrogatories, and this is at Tab 9, Your Honor, SCO has  
9 stated IBM made and continued to make investments in the  
10 development of Linux and secretly advanced and promoted in the  
11 development of Linux without disclosing such activities to SCO  
12 including under Project Monterey.

13 SCO also stated that IBM's conduct forming the  
14 basis of a claim of unfair competition included using  
15 products, methods and know-how jointly developed by SCO and  
16 IBM in Project Monterey. And we noted in that interrogatory  
17 response, Your Honor, that SCO needs to take discovery of IBM  
18 where activity of this sort is typically done behind closed  
19 doors. And the documents we walked through, Your Honor, show  
20 that.

21 In addition, Your Honor, Project Monterey is  
22 already involved in this lawsuit by virtue of IBM's Ninth  
23 Counterclaim, which is very (unintelligible).

24 THE COURT: Which is what?

25 MR. NORMAND: Very broad, Your Honor.

1                   And we quote that in the tabloids. Ninth  
2 Counterclaim states:

3                   IBM is entitled to a declaratory judgment that IBM  
4 does not infringe, induce the infringement of or contribute to  
5 the infringement of any SCO copyright through the  
6 reproduction, improvement and distribution of AIX and Dynix,  
7 and that some or all of SCO's purported copyrights in Unix are  
8 invalid and unenforceable.

9                   IBM lists SVR-4 code as one of the copyrights for  
10 which IBM seeks a declaration of non-infringement. In short,  
11 IBM asks the Court to declare that IBM has not infringed any  
12 SCO copyrighting in developing AIX. And in SCO's proposed new  
13 copyright claim, we seek to prove such infringement.

14                   In fact, IBM has acknowledged that Project Monterey  
15 is already subject matter specifically in the lawsuit. For  
16 one thing, in response to our document requests, IBM produced  
17 the Project Monterey documents. In addition, Your Honor, and  
18 by way of example, in response to one of our interrogatories,  
19 IBM identified 19 Project Monterey witnesses who may have  
20 knowledge concerning certain issues in this lawsuit and  
21 identified Project Monterey as those persons subject to area  
22 of knowledge.

23                   SCO has also noticed and deposed two witnesses  
24 almost exclusively regarding the subject matter of Project  
25 Monterey and IBM's interpretation of the joint development

1 agreement that was the basis for the relationship between IBM  
2 and Santa Cruz under Project Monterey.

3 Finally, of how, Your Honor, IBM has acknowledged  
4 that Project Monterey is already in this lawsuit is the very  
5 first deposition that was taken in this case. And we quote  
6 part of the transcript of that deposition at Tab 12. The  
7 deposition concerned Project Monterey. Toward the end of the  
8 deposition, counsel for IBM specifically asked the witness  
9 whether the witness knew that IBM did, in fact, release a  
10 product, a Monterey product, worldwide to customers. In other  
11 words, Your Honor, at the very time, the very first deposition  
12 in this case, IBM was asking witnesses questions to set up  
13 IBM's assertion that its release of the Monterey product was a  
14 worldwide product giving IBM authorization to copy the SVR-4  
15 code.

16 And I can tell you at the time, Your Honor, we  
17 didn't appreciate the important question. In retrospect, you  
18 see what a defensive question it was, that IBM knew Project  
19 Monterey was an issue in the case and was trying to collect  
20 evidence to defend its pretextual release of the Monterey  
21 product in 2001. At the time of the deposition, we had asked  
22 for the Project Monterey documents before the discovery --  
23 before the amendment deadline, Your Honor, and yet, we didn't  
24 get the documents until after the amendment deadline. All of  
25 the foregoing, Your Honor, shows that SCO's copyright claim

1 would not unduly prejudice IBM.

2           Very briefly, Your Honor, the question of good  
3 faith, which is a factor in the Rule 15. The facts forming  
4 the basis of SCO's claim are based on the documents that we've  
5 uncovered in the last to six eight months. IBM's main  
6 argument is that if our motion were granted, we would no doubt  
7 immediately following the granting of the motion would request  
8 for additional discovery. That was IBM's sole argument for  
9 claiming that our motion was made in bad faith. Of course,  
10 the magistrate court orders have mooted that argument. I  
11 won't dwell on the point, but I will point out in our opening  
12 brief, we pointed out by the time this motion was argued,  
13 either Your Honor or the magistrate court would have decided  
14 whether fact discovery would be extended. So the suggestion  
15 that we filed our motion to trump the Court's decision of  
16 whether to extend the discovery schedule is an inaccurate one.

17           I think it's clear, Your Honor, that we don't  
18 propose the amendment in bad faith and that the amendment  
19 would not unduly prejudice IBM. IBM further argues that SCO  
20 has delayed in proposing the amendment and that the amendment  
21 would be futile. We think both of those arguments are  
22 incorrect, taking the argument as to the delay first. IBM  
23 first argues that Rule 16 applies because deadline for  
24 amendment has passed. As Your Honor mentioned, there is a  
25 relationship between the issue of the scheduling order and our

1 motion to amend, I'd be happy to address that issue.

2 I will move now to the issue of the scheduling  
3 order or briefing. I can say we think there are good reasons  
4 and independent reasons why IBM's Rule 16 argument does not  
5 make sense. First, we've proposed a new amendment deadline.  
6 We think a new amendment deadline makes sense for at least two  
7 reasons. One, the appointment of the deadline is to allow the  
8 parties to conform the evidence to their claims. Two, the  
9 question of whether a prejudice results from a deadline not at  
10 issue here.

11 IBM will have more time under the new discovery  
12 schedule to take discovery on our new claim than it would have  
13 had under the old schedule. Under the schedule we proposed,  
14 even the Court -- the magistrate court's order yesterday,  
15 there will be six, seven, eight months of fact discovery even  
16 after the proposed amendment deadline. Under the previous  
17 order, I think it was five-and-a-half or six months of  
18 discovery that would follow the amendment deadline. As a  
19 practical matter, Your Honor, we think we will succeed for  
20 that matter.

21 As a logical matter, we also think Rule 16 doesn't  
22 apply for the following reason. If there is no undue delay by  
23 SCO under Rule 15 because SCO's amendment is based on the  
24 documents that SCO obtained in discovery, then Rule 16 cannot  
25 bar the amendment. That is because it is undisputed that IBM

1 produced the documents after the amendment deadline, but that  
2 we requested the documents before the amendment deadline. So  
3 if there is no undue delay under Rule 15, there's no place for  
4 Rule 16. It doesn't apply. We asked for the documents  
5 before. We got them afterwards. We also asked for the  
6 documents two or three months into the case, Your Honor, in  
7 June of 2003.

8 So the relevant analysis of Rule 15, which I'll  
9 turn to now, Your Honor I'm sure is familiar with the refrain  
10 from liberal granting of motions to amend, reflect the basic  
11 policy that pleadings should enable the claims to be heard on  
12 the merits.

13 THE COURT: I have heard that before.

14 MR. NORMAND: I suspected it.

15 The rule for undue delay is the following, Your  
16 Honor. Where the parties seeking amendment knows or should  
17 have known of the facts upon which the proposed amendment is  
18 based but failed to include them in the original complaint,  
19 the motion to amend is subject to denial.

20 Our claim is based on facts in the documents that  
21 we saw for the first time since the last amendment deadline.  
22 Those documents show, as I described, Your Honor, that IBM  
23 copied more than 200,000 lines of the SVR-4 code into IBM's  
24 AIX For Power product without authorization. And that during  
25 the project, IBM knew that its limited release of the AIX For



1 Itanium product did not authorize IBM to copy the code as it  
2 had done. As soon as we reviewed those documents and  
3 undertook an investigation, we brought a proposed claim, and  
4 IBM doesn't argue that we weren't diligent in acting after we  
5 received the production that they produced after the amendment  
6 deadline.

7           Given these basic facts, our amendment is not  
8 unduly delayed. It's not delayed at all. The function of  
9 Rule 15, which provides generally the amendment of pleadings,  
10 is to enable a party to assert matters that were overlooked or  
11 were unknown at the time he interposed the original complaint  
12 or answer. The Court admitted there is no delay if the  
13 plaintiff uncovered the facts supporting the amendment during  
14 discovery.

15           And we cited in our brief two cases that we think  
16 are good examples in particular of that. The Journal  
17 Publishing case from the Southern District of New York, a  
18 three-and-a-half year lapse between the original complaint and  
19 the amended complaint were justified where the plaintiffs  
20 proposed amended complaint was based at least in part on  
21 documents that came to light during discovery.

22           The Koch case, District of Kansas, there is no  
23 undue delay to seek leave to amend if plaintiffs acquire  
24 knowledge of the facts behind the new claim only through  
25 recent discovery.

1           As we see it, Your Honor, IBM would have this Court  
2 apply a standard whereby as soon as the plaintiff in  
3 litigation had any conceivable basis for bringing a claim, it  
4 would be obligated to assert that claim rather than await the  
5 production of documents that the plaintiff has requested and  
6 expect to bear on the issue. Again, we take it that that is  
7 the point of the amendment deadline. That is not standard and  
8 one that IBM opposes that the Court should impose. And,  
9 indeed, the very point of Rule 15 is to impose a different  
10 standard. Under the precedent, the plaintiff should be  
11 entitled to a critical mass of evidence of high probative  
12 value supporting the claim. And that's a quote from the  
13 case -- one of the tabs to the binder.

14           And we think, Your Honor, that IBM's own cases make  
15 that point. And we discussed these cases and distinguished  
16 them in detail in our reply brief. I'll mention a few of  
17 them. In particular, from the 10th Circuit, in the Panis  
18 case, 10th Circuit 1995, the plaintiff's proposed amendments  
19 were not based on new evidence. In the Pallottino case, 10th  
20 Circuit, 1994, the proposed amendment was not based on new  
21 evidence. In the Frank case, 10th Circuit, 1993, plaintiff's  
22 counsel conceded that the failure to amend was strategic  
23 decision. In the Woolsey case, 10th Circuit, 1991,  
24 plaintiff's counsel acknowledged that no new evidence that was  
25 unavailable at the time of the original filing had come to

1 plaintiff's attention. Those cases make the point that focus  
2 on undue delay is on the plaintiff in litigation and  
3 plaintiff's efforts to find the documentation to support the  
4 new claim.

5 IBM's response to these points is to argue that the  
6 question of undue delay requires the Court to impute to the  
7 SCO Group the limited knowledge that certain employees of  
8 SCO's predecessor Santa Cruz might have regarding the same  
9 general subject matter, that is, Project Monterey and products  
10 being created.

11 Now, IBM does not argue, nor present any evidence  
12 that Santa Cruz or the SCO Group had concluded it actually had  
13 a copyright infringement arising out of Project Monterey. And  
14 IBM does not argue, nor present any evidence that anyone from  
15 Santa Cruz or the SCO Group knew anything about IBM's internal  
16 views of its pretextual release as reflected in the documents  
17 that were produced. What the evidence does show is that those  
18 key facts were hidden from view until discovery in this case.

19 And one of the internal IBM documents that I cited  
20 earlier illustrates the point, and we'll quote, Your Honor, at  
21 Tab 7, but it is the document, internal IBM e-mail that  
22 expressly draws the distinction between the internal position  
23 that IBM has taken on Project Monterey is not worth pursuing.  
24 And in the e-mail the author said, we need to take an external  
25 position, and the external position is that Project Monterey

1 goes on. We're still working on the AIX For Itanium product.  
2 That is the kind of information that the world and that we  
3 were aware of, the external position.

4 The excerpt from the first deposition taken in this  
5 case, and I also mentioned earlier, further illustrates the  
6 point. While IBM was asking witnesses questions to defend its  
7 worldwide release, IBM had documents in its possession  
8 reflecting the fact that IBM itself did not regard the  
9 Monterey product release as one that would authorize IBM to  
10 copy the SVR-4 system.

11 Although SCO had served numerous document requests,  
12 IBM would not produce the documents in response to those  
13 requests until after the amendment deadline. IBM relies on  
14 several documents with respect to Santa Cruz' supposed  
15 knowledge. We believe those documents are not compelling, and  
16 they fall into two basic categories. One, documents that SCO  
17 did not see and Santa Cruz did not see and had no reason to  
18 see, such as private consulting for its software announcements  
19 and memoranda for IBM licensees and manuals that IBM's  
20 technical support organization published for IBM licensees.  
21 Santa Cruz was not an IBM licensee.

22 The second category of documents show what products  
23 certain people envisioned would be created in Project  
24 Monterey. These are not documents that reflect any actual  
25 knowledge on the part of anyone at Santa Cruz about any claim

1 for copyright infringement. These facts are no grounds for  
2 the Court to conclude there has been any undue delay on the  
3 part of the SCO Group.

4 And it's worth pointing out, Your Honor, because I  
5 will briefly get to the point, IBM can and does raise such  
6 arguments in support of the statute of limitations argument on  
7 futility. These are accrual arguments that are subject to  
8 different standards. And we put cases in the binder that show  
9 the courts analyze the question of undue delay distinctly from  
10 the question of whether the limitations period. I won't dwell  
11 on that point, Your Honor, but I do think there are important  
12 policy differences between Rule 15 and the application of the  
13 statute of limitations. I quoted Wright, et al, earlier, the  
14 function of Rule 15, to enable a party to assert matters that  
15 were overlooked or unknown, the purpose of policy underlying  
16 all statutes of limitations. And this is from a Utah Supreme  
17 Court case in the last few months, Your Honor. To promote  
18 justice by preventing surprises through the revival of claims  
19 that have been allowed to slumber until evidence has been  
20 lost, memories have faded, and witnesses have disappeared.

21 None of those things is true here.

22 In addition, Your Honor, there's essentially a  
23 policy for statute of limitations conflicts with the policy  
24 under Rule 15, which is to promote claims to be brought even  
25 if they were overlooked. That's not the case here, but right

1 from the middle to point out the policy.

2 IBM's next claim under Rule 15 is that our claim  
3 would be futile. And we think that's wrong, as well. As an  
4 initial matter, an amendment is futile only if the proposed  
5 amendment could not have withstood a motion to dismiss.  
6 That's the general standard. I'm sure the Court has heard  
7 that one, as well.

8 SCO alleges that only through copyright to the  
9 SVR-4 code that IBM copied in excess of 200,000 lines of that  
10 code into the AIX For Power product. IBM did it without  
11 authorization, that those are the elements of copyright  
12 infringement. IBM does not dispute the merits of those  
13 allegations, but they made several procedural arguments.

14 IBM first invokes a statute of limitations  
15 provision in the joint development area for JDA. That  
16 provision states:

17 Any legal or other action relating to a breach of  
18 disagreement must commence no later than two years from the  
19 date of the breach.

20 And the Court cited that in the state of New York.  
21 Now, IBM does not dispute that the Court must strictly  
22 construe a contractual provision modifying a statute of  
23 limitations, which it does. In fact, under a reasonable  
24 instruction, let alone a strict instruction, IBM's  
25 interpretation of Section 22.3 does not make sense. It cannot

1 encompass (unintelligible).

2 THE REPORTER: Excuse me. Cannot encompass?

3 MR. NORMAND: SCO's copyright claim.

4 The reading that IBM offers fails to reconcile  
5 other provisions in the JDA and creates an unreasonable  
6 result. First, IBM actually ignores parts of the provision  
7 interpreting Section 22.3. That is, IBM does not even argue  
8 that the accrual portion of Section 22.3 applies to SCO's  
9 claim.

10 You'll note that the portion of the provision, Your  
11 Honor, saying that the claim under Section 22.3 must be  
12 commenced no later than two years from the date of the breach.  
13 IBM ignores that part of the rule because it creates an  
14 unreasonable result. IBM argues that the rule of the accrual  
15 should be the rule of accrual for the copyright act. And we  
16 think the reason that IBM does that is because when you read  
17 the provision as a whole, it would mean that under IBM's  
18 interpretation, Section 22.3 would eliminate both the rule for  
19 when a copyright claim accrues as well as the rule that the  
20 plaintiff can bring a copyright claim on the defendant's  
21 continuing infringement. That is not a reasonable reading.

22 If the scope of Section 22.3 were as broad as IBM  
23 argues, the copyright claim would have to be commenced within  
24 two years of the breach of the contract. Under that reading,  
25 if during Product Monterey IBM copied SCO's code but then

1 waited two years to release the part containing the code,  
2 SCO's claim would have been time-barred. We think that's an  
3 unreasonable result. IBM relied only on the first part of the  
4 language of Section 22.3 because it knows the section read as  
5 a whole, it creates an unreasonable result.

6 The fact that Section 22.3 clearly does provide for  
7 a discovery rule of accrual -- excuse me -- that Section 22.3  
8 does not provide for a discovery rule of accrual is a reason  
9 to reject items of interpretation, not to parse the language  
10 as IBM has.

11 In addition, Your Honor, IBM's interpretation fails  
12 to reconcile other provisions of the JDA. You'll see at  
13 Tab 19, Your Honor --

14 THE COURT: 20.1.

15 MR. NORMAND: 20.1. The entire liability of each  
16 party for any cause whatsoever regardless of the form of  
17 action, whether in contract or tort.

18 Section 20.1 shows the parties knew how to include  
19 in broad fashion any claims under the agreement, which is  
20 effectively the interpretation IBM gives of Section 22.3.  
21 It's not reasonable to give different conditions the same  
22 meaning.

23 In addition, Your Honor, we think these arguments  
24 made clear that Section 22.3 can reasonably be interpreted as  
25 SCO's (unintelligible). We think that the provision is clear



1 in our favor. At an absolute minimum, the provision is  
2 ambiguous. And because it's ambiguous, the Court cannot  
3 resolve the party's intent and, therefore, cannot preclude  
4 SCO's amendment at this stage of the proceedings.

5 Given that Section 22.3 does not apply, Your Honor,  
6 we enter into the world of accrual of copyright claim and  
7 statute of limitations of copyright claim. There shouldn't be  
8 any dispute on this point. Under the copyright act, every  
9 court that has addressed the issue has concluded that the  
10 copyright claim in which claims based on infringement that has  
11 occurred in the previous four years under the statute of  
12 limitations. I think it's actually three years, Your Honor.

13 IBM argues that there's some dispute in the case  
14 law as to the doctrine of continuing infringement. That's  
15 wrong. There's a dispute as to whether a copyright claim of  
16 who brings a claim 10 years after the copyright claim has  
17 accrued can recover damages for the entire 10-year period.  
18 There is no dispute under the case law that plaintiff who  
19 brings a copyright claim can recover the damages for the  
20 infringement that has occurred the previous three years.  
21 Where the copyright claim accrual and limitations period  
22 applies, there is no question that our amendment is not shield  
23 from.

24 IBM argues that venue is improper in this court.  
25 Given that Section 22.3 does not apply, that argument fails.