

1                   Finally, Your Honor, I think it is worth noting IBM  
2 dismisses too quickly a case showing very clearly that the  
3 District Court always has the discretion to determine that the  
4 interest of judicial economy regarding pending litigation can  
5 override the forum selection. In the Steward case from the  
6 District of Minnesota, 2001, the Court declined to transfer  
7 the litigation to the locale specified in the forum selection  
8 clause because the Court preferred to have both cases  
9 adjudicated simultaneously before the Court that is intimately  
10 familiar with the issues in the case. We think that is the  
11 case here, Your Honor.

12                   The discovery that SCO must pursue to defend  
13 against IBM's Ninth Counterclaim, for example, includes the  
14 precise Project Monterey activities underlined in SCO's  
15 proposed amendment. The fact that in this case the documents  
16 regarding Project Monterey have already been produced and are  
17 being reviewed, and presumably there will be a supplemental  
18 production, the parties have already taken other discovery  
19 regarding Project Monterey, such as the three depositions I  
20 referred to. The subject matter and many specifics of Project  
21 Monterey have already been part of the lawsuit and been made  
22 part of the lawsuit. And whether or not SCO's new claims in  
23 the case, SCO will present the facts of IBM's conduct in  
24 copying Project Monterey. Your Honor, in the interest of  
25 judicial economy clearly shows that SCO's new claim should not

1 be split from this litigation.

2 In short, Your Honor, SCO proposes a good faith  
3 meritorious claim on the basis of facts that SCO uncovered  
4 only recently in discovery in this matter and that SCO could  
5 not have recovered without that discovery or before the  
6 deadline for the amendment of the pleadings. We proposed a  
7 claim that concerns the very same subject matter that is  
8 already at issue in the case including by virtue of IBM's  
9 counterclaims. We propose a claim with approximately six to  
10 eight months of fact discovery remaining, depending on how  
11 Your Honor rules on the issue of scheduling orders.

12 Under the circumstances, Your Honor, we submit the  
13 Court should permit SCO to bring its copyright claim.

14 THE COURT: Thank you, Mr. Normand.

15 Mr. Marriott?

16 MR. MARRIOTT: Your Honor, there are a number of  
17 reasons why the Court should deny SCO's application to amend.  
18 I'd like to focus on just two of them without diminishing the  
19 importance of those other reasons which I think are adequately  
20 addressed in our briefs.

21 THE COURT: All right.

22 MR. MARRIOTT: Before I come to those, Your Honor,  
23 two quick points. We believe that SCO's predecessor in  
24 interest, Santa Cruz Operation, Inc., granted to IBM and that  
25 IBM has a license to use Unix System V Release 4 code, SVR-4

1 code, in its AIX For Power product. SCO devoted some portion  
2 of its presentation to its view of the merits of whether IBM  
3 has that license. The Court cannot resolve that question on  
4 this motion. I don't intend to try Your Honor's patience with  
5 inquiring into the merits, except to say we believe that the  
6 evidence will show that we have that license.

7 Second, Your Honor, as another preliminary matter,  
8 let me just say just a word about the standards that apply to  
9 this motion. There are three. The first, Your Honor, rose  
10 out of this Court's order of June 10, 2004. The deadline, as  
11 Mr. Normand indicates, for amending the pleadings has passed.  
12 It passed more than a year ago. As a result, this motion is  
13 untimely, unless SCO can satisfy first the requirement of this  
14 Court's order of June 10. In the order dated June 10, Your  
15 Honor said that the scheduling order will not be modified  
16 again except upon a showing of extremely compelling  
17 circumstances. Absent a showing of extremely compelling  
18 circumstances, the motion should be denied.

19 Second standard, Your Honor, that relates to this  
20 claim is Rule 16(b). Rule 16(b) provides that an amendment  
21 shall not be permitted after the deadline for amending the  
22 pleadings has passed, except upon a showing of good cause.  
23 And as Your Honor knows, the central inquiry there is whether  
24 the parties seeking to amend after the deadline has acted in  
25 due diligence.

1           The third standard, Your Honor, is the standard  
2           that Mr. Normand focuses on primarily. That is Rule 15 and  
3           Rule 15(a), the rule the Court need not reach. But if it  
4           chooses to reach Rule 15, Rule 15 would not permit an  
5           amendment where there has been undue delay where there would  
6           be prejudice to the party opposing the amendment, which bad  
7           faith with an ulterior motive where the proposed amendment is  
8           futile or should have been and must be brought in another  
9           court.

10           First point, Your Honor, which I would like to make  
11           is that SCO has known about the proposed claim, that is to  
12           say, its claim that IBM has included Unix System V Version 4  
13           code and IBM AIX For Power product for many years, and it has  
14           done nothing about it. If SCO, Your Honor, knew or should  
15           have known that IBM included -- that IBM included in AIX For  
16           Power SVR-4 code and it knew that before the deadline for  
17           amending the pleadings passed, then this motion fails. If it  
18           knew before the deadline passed for amending the pleadings  
19           that IBM included that code, Unix System V Release 4 code in  
20           its AIX Power Product, then it can't establish good cause, it  
21           can't satisfy the requirements of Rule 15, it certainly can't  
22           establish compelling circumstances, let alone extremely  
23           compelling circumstances.

24           SCO contends, Your Honor, that it did not know and  
25           had no reason to know that IBM included SVR-4 code in its AIX

1 For Power product because in SCO's words, IBM's conduct was,  
2 quote, an egregious clandestine violation, close quote. And  
3 IBM, quote, took affirmative steps, close quote, to prevent  
4 SCO from discovering this alleged clandestine conduct.

5 Those allegations are false. And with the Court's  
6 permission, I intend to show that SCO's internal documents,  
7 Your Honor, documents in its possession for many years and in  
8 possession of its predecessor interest, show it to be false.  
9 I will show also, Your Honor, that the public record makes  
10 perfectly clear that SCO and the world knew and understood  
11 that IBM had included SVR-4 code in its AIX For Power product.  
12 The showing I intend to make, Your Honor, again is not based  
13 on the Monterey licensing agreement, so we think it will  
14 totally support our position. This showing is based upon  
15 their documents and the public record.

16 If I may approach.

17 THE COURT: Yes.

18 MR. MARRIOTT: Your Honor, beginning at Page 2, we  
19 lay out at least eight indications in the public record and in  
20 SCO's own documents, documents found in its files, that IBM  
21 included SVR-4 code in its AIX For Power product. One,  
22 indication one, the purpose of Project Monterey, Your Honor,  
23 was to create a family of operating systems, including the AIX  
24 For Power product. It was not, as the SCO brief suggests, a  
25 simple afterthought. And I refer the Court to the last bullet

1 on the page, a SCO presentation at a SCO partner conference in  
2 the year 2000.

3 Project Monterey in the presentation said, quote:  
4 To establish high-volume, enterprise class  
5 Unix platform through...Single scalable Unix  
6 product line family for IA-32, IA-64 and IBM  
7 Power microprocessors.

8 In a joint IBM/SCO presentation, Your Honor, it  
9 states IBM and SCO -- quote:

10 IBM and SCO join forces to deliver the most  
11 advanced family of Unix products in the world  
12 including AIX, PPC.

13 That's Power PC product.

14 At Page 2 of our book, Your Honor, the second  
15 indication found in SCO's documents that it knew or should  
16 have known Project Monterey's combined features from both AIX  
17 and UnixWare. If you look, for example, at the last quote on  
18 Page 3, Your Honor, May 2, 2001, print-out of the web page for  
19 the AIX 5L product, which website was jointly sponsored by IBM  
20 and SCO, that is to say, the Santa Cruz Operation, Inc., so  
21 its predecessor. This is a document produced by SCO to us in  
22 this litigation. AIX is, quote, for both Intel Itanium- and  
23 IBM Power-based systems, close quote. AIX 5L is taking IBM's  
24 AIX Unix operation system and combining it with the best  
25 technologies from SCO's UnixWare operating system.

1                   The third indication, Your Honor, is found at  
2 Page 4 of the book. SCO provided IBM with UnixWare/SVR-4 code  
3 for inclusion into IBM's AIX For PowerPC Product. A SCO  
4 e-mail dated 10-23-98 states, quote:

5                   UnixWare for AI32 and AIX PPC continue to be  
6 developed and controlled by SCO and IBM  
7 respectfully. The only difference here is each of  
8 us now has access to technology from both UnixWare  
9 and AIX which can be added to the existing product  
10 lines to increase compatibility and improve the  
11 family story.

12                  Next bullet, SCO e-mail dated 9-7-99. Quote:

13                  SCO is providing UnixWare technology to IBM  
14 for inclusion in AIX. Thus users should think of AIX,  
15 paren, on PowerPC, close paren, SCO's UnixWare on IA32  
16 and Monterey on IA64 as becoming the same operating  
17 system over the next two years.

18                  Indication four, Your Honor, Page 5 of our book.

19                  IBM communicated to SCO regarding the inclusion of  
20 UnixWare/SVR4 code in AIX For Power.

21                  And IBM-SCO Family Unix Technical Proposal, dated  
22 9-2-98, produced by SCO in the case states that technology  
23 from UnixWare 7 would be incorporated in both AIX or IA-64 and  
24 AIX For Power.

25                  And IBM presentation also produced by SCO states

1 that the Project Monterey strategy includes a plan to  
2 aggressively grow and enhance AIX-Power offering by including,  
3 quote, contributions from SCO's UnixWare and Sequent's  
4 Dynix/ptx.

5 It lists SVR-4 Print Subsystem as among the common  
6 subsystems in the Project Monterey product line, including AIX  
7 For Power.

8 And finally, SCO e-mail dated 8-11-00, distributing  
9 text of a press release prepared by IBM: refers to AIX 5L  
10 running on both Power, the allegedly infringing product,  
11 running on both Power in IA64 and notes, quote, that among the  
12 Unix System 5 technologies to be incorporated in this release  
13 is the SVR-4, the allegedly infringed technology, printing  
14 substance.

15 Fifth indication, Your Honor, in the documents is  
16 that SCO was aware of the specific UnixWare/SVR-4 code that  
17 would be included in AIX For Power. An IBM-SCO family Unix  
18 technology proposal, again produced by SCO in the litigation,  
19 lists specific technology from UnixWare 7, the allegedly  
20 infringed product in part, to be incorporated into both AIX  
21 for IA64 and AIX For Power. Included are, quote, proc  
22 filesystem and SVR-4 Printing subsystem/printcap files, the  
23 allegedly infringed product listed in the proposed amended  
24 complaint.

25 A joint SCO/IBM document comparing AIX For Power



1 and AIX for IA64:

2 Notes that the SVR-4 print subsystem is common  
3 between the two products

4 A SCO-IBM agreement overview, dated 11-4-98 lists,  
5 quote, common features/technology, close quote, between  
6 UnixWare 7, Monterey IA64, and AIX For PowerPC, including,  
7 again, SVR-4 print subsystem, one of the allegedly infringed  
8 products.

9 The sixth indication. SCO and IBM marketed AIX For  
10 Power -- SCO and IBM marketed AIX For Power as a product that  
11 would include UnixWare/SVR-4 technology.

12 A SCO presentation to its Data Center Acceleration  
13 Program, dated 11-4-98.

14 SCO supplying IBM. SCO, present sentence,  
15 supplying IBM with UnixWare 7 APIs and technologies for AIX.  
16 It describes AIX on PowerPC as, quote, AIX with UnixWare,  
17 close quote.

18 SCO presentation at SCO partner conference 2000.  
19 Refers to technology exchanges between AIX, UnixWare and  
20 Dynix. And notes that the Project Monterey strategy includes  
21 the plan to, quote, aggressively grow and enhance AIX-Power  
22 offering, close quotes, by including, quote, enhancements from  
23 SCO's UnixWare and IBM NUMA-Q Dynix/ptx.

24 Seventh, and nearly final indication for today,  
25 Your Honor, IBM specifically announced the inclusion of

1        Unix/SVR-4 technologies in AIX 5L For Power.

2                    In March 2001, a document entitled, Printing for  
3        Fun and Profit under AIX 5L, it's noted that the addition of  
4        the SVR-4 print subsystem, the allegedly infringing product --  
5        alleged infringed product, rather, is in this release of AIX,  
6        it devotes more than 150 pages for the SVR-4 print subsystem.

7                    IBM 4-17-01 software announcement for AIX 5L For  
8        Power, includes a section titled, SVR-4 Printing Subsystem.

9                    A 2001 AIX 5L for Power Version 5.1 release notes  
10       includes a section of instructions on how to use SVR-4  
11       printing subsystem.

12                   The eighth indication, Your Honor, is that  
13       contemporaneous industry reports noted the inclusion of  
14       UnixWare/SVR-4 code in AIX For Power.

15                   And August 8, 2000 -- this is Page 9 in the book.  
16       August 8, 2000, "The Register" refers to AIX 5L as an  
17       operating system that runs on both the IA64 and Power  
18       architectures and that included contributions from, quote, SCO  
19       UnixWare and Unix System V standard technologies, quote close.

20                   June 2001, report by Andrews Consulting Group  
21       describes AIX 5L as, quote, a single Unix for both PowerPC and  
22       IA64, close quote. And notes that, quote, AIX 5L supports a  
23       number of Unix System V Release 4, SVR-4, commands and  
24       utilities, especially in the printing subsystem, close quote.

25                   And finally, September 24, 2001, article, notes

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

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

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

25 The document was produced, Your Honor, not among

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

6 On this record, I would respectfully submit that  
7 there is no basis for SCO's proposed amendment. SCO fails to  
8 establish good cause. It fails to satisfy the requirements of  
9 15(a), and it certainly fails to establish compelling  
10 circumstances, again let alone extremely compelling  
11 circumstances, as this Court's June 10, 2004, order requires.  
12 In fact, Your Honor, SCO cannot establish a good cause. To  
13 quote the Court on deadlines, which is cited in our papers,  
14 the good cause standard primarily considers the diligence of  
15 the party seeking the amendment.

16 This party, which had these documents in its files  
17 for years, has acted with anything, we respectfully submit,  
18 but diligence. The courts, Your Honor, have refused to  
19 find -- putting aside the Court's June 10 order, the courts  
20 have refused to find good cause under circumstances no  
21 different than these. And I direct the Court to Pages 10 and  
22 11 of the book where we cited a number of cases where the  
23 court commonly refused to permit pleadings after the deadline  
24 for amendment of pleadings.

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

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

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

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

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

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

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

25 Now, Your Honor, SCO offered by my count three

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

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

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

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

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

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

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

24 It says:

25 In furtherance of Project Monterey, SCO

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

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

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

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

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



1 filing the motion has no adequate explanation  
2 for the delay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 wrong for three reasons.

2 First, Your Honor, SCO didn't raise the argument in  
3 its opening brief. It's improper for the reasons that I've  
4 already stated. Second, we haven't submitted a responsive  
5 pleading. The complaint hasn't been allowed in the case yet.  
6 Third, Your Honor, we have submitted in the case in connection  
7 with their other three complaints four responsive pleadings.  
8 In every one of those pleadings, notwithstanding their  
9 contentions to the contrary, and this is laid out, Your Honor,  
10 at Page 28 of our book, notwithstanding what their brief says,  
11 in every one of our responsive pleadings, we have asserted a  
12 defense of improper venue.

13 The second and last argument they make with respect  
14 to waiver, Your Honor, is that the claim is waived somehow by  
15 virtue of IBM's assertion of its Ninth Counterclaim. Your  
16 Honor, Section 22.1 of the Joint Development Agreement -- and  
17 that's wrong, by the way, Section 22.1 of the Joint  
18 Development Agreement, which is set out at Page 29 of the  
19 book, expressly provides:

20 No waiver of any portion of this agreement  
21 shall be effective unless it is set forth in a  
22 writing which refers to the provisions so affected  
23 and is signed by an authorized representative of  
24 each party.

25 There is no such writing.

1                   Second, to establish waiver, they've got to show a  
2 voluntary and intentional abandonment of a known right. Cases  
3 to that effect are set out at 30. There has been no knowing  
4 and intentional abandonment of a known right. And the case  
5 law, Your Honor, indicates that the mere assertion of a  
6 counterclaim, as we show at Page 31, is an insufficient basis  
7 for final waiver.

8                   Finally, they suggest that the Ninth Counterclaim  
9 somehow encompasses the proposed claim. That isn't right,  
10 Your Honor. The Ninth Counterclaim was intended to be narrow  
11 in scope. The Ninth Counterclaim could not have been as broad  
12 as they contend because, A, the Court wouldn't have subject  
13 matter jurisdiction over it, IBM couldn't have brought a Ninth  
14 Counterclaim seeking a declaration of non-infringement with  
15 respect to the conduct at issue in their proposed complaint  
16 because we hadn't been sued for that, one; and they had never  
17 threatened to sue us for that, two. We lacked a reasonable  
18 apprehension suit. There would have been no subject matter  
19 jurisdiction with respect to a claim of that kind. And in any  
20 event, the claim that they contemplate having somehow been  
21 swept up in Ninth Counterclaim is a claim that must be  
22 brought, if at all, in New York by virtue of the agreement  
23 that IBM entered into with its partner in Monterey, the Santa  
24 Cruz Operation, Inc.

25                   In summary, Your Honor, the motion should be

1 denied. It should be denied because they've known about this  
2 claim from the very beginning of the case, and it should be  
3 denied because there is a forum selection clause here which  
4 requires this claim to be asserted in New York, not in the  
5 state of Utah.

6 THE COURT: If I let them amend as they want to do,  
7 would it affect your motion to narrow the Ninth Counterclaim?

8 MR. MARRIOTT: Would it affect the motion? Your  
9 Honor --

10 THE COURT: In other words, would you still want me  
11 to grant that motion?

12 MR. MARRIOTT: Your Honor, the motion with respect  
13 to the Ninth Counterclaim is intended simply to reflect IBM's  
14 intent to filing a motion.

15 THE COURT: All right. So I'll call it a motion to  
16 clarify.

17 MR. MARRIOTT: Call it a motion to clarify. The  
18 motion frankly is of little consequence. It doesn't make much  
19 difference. SCO doesn't really care, Your Honor, about that  
20 motion except for purposes of being able to argue in this  
21 connection that somehow the claim is waived.

22 THE COURT: But my question to you is, if I let  
23 them amend, do you care about your motion?

24 MR. MARRIOTT: I don't care about the motion, Your  
25 Honor.

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THE COURT: Okay. Thank you.

MR. MARRIOTT: Thank you.

THE COURT: Reply, Mr. Normand?

I assume you'll be brief and efficient.

MR. NORMAND: Thank you, Your Honor. I'll make an effort to be brief and efficient. Mr. Marriott has raised some new issues, some new documents and some arguments that I'm hearing for the first time.

Just to clear the field, to begin with, Your Honor, the question of when documents were produced, I think we're going to have a factual dispute with IBM about that. I do not purport to have personal knowledge about when documents were produced, but it is my understanding that the documents had been produced after the amendment deadline. If we're incorrect, we're incorrect. It stands that several of the documents at least, as Mr. Marriott concedes, were produced after the deadline. And this goes to the point of plaintiff's entitlement to collect a core critical mass of highly privilege documents. There is no question that some of the very important documents were produced after the deadline. And we have not purported to present to the Court with all of the documents.

As an overarching matter, Your Honor, there is no argument of undue prejudice from IBM. And under the Supreme Court precedent and under a lot of other precedents, that's



1 the primary overriding factor. There is no undue prejudice.

2 IBM makes a series of arguments about Rule 16. We  
3 think those arguments misconstrue the case law and are  
4 overstated. Let me note from the onset, Your Honor, that, as  
5 I noted in my opening argument, there is no place for Rule 16  
6 here. There may not be a place for Rule 16 because there may  
7 be a new amendment deadline.

8 Even if there is not a new amendment deadline, the  
9 question, then, is Rule 16, because there is no question that  
10 many of the documents, at least, even pending this dispute  
11 with IBM over the timing of production of documents, there's  
12 no question that some of the documents were produced after the  
13 deadline. If there's been no undue delay and Rule 15 is prior  
14 to the deadline, Rule 16 has been placed. In any event, the  
15 questions under Rule 16 as we cite in the briefs is whether  
16 the plaintiff uncovered previously unknown facts during the  
17 discovery that would support an additional cause of action.  
18 The question is whether the supporting facts did not surface  
19 when the last amendment deadline had passed.

20 Now, with regard to another matter, IBM spends a  
21 lot of time going through the documents, the documents that we  
22 had not seen before, internal documents from Santa Cruz. We  
23 think that misses the point entirely. There is evidence that  
24 people at Santa Cruz might have known that as part of the  
25 Project Monterey the parties intended to allow copying to