THE COURT: Go ahead, Mr. Shaughnessy.

MR. SHAUGHNESSY: Thank you, Your Honor.

Your Honor, this motion concerns Counts VII, VIII and IX of SCO's second amended complaint. Those are claims that IBM tortuously interfered with various business relationships with SCO. SCO claims that IBM interfered with SCO's contracts for licensing its OpenServer and Unixware products in Count VII; that IBM interfered with the asset purchase agreement between Novell and Santa Cruz in Count VIII; and that IBM interfered with various existing and prospective economic relationships with companies in the computer industry in Count IX.

Your Honor, as you will see in the illustration that we provided at Tab 2, this claim has been a constantly moving target in the course of discovery. We in July of 2003 sort of hit the low point when we only had three companies with whom we had supposedly interfered, and the high point in December of 2005 of having supposedly interfered with more than 250 companies. Each time we got a new pleading, discovery response, deposition, the list of companies expanded, tracted and changed. Ultimately SCO committed to fully and finally articulate the scope of its interference claims.

THE COURT: 177.

MR. SHAUGHNESSY: That's correct, Your Honor.

And despite having agreed to meaningfully limit them, we have now 177 as you see at Tab 3. Of those 177, Your Honor, SCO claims that IBM contacted directly only seven for purposes of discussing SCO. For the remaining 170, 14 purported to be former SCO customers and the balance are simply companies who may have used Linux.

There are at least three independent reasons why IBM is entitled to summary judgment, Your Honor. And not surprisingly, they track the three elements of the claim of tortious interference under Utah law. They are that SCO ––

THE COURT: Does Utah law apply?

MR. SHAUGHNESSY: Utah law does apply Your Honor. I think the parties are in agreement on that issue.

SCO offers no admissible evidence that IBM interfered with any of the 177 companies in question.

Number two, SCO has failed to show that IBM acted with improper purpose or by improper means and IBM's conduct is privileged.

And Number three, Your Honor, SCO has failed to show causation or injuries.

Now, beginning with the interference portion of the text, Your Honor, you see at Tab 7 we have excerpted for you IBM's Interrogatory Number 8. In that interrogatory, we asked SCO –– which is part of IBM's first set of interrogatories, we asked SCO to identify all of the agreements with which IBM has

supposedly interfered, and describe in detail what IBM had supposedly done. In December of 2003 and then three months later, Judge Wells entered two separate orders requiring SCO to respond to those interrogatories.

And if you turn to Tab 8, Your Honor, you will see that as I mentioned with regard to 170 of 177 companies, SCO in the words of its Rule 30(b)(6) witness on this subject, quote:

> Is not alleging that IBM contacted any one of these companies individually and somehow wrongfully induced them to switch to Linux on that basis.

With respect to the remaining seven, Your Honor, which I will speak about in just a moment, each of these companies have testified that they did not speak -- strike that -- that they did not in any way change their relationship with SCO as a result of anything IBM said or did.

So if we can begin at Tab 10, Your Honor, with BayStar, and I'll try to clip through these fairly quickly. We tried --

THE COURT: These are the seven; right?

MR. SHAUGHNESSY: These are the seven. These are the seven with whom IBM supposedly had some contact according with SCO.

We start with BayStar. The background here, Your

Honor, is that in October 2003, BayStar invested and arranged for others to invest in SCO. The companies had a rocky relationship and ultimately a falling out seven months later when BayStar redeemed its investment. SCO claims that IBM is at fault, that IBM contacted BayStar and somehow convinced BayStar that it should redeem its investment, and thereby tortuously interfered with that relationship.

Your Honor, we've submitted a declaration from BayStar's CEO Larry Goldfarb who testified unequivocally that he has never even spoken with anyone at IBM about SCO. And he further testifies that BayStar's decision to redeem its investment was done for a whole laundry list of reasons concerning SCO and the company and the way the company was being managed. But none of those reasons had anything whatsoever to do with IBM.

Now, in the face of that evidence, Your Honor, SCO offers one thing. SCO submits the declaration of Darl McBride in which Mr. McBride says that Mr. Goldfarb told him IBM was, quote, on him, on him, on him, close quote.

That, Your Honor, is the complete substance of SCO's evidence with respect to BayStar. And I have absolutely no idea what "on him, on him, on him" means. But I do know that it's hearsay and it can't be used to create an issue of fact.

Next, Your Honor, at Tabs 11, 12, and 13, Intel,

Oracle and Computer Associates, briefly by way of background. In January of 2003 as SCO was preparing its SCO source licensing/litigation plan, according to SCO, IBM had expressed some opposition to that plan. And SCO claims that in the LinuxWorld convention in January of 2003, Karen Smith, an employee of IBM, spoke with representatives from Intel, Oracle and Computer Associates and attempted to convince each of these companies to stop doing business with SCO. Now, what does the evidence show?

Ms. Smith has testified no such conversation occurred. Representatives from Intel, Oracle and Computer Associates have each testified that no such conversations occurred. Representatives from each of these companies, Your Honor, have further testified that they did not reduce or change their business with SCO in any way as a result of anything that IBM did.

And, Your Honor, SCO admits that it has no evidence of any contact or communication between Ms. Smith and any of these companies in which they attempted to persuade SCO not to do business with -- persuade these companies not to do business with SCO other than one thing. SCO claims that it can simply point to the decline in the business that it was doing with these particular companies at or around January of 2003 and that a jury could simply infer from the drop in that business that these conversations must have occurred even

though everyone denies them.

Your Honor, that argument is both factually wrong and it's irrelevant. The only evidence SCO offers to support this purported decline in business is the declarations of Eric Hughes and Janet Sullivan. That testimony is summarized or quoted at Tab 17. And what you will see, Your Honor, is that neither Mr. Hughes nor Miss Sullivan testified that SCO's relationship changed with any of these companies in or around January of 2003. Instead what you see, Your Honor, is these SCO declarants say that the relationship changed in 2001, two years before the contact at issue.

Now, Your Honor, the fact that companies decline or altered their relationship with SCO in 2001 cannot by any stretch support an inference that a conversation occurred two years later. But even more fundamentally, Your Honor, even if that relationship had declined, that business relationship had declined in early 2003, that change is not evidence of Ms. Smith having talked to these companies. Your Honor, there are any number of reasons why these companies may have done less business with SCO, not the least of which being a very public attack SCO had launched on Linux.

Tab 14, Your Honor, summarizes Hewlett-Packard. Same allegation here. SCO claims that Karen Smith from IBM encouraged Rick Becker from HP to stop doing business with SCO. The only difference here, Your Honor, is that they have

the deposition testimony from Mr. Becker in which he recounts his version of a conversation with Ms. Smith. The content of that conversation is disputed, Your Honor. But what is not disputed is that HP did absolutely nothing as a result of that. Mr. Becker himself testified that he did as a result of this conversation nothing more than simply decide not to have any further conversations with Ms. Smith, and that HP continued to do business with SCO.

We've also submitted a declaration from HP's Joseph Beyers who says that HP has not reduced or altered its relationship with SCO. And, in fact, Your Honor, SCO admits itself that SCO has a very good relationship with HP.

Once again, Your Honor, the only evidence that SCO offers is the Hughes declaration claiming that the business between the two companies declined as a result of this supposed conversation. And once again, Mr. Hughes' declaration does not say that.

Tab 15, Your Honor, is Novell. And here, Your Honor, SCO claims that IBM directed Novell to a certain ownership over the copyrights, the UNIX copyrights that are at issue in this case and to exercise Novell's right under the asset purchase agreement to waive breaches of contract claims against IBM. There are, Your Honor, at least three problems with this interference claim concerning Novell.

The first problem, SCO has never identified Novell

or the asset purchase agreement in response to any of the many varied answers it has provided to Interrogatory Number 8. That interrogatory required SCO to tell us if it was claiming interference with the asset purchase agreement. Judge Wells ordered SCO twice to fully answer the interrogatory. And it is undisputed that in none of the four iterations of that answer has SCO ever identified or even mentioned Novell or the asset purchase agreement, and on that basis alone will tie the summary judgment.

The second problem, Your Honor, is that Novell has submitted a declaration in which it refutes entirely SCO's claim. Novell makes it clear that it acted on its own behalf, that it did not force or pressure IBM to do anything, and that its actions were entirely independent. SCO has not come up with evidence to refute that, and it's an additional basis why Novell's claim fails.

The third problem, Your Honor, is that SCO can offer literally no admissible evidence from anyone that any such conversation between IBM and Novell occurred. Instead, the substance of SCO's evidence as SCO describes it in SCO's brief is, quote:

> It was Mr. McBride's impression that Ms. Smith implied that someone from IBM had asked Novell whether Novell or SCO held the copyrights.

Your Honor, I can't begin to list all the reasons why that statement is not admissible and doesn't create a genuine issue of fact. But at the end of the day, Your Honor, even if SCO could show that someone from IBM talked to someone from Novell about the UNIX copyrights or about the asset purchase agreement, the question remains, so what? That's not interference, and it's not evidence of interference.

I won't discuss the OpenSource conference, which is at Tab 16. SCO has abandoned that claim in its opposition brief.

And, Your Honor, what has happened here is that as a result of being utterly unable to develop any evidence of tortious interference by IBM, SCO struck upon a theory at a late date in the case that IBM had not interfered with any of these companies, but it instead interfered with the UNIX-on-Intel market in general. And SCO advocates in --

THE COURT: What's the status of the law on that type of claim?

MR. SHAUGHNESSY: Well, the status of the law on that type of claim, Your Honor, as far as we can tell is non-existent. SCO has cited nothing in its opposition brief to support such a claim, and we've located no law that would recognize such a claim. And there is certainly no good reason for Your Honor to reach out and recognize a claim like this.

But beyond that, Your Honor, there are additional

problems with the theory. With respect to the 170 companies with whom IBM supposedly interfered, you've got 14 who are former customers, but SCO has offered no information and no evidence concerning whether or when any of these companies adopted Linux, why they adopted Linux, whether those companies would have chosen SCO's products had Linux been not in existence. And the other 156 companies stand on the same footing.

Again, SCO has provided absolutely no evidence about these companies; whether they adopted Linux; when they adopted Linux or why; whether SCO had products that would have been available to compete; whether these companies would have, in fact, purchased those products; and indeed, Your Honor, SCO has not even been able to identify whether any one of these products was ever a prospective customer of SCO. It is, Your Honor, simply a list of random companies who apparently are Linux users that SCO is asking the Court to find IBM interfered with the respective relationship.

THE COURT: In securities cases, there is a fraud on the market theory. Maybe its akin to that.

MR. SHAUGHNESSY: It's a far cry I think from a securities case and fraud on the market theory. I mean, fraud on market is generally recognized -- in a securities context is generally recognized as a substitute for being able to show causation. And you have to have an efficient market and all

of the other things that are required in a securities that are not present here.

Finally, Your Honor, the case that we have that is closest to this one is Judge Campbell's decision in Bower vs. Stein Eriksen. And she correctly concluded there that a claim like this ultimately rests on speculation.

And SCO's case, SCO's claim asked the Court to speculate on any number of grounds that these companies use Linux, that they use Linux only because of IBM, that in the absence of Linux each and every one of them would have purchased products from SCO rather than someone else.

The second element, Your Honor, SCO has not shown either an improper purpose or improper means. I won't discuss this in detail. The Court is familiar with the standards.

With respect to improper purpose, SCO really doesn't make a serious effort to show that IBM acted with ill will and a desire to harm SCO, purely for the sake of harming SCO, and that that ill will predominated over any and all other legitimate economic purposes.

SCO attempts to make an argument with respect to HP and Novell. But at the end of the day, Novell is a company that can't even establish a communication ever occurred. So they're certainly going to have a difficult time showing that that communication was motivated by spite and a desired harm to SCO as opposed to a legitimate business interest.

With respect to improper means, briefly, Your Honor, SCO cites no statute, no regulation, no common law rule that prohibits a company from saying to someone else that they shouldn't do business with a competitor.

Now, SCO has no evidence that these conversations ever occurred, Your Honor. But let's assume that they did. Let's assume that IBM met with Intel or Oracle or Computer Associates and told them that they shouldn't do business with SCO. Judge, that's not against the law. They are permitted to do that, and SCO doesn't even attempt to make an argument that that is not permitted under the law.

With respect to the interference with the market, Your Honor, SCO seems to be claiming, at least as I can best understand it, that IBM made contributions to Linux in violation of SCO's purported contracts with IBM, that those constitute a breach of contract, and SCO has been damaged as a result.

The Utah Supreme Court has recognized since the Leigh Furniture case that a breach of contract by itself, even an intentional breach of contract is not sufficient to satisfy improper means. And to satisfy improper means with respect to a breach of contract there has to be an intent, an immediate intent to injure. SCO's experts have testified that IBM was not acting with the intent of injuring SCO, but rather was acting with the intent of competing with Sun and

with Microsoft.

With respect to the copyright infringement claim or the argument that IBM has infringed copyrights, Your Honor has heard discussion of this in part in discussion of the unfair competition from Mr. Marriott, I won't repeat any of that here, except to say that SCO seems to be arguing that if it can establish unfair competition or if it can establish copyright infringement, it will have automatically established interference, tortious interference. And that, Your Honor, is simply not the case. The claims standalone, and SCO is required to establish the elements of each of them.

Finally, Your Honor, with respect to causation and injury, SCO has failed on both fronts and can prove neither causation nor injury for four reasons.

First, SCO failed in discovery responses to identify any damages resulting from IBM's tortious interference. At Tab 27, we have excerpted for you Interrogatory Number 24, which asked for an explanation of SCO's damages for all its claims, including its interference claims. And as Mr. Marriott indicated a moment ago, SCO said it was going to provide those answers in its expert reports. Not one of SCO's expert reports calculated, addressed or even purported to calculate damages resulting from IBM's alleged interference. SCO's experts don't even mention Intel, Oracle Computer Associates and what happened after January of 2003

and the effect on SCO's relationship after January 2003.

Your Honor, we noticed a Rule 30(b)(6) deposition of SCO on this precise topic precisely because we had no idea what damages they were claiming. And SCO's 30(b)(6) witness testified that he could not identify, quote, any damages that SCO may have suffered with respect to a particular company with which IBM -- with which SCO alleges IBM interfered.

Now, Your Honor, in its opposition brief for the very first time SCO says that its damages for indirect interference are the same as its damages for contract -- breach of contract copyright. That damage theory should have been disclosed long ago, but in the end, Your Honor, it fails for a couple of reasons.

First of all, it fails, Your Honor, because if it is true that SCO's damages for breach of contract are the same as its damages for interference and if it is true that the conduct making contributions to Linux in violation of the IBM and Sequent licensing agreements are the same, then any claim for damages for intentional interference would be barred by the economic loss doctrine. The conduct is the same. The measure of damages is the same. And the courts don't permit double recovery for the same conduct.

Your Honor, additionally, each of the companies with whom IBM allegedly interfered that I've talked about a moment ago has directly testified that any change in their

relationship with SCO was due to events having nothing to do with IBM. That, Your Honor, is fatal to causation in the face of that evidence which SCO's not disputed, at least not disputed with competent evidence, IBM's entitled to summary judgment.

And finally, Your Honor, SCO's own employees have had something to say about why SCO's business with these particular companies declined. And those are excerpted at Tab 26. You can see that they are very clear in speaking about each of these companies, Computer Associates, Oracle, Intel, Hewlett-Packard. And their conclusion is that those business relationships declined for reasons having nothing to do with IBM and having everything to do with SCO and the way in which SCO chose to run its business.

In the end, Your Honor, SCO can prove none of the elements of intentional interference. Indeed, in our view SCO is not close on any of them, and IBM is entitled to summary judgment on those claims.

THE COURT: Thank you, Mr. Shaughnessy.

MR. SHAUGHNESSY: Thank you very much.

THE COURT: Mr. James?

MR. JAMES: Thank you, Your Honor.

I think Mr. Shaughnessy touched on this, but let me make clear. Our Seventh Claim alleges interference with contracts relating to certain specific entities. Eighth cause

of action relates specifically to Novell. Ninth Claim is for interference with prospective business relations or economic relations.

I think it's appropriate to provide Your Honor with at least a brief chronology relating to the acts and history that we think are relevant to the three causes of action. The chronologies are summarized in Tabs 2, 3 and 4. Let me talk first about IBM's interference with SCO's existing contractual relations. That the Seventh cause of action, and that's Tab 4.

During the period of November 2002 to January of 2003, SCO initiated discussions with IBM regarding SCO's concerns over its intellectual property in Linux. SCO had learned that its proprietary UNIX libraries were being used in Linux, and SCO had devised a license by which customers could use Linux more broadly without violating SCO's intellectual property rights.

IBM urged SCO not to pursue its plan to pursue its intellectual property. In fact, IBM's general counsel reacted to the news about SCO's plan with four-letter expletives which were relayed to SCO through IBM, an IBM executive. IBM urged SCO not to announce its plan at least until after the end of the year because was IBM had some very large Linux-related deals in the works. And then SCO was in agreement and complied -- and agreed to comply and agreed to wait while IBM

and SCO talked and tried to work something out.

When no resolution was reached with IBM on January 22nd, 2003, SCO issued a press release regarding its intent to protect its intellectual property that had been placed in Linux.

The following day, SCO's CEO Darl McBride met with IBM executive Karen Smith. Smith was very angry at the meeting, and she threatened Mr. McBride. And she told Mr. McBride that IBM would cut off all business relationships with SCO and that she would tell SCO's partners to do the same.

When Mr. McBride would not back down, Smith followed through on her threats telling HP executive Rick Becker that IBM was cutting off its business relationship with SCO. HP should do the same. Subsequently, Your Honor, HP significantly reduced its financial support of SCO.

There is a genuine issue of material fact here. IBM asserts Smith did not instruct or encourage HP to cut off ties with or support for SCO. SCO has submitted evidence that that did, in fact, occur.

There is also a genuine dispute of material fact as to whether and why HP decreased its support for SCO. IBM claimed that HP did not reduce its support for SCO, and that even if it did, it was not related to IBM.

This is a jury question, Your Honor. SCO has, in

fact, presented evidence that following Smith's threat, HP did reduce its support of SCO. A reasonable jury could conclude that this was no coincidence, that HP was bowing to the pressure applied by IBM.

On January 24th, 2003, Smith again followed through on her threats and directed IBM departments in an e-mail to discontinue any plans to work with SCO and avoid any association with SCO in our development sales and marketing efforts.

Subsequent IBM e-mails demonstrate that the freeze was purely motivated by Smith's anger toward SCO and that it was inconsistent at the time with IBM's financial interests.

From January to March of 2003, IBM continued to follow through on Ms. Smith's threats contacting SCO UnitedLinux partners to reinforce a negative position on SCO's efforts to protect its intellectual property.

In July of 2003, IBM met with Novell, Computer Associates, Oracle, Dell, Intel and HP. And the companies discussed at that time SCO's efforts to protect SCO's intellectual property and the potential damage this would do to the Linux market.

This evidence creates a genuine factual dispute. A reasonable jury could conclude that Smith not only threatened to interfere with SCO's business, she executed on those threats.

Throughout 2003, key SCO partners decreased or ceased their dealings with SCO. Oracle stopped trading processor roadmaps with SCO. HP, its SCO market development fund declined from $1 million a year to 100,000. Computer Associates' certification to SCO's product declined remarkably. Oracle withdrew its support of SCO or withdrew its SCO OpenUNIX8 certification.

We've heard about BayStar. In October of 2003, BayStar invested $50 million in SCO. Thereafter, BayStar began behaving erratically, at times supporting this lawsuit and at other times criticizing SCO's focus on the suit.

On April 14, 2003, BayStar suddenly claims SCO breach its agreement but would not explain how. BayStar's Larry Goldfarb tells SCO that IBM was on him, on him, on him, suggesting, Your Honor ––

THE COURT: It is hearsay, isn't it?

MR. JAMES: It's hearsay, Your Honor. But it creates an issue of fact for this reason, and that is IBM has come forward with information or testimony from Mr. Goldfarb testifying that IBM didn't tell him anything. Darl McBride has come forward with testimony saying that Mr. Goldfarb did tell him.

At a minimum, Your Honor, that is evidence that comes in for impeachment purposes, and it does create an issue of fact as to whether Mr. Goldfarb was being honest when he

gave his deposition testimony because now we have testimony that is directly contrary to that.

All of these involves material fact disputes, Your Honor, particularly when you draw the reasonable inferences from the evidence. In the context of IBM's cumulative bad acts, its repeated threats, its efforts to cut off support for SCO, a reasonable jury could conclude from the evidence that IBM pressured BayStar to withdraw the support for SCO.

Now let me talk briefly, Your Honor, if I might, about our Eighth cause of action. This is a cause of action that discusses interference between SCO and Novell with respect to the asset purchase agreement. Very curiously, counsel makes reference to the fact that SCO never explained or referred IBM to the Novell interference claim. But, in fact, if you look at our Eighth cause of action, it's about Novell, and it's only about Novell, and that's what it talks about.

Let me just talk briefly about the chronology relating to that claim. '96, Santa Cruz purchased Novell's Unix business. As Novell would later describe, Santa Cruz purchased that business lock, stock and barrel. Novell kept only existing royalty rights. Subsequently Novell confirmed its and SCO's understanding that the UNIX business that SCO acquired included the Unix copyrights. Novell even offered to provide SCO with verification of that understanding.

However, January of 2003, Novell's CEO Jack Messman began having multiple discussions with IBM which occurred over a period of several months. Novell then suddenly reversed course and refused to provide the previously promised clarification that SCO, in fact, owned all of the UNIX-related copyrights.

On January 23rd, 2003, IBM executive Karen Smith told SCO's CEO Darl McBride that IBM had looked into SCO's copyright acquisition and concluded that SCO had not acquired the copyrights, implying that IBM had obtained such assurances from Novell.

In May of 2003, at the end of the discussions between Novell CEO Messman and IBM, Novell announced publicly that Novell, not SCO owned the UNIX copyrights that were the subject of the asset purchase agreement between Santa Cruz and Novell.

On June 6, 2003, after SCO sent Novell Amendment 2 to the asset purchase agreement, Novell retracted its public claim of copyright ownership.

Two days later on June 8, 2003, Novell again reversed its position and falsely asserted ownership over the UNIX copyrights. Novell also falsely purported to waive SCO's rights to enforce and terminate the IBM software agreement.

Shortly thereafter, Novell announced that it secured a $50 million investment from IBM so that Novell could

acquire SuSe Linux, an investment that Novell said resulted from a single telephone call from Novell CEO Messman to an IBM executive. Remarkably, Novell acknowledges that it did not seek investment capital from any other entities.

And then in early 2004, Novell consummated its acquisition of SuSe, a major Linux distributor.

There is an overreaching genuine issue of material fact here. IBM asserts that Novell's actions toward SCO was just completely independent of IBM, that it was merely coincidental, that IBM was in active discussions with Novell and providing Novell with $50 million all the while Novell was doing a complete about face on its previous position that it had not retained the UNIX copyrights, but rather that SCO had obtained all of those under the asset purchase agreement.

The reasonable inference that can be drawn here based on the facts is that IBM plainly did interfere with SCO's contractual relationship with Novell.

A reasonable jury could find that IBM's conduct was an intentional interference with a contractual relationship between SCO and Novell. An offer of support for Novell's flegently (sic), Linux business, ultimately a payment of $50 million in return for Novell's support deriving its position in the SCO litigation.

Finally, let me just briefly address, Your Honor, the chronology relating to IBM's interference with the

UNIX-on-Intel market. That's SCO's Ninth cause of action. And that chronology is set forth in summary fashion behind Tab 2.

The UNIX-on-Intel market is SCO's UNIX operating systems running on Intel processors. In 1998, that was a $3 billion industry in which IBM acknowledged SCO's dominance. In 1998, SCO had 80 percent of the market share in that market. In April of 1999, IBM knew and it recognized in its internal e-mails that we've cited to the Court that Linux was not then sufficiently advanced or what they call commercially hardened to compete with SCO's UNIX operating systems.

While IBM realized the injury that would be inflicted on SCO, IBM nevertheless publicly announced in January of 2000 that it two disclose UNIX-derived technology to harden Linux for commercial use. IBM did so by among other things disclosing protective UNIX-derived AIX and Dynix technology starting with SCO's JFS.

To cover its tracks, IBM subsequently made the false assertion that the JFS that it disclosed put into Linux was derived from the OS/2 rather than UNIX System V AIX, which is where it was actually derived.

There is a genuine issue of material fact here, Your Honor, that I think is fairly obvious, whether or not IBM breached its software agreements with SCO by disclosing SCO's

protected intellectual property to Linux. Tied up in those disputes is the origin of the JFS disclosed to Linux, an issue I believe was addressed with Your Honor this past week, along with other technologies that IBM disclosed to Linux.

From the date of those 2000 disclosures made by IBM, those disclosures have substantially improved Linux for commercial use enabling Linux to be used within corporations for the same functions as SCO's UNIX at a much lower price. IBM disputes this, but SCO has submitted substantial evidence on this point. There is a genuine issue of material fact.

Tellingly from 2000 to 2002, SCO's revenue dropped like a brick plummeting 74 percent following IBM's disclosure of Linux and the commercial hardening of Linux that resulted. SCO's experts have directly attributed the decline to the increased competition from Linux due to IBM's disclosures of protected technology. Again, there are disputed issues of facts here, Your Honor, that cannot be properly resolved in summary judgment.

And Leigh Furniture, the leading case applicable here, the Utah Supreme Court observed that:

> Driving away an individual's existing or potential customers is the archetypical injury this cause of action was devised or designed to remedy.

THE COURT: You're both citing it. It must be the leading case.

MR. JAMES: I don't think there's any disagreement on that issue. I'm going to talk about Leigh Furniture. I think Mr. Shaughnessy called it Leigh Furniture. Leigh, Leigh, but whatever.

Let me talk a little bit more just for a moment about the disputed facts, Your Honor. In support of their motion, IBM set forth the statement of facts that they claimed were material and undisputed. IBM, in fact -- or excuse me -- SCO, in fact, has disputed in whole or in part at least 35 of those paragraphs. Those are identified by number at Tab 5. One disputed material fact is sufficient to defeat summary judgment. In this case, we've disputed numerous, at least 35 of the facts that are relied upon by IBM in seeking summary judgment. And those disputes as well as the evidence that SCO has cited in asserting those disputes are detailed in Appendix A to SCO's opposition memorandum.

Now, in Addendum A to IBM's reply memorandum, IBM tries to eliminate the disputes of material fact that SCO has raised primarily by asserting a conclusory fashion deemed admitted as if IBM has the power or right to make that determination. IBM seems to think, Your Honor, that it's a final arbiter of what facts are material, how disputes are resolved, what rules apply. We beg to differ, and we will defer to Your Honor in that regard.

THE COURT: Thank you.

MR. JAMES: You're welcome.

There are multiple disputes of material fact with respect to IBM's conduct that resulted in harm of the termination of specific contractual relationships. We've talked about some of those. There are genuine disputes regarding why these companies withdrew support for SCO and UNIX. IBM alleges that the companies only withdrew support for SCO after SCO stopped distributing Linux. SCO has produced evidence that the companies withdrew support before it stopped distributing Linux and did so because IBM demanded and pressured those companies to do so.

There are genuine issues of material facts about SCO's damage claims, Your Honor, and I'll talk about those in a minute. IBM claims that SCO cannot specifically identify any damages relating from IBM's interference, contracts. SCO has put forth evidence that SCO's UNIX space revenue declined almost immediately after IBM began distributing derivations of UNIX code into Linux and that further damages resulted from IBM's demands made to it and to SCO's business partners. Those companies as a result either seized or reduced their business with SCO.

Again, one issue of material fact is sufficient to defeat summary judgment. In this case, there are multiple.

Now, in addition to controverting various facts that IBM set forth in support of its motion, SCO set forth an

additional 91 paragraphs of material facts that set forth IBM's conduct in which supports SCO's opposition. IBM in response does not dispute or purport to dispute any of those facts, simply ignores them because otherwise, the existence of material facts becomes even more obvious.

Now, IBM cites the Ashley Creek case. It asserts that a party cannot avoid summary judgment based on a counter statement of facts that does not satisfy the requirement of Utah Rule, Civil Rule 56(1)(c).

THE COURT: Ashley Creek. It's another case that sounds very familiar to me.

MR. JAMES: I wonder why.

IBM's argument in that regard, however, is irrelevant, Your Honor, and it entirely misses the point. Ashley Creek addresses a situation where the party opposing summary judgment did not even respond to the moving party's statement of facts or refer the Court to any material facts that claims were in dispute.

Here SCO has specifically disputed IBM's facts and then sets forth an additional statement of material facts which IBM does not even dispute. Those additional facts, Your Honor, further support SCO's opposition to IBM's motion here.

Let me talk just for a few minutes about some of the legal issues that IBM has raised. I think there are some guiding principles that are important to keep in mind in that

regard. See those summarized I think at Tab 6. It refers at least to the elements of the claim.

The intentional interference element of the claim requires only that the plaintiff show that the defendant's conduct interfered with existing and prospective business relationships.

The second element of the tort requires one or the other of improper purpose or improper means, not both. Improper means may be shown in a variety of ways including by violation of statutes, regulations, common law rules and deliberate breach of contract for the purpose of injuring the plaintiff, false statements regarding a plaintiff, disclosure of confidential information through a variety of other types of conduct.

It is not necessary, Your Honor, that one particular act or even several acts establish interference, although they might. The fact finder may look to the total cumulative affect, the course of action over time in determining whether interference has occurred.

Finally, a plaintiff may defeat its burden of defeating summary judgment or may meet its burden of defeating summary judgment through circumstantial evidence with the right that all reasonable inferences be drawn in favor of the non-moving party.

That is the case even in the face of direct

evidence offered by the moving party. It's rare that a party will admit to lying or otherwise acting improperly, and often circumstantial evidence is all that is available to prove improper conduct.

SCO set forth in its memorandum, Judge, the strong position that it held with UNIX-on-Intel marketplace as well as IBM's awareness of SCO's position. Those are facts that IBM does not dispute. It's SCO's position, and we think the facts support this, that IBM intentionally interfered with SCO's business relationships in that market.

Again, we have facts that in 2000 IBM began disclosing derivatives of SCO's proprietary UNIX technology to Linux for the purpose of improving Linux. I talked about the impact on SCO. It was immediate. It was devastating. Linux source code was free. Companies began a rapid migration away from SCO's UNIX technologies from Linux. During the two-year period from 2000 through 2002, SCO's revenues declined by 74 percent. You'll see that at Tab 8, Your Honor.

I talked about the actions that were taken as a result of SCO having devised a license, the actions that Karen Smith took informing Darl McBride that if SCO went forward with this licensing efforts, IBM would terminate its relationship and would encourage others to do the same.

Since 2000, IBM has frequently misrepresented to the public its claimed rights to disclose the technology and

the derivation of the technologies. It's violated copyrights. It's committed unfair competition. You heard about that from Mr. Normand.

I think the point is, Your Honor, when you took the cumulative effect of IBM's actions, there is sufficient evidence that a jury can conclude IBM tortuously interfered with the relationships of SCO.

And those improper means are summarized at Tab 9.

IBM has argued that SCO cannot identify any relationships, and there's no harm, anyway. I've talked about the specific relationships.

Regarding the second aspect, the interference on the market aspect, I want to talk to Your Honor for a few minutes about that. I think that relates to SCO's broader, more significant interference claims. That's not a new theory, as Mr. Shaughnessy describes it. In fact, that's our Ninth cause of action.

IBM argues that such theory is not legally cognizable because SCO has not identified specific relations by name with which IBM has claimed to have interfered. I submit, Your Honor, that is not required by Utah law. And I don't think the Court needs to look any further than the Leigh Furniture case to answer that question. Let me just talk very briefly about that case.

In the Leigh Furniture case, Mr. Leigh sold his

furniture store in St. George to a guy name Richard Isom. The deal involved payments over time, a long–term lease, purchase options. Subsequently, Leigh apparently wanted out of the deal. His conduct included frequent visits to the store during business hours by Leigh and his employees, which visits annoyed and drove off Isom's customers. Numerous letters of complaint to Isom. Demands for audits. Threats to cancel contracts. Filing frivolous lawsuits against Isom. All of these acts apparently had the common purpose of forcing Isom out of the business and out of the building.

Isom eventually concluded he couldn't stay in business. He closed the store and shortly thereafter declared bankruptcy in response to Leigh's suit seeking to cancel the contract. Isom counterclaimed for tortious interference.

Now, if you look at what happened in that case, Your Honor, the facts were these, and these were relevant. Expert testimony valued the Isom's lease hold at $45,000. The net value of Isom's furniture business, $59,300. Based on this evidence, the Utah Supreme Court affirmed the damage award of $65,000 and reinstated the full amount of a punitive damage award that had been awarded.

There's no suggestion in that opinion, none, that Isom ever proved the specific identity of each lost prospective customer or for that matter any lost prospective customer. There was no evidence of the amount of profit Isom

might have expected from each lost customer or from any particular lost customer. Isom's damages were based on the valuations of the business rather than a tabulation of the profits he lost from each act of alleged interference.

Yet, the Leigh court held that was sufficient, that the prospective relationships from unidentified customers who may or may not have purchased goods for an unspecified amount were the very types of injuries that tort of interference with economic relations was devised to address.

IBM cites the Bower vs. Stein Eriksen case, a case by Judge Campbell of this court. In the Bower case, the tortious interference claim was premised on the plaintiff's contention that an obstructed view caused by defendant's construction lowered both the fair market value and the rentability of the condominium, and therefore interfered with prospective economic relations.

IBM concludes that this case adds an extra element that, in fact, is not found in Utah law, the requirement of specifically identifying third parties. The Bower case does not stand for that proposition. In fact, in Bower, Judge Campbell found dispositive the fact that plaintiff had failed to establish evidence of any damages. They had not tried to sell the condominium. They continued to rent it. Any future interference with renters was purely speculative. And she concluded that plaintiff's allegations of interference

of third party damages were, in fact, pure speculative.

Here, Your Honor, SCO has identified a specific theory of damages and advanced evidence or loss of market share, UNIX–on–Intel market, directly attributable and co–extensive with IBM's development of the Linux strategy and IBM's improper acts.

In Kerry Coal vs. United Mine Workers, it's a case from the Third Circuit, 637 F. 2e 957, the Third Circuit specifically rejected the argument that IBM is making here, that tortious interference with respect to economic relations claims requires identification of specific third parties. In Kerry Coal, the plaintiff was a non–union coal producer that was effectively shut down during a union strike by various threats and interferences by the Union and its representatives.

Plaintiff contended and offered into evidence that it could have continued to sell its coal market prices if it had been able to operate during the strike. Plaintiff did not prove any of the specific customers to whom it would sell coal, rather what its expert did was it calculated damages by determining the difference between a maximum sale at the time the defendant's activities were low and with sales when the defendant's activities were more intense.

On appeal after a verdict in favor of the plaintiff, the defendant contended that the evidence on lost

profits was insufficient because it failed to establish lost sales to specific customers. And because it failed to tie such specific loss to defendant's activities, the Third Circuit held in response, and this is Tab 11, Your Honor:

> We reject its contention. The jury was presented with a reasonable basis from which it could find both the amount of Kerry Coals lost sales during the coal strike and the causal relationship between the lost sales and the defendants' activities. No more was required.

Same applies here. We've provided evidence of the market share of SCO's revenues in that market, SCO's percentage of market share and what happened after IBM's interference.

Regarding improper purpose or improper means, IBM has asserted in its briefing, Your Honor, that the various means asserted by SCO are merely conclusory statements of SCO's allegations of improper purpose.

I'm not sure why IBM makes that claim. It's not accurate. SCO's claims again I think with respect to improper means, which is what SCO primarily relies on, are very straight forward, talked about those. They're summarized at Tab 9. Such conduct we believe was clearly inappropriate.

If you look at the Leigh Furniture case, and I set forth the quote at Tab 2, basically what the Court says is

even with independent acts they made on their own or even several acts that may together not constitute a tortious interference, when you look at the cumulative effect of those acts, which is what a jury is entitled to do, it says:

> In total and in cumulative effect, as a course of action extending over a period of three and one–half years and culminating in the failure of Isom's business, the Leigh Corporation's act cross the threshold beyond what is incidental and justifiable to what is tortious.

Utah Court of Appeals applies the same approach in the Sampson v. Richins case. In that case, Sampson had countered his acts were taken in good faith. And again, the Court said:

> Taken in isolation, each of the interferences might justify as an overly zealous attempt to protect Sampson's interest. However, the cumulative effect crossed the threshold beyond what is incidental and justifiable to what is tortious.

I think that is the case here. Let me just very quickly address the intentional aspect, Your Honor.

THE COURT: Okay.

MR. JAMES: IBM says it did not act intentionally. If you look at Mumford vs. ITT Commercial Financial Corporation case, a case from the Utah Court of Appeals, what

that case says is the intent for improper means is not an intent that you act with hostility or that you act with ill will. It is simply that you would have the intent to act, that you know that you're acting.

In fact, in that case, the defendant contended that it didn't even know that the contract existed or alleged to have been interfered with. But what the Court of Appeals said reversing summary judgment that had been entered on the tortious interference claim said the affidavit of a plaintiff indicating that the defendant had acted intentionally to prevent access to property was sufficient with respect to the intentional aspect.

IBM claims there's no harm, there's no damages, no causation. We've set forth expert testimony on that regard, Your Honor. This isn't an economic loss theory issue. This is alternative theory issues. And we've presented damage evidence on this case. We've shown the loss of market share as a result. We have shown you have undisputed evidence that IBM knew where SCO stood in the market. We've come forward with undisputed evidence as to what SCO's market share was in the market and what that size of that market was.

And we've also demonstrated to Your Honor through undisputed evidence the loss of market share and revenues that SCO has experienced.

I'm out of time, I know. Let me just read very,

very quickly and very succinctly, Your Honor, a couple of passages from IBM's memorandum in opposition to SCO's motion for summary judgment. You're going to be hearing about this on Wednesday.

THE COURT: This is sort of a preview, is it?

MR. JAMES: A little preview that I think is relevant here, because I think what IBM does is it takes irreconcilable positions. What it says in its briefing is:

> SCO's actions have affected the market place adoption of Linux. IBM has made Linux a large part of its business strategy. Therefore, decreased adoption of Linux has decreased sales and profits of IBM.
>
> IBM alleges that SCO has intentionally interfered with its relationships with numerous companies and individuals to whom IBM has sold and are licensed products and services and to whom IBM seeks to sell and are licensed products and services as well as with businesses and individual members of the Linux and OpenSource software development distribution services and computing community.

In direct contravention to what IBM tells the Court in this context, IBM argues in its context of opposing SCO's motion for summary judgment, and SCO, by the way, doesn't

allege in that context that a market theory is inappropriate, it alleges exactly the same theory that it attacks in this case.

IBM doesn't identify a single customer, a single lost sale, a single -- it doesn't attempt to connect any particular loss with any particular customer. Yet, it claims that there are issues of facts with respect to its tortious interference claim that mandates denial of that claim.

Your Honor, we've set forth those excerpts at Tab 16 and Tab 17, if you look at a couple of tabs before that regarding damages.

And finally to defeat SCO's motion, IBM need only raise a question of fact that it was injured as a result of SCO's misconduct. It need not provide an exact dollar figure for damages. That is as equally applicable here. Even, as IBM says, Your Honor, even nominal damages will suffice.

SCO has provided evidence, Your Honor, to support its damages in this case. There are issues of material fact, Your Honor, that preclude summary judgment. Thank you.

THE COURT: Thank you, Mr. James.

Reply, Mr. Shaughnessy?

MR. SHAUGHNESSY: Unless the Court has questions, Your Honor, I'm good.

THE COURT: Thank you. Well, two more motions argued and taken under advisement. We'll see you Wednesday at

2:00, we decided at 2 o’clock. We’ll be in recess.

(Whereupon, the court proceedings were concluded.)

* * * * *

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

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

That as such reporter, I attended the hearing of the foregoing matter on March 5, 2007, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages number 561 through 42 constitute a full, true and correct report of the same.

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

And hereby set my hand and seal, this ____ day of _____ 2007.

_____
KELLY BROWN HICKEN, CSR, RPR, RMR