UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WAYNE R. GRAY, Plaintiff, v. NOVELL, INC., THE SCO GROUP, INC., and X/OPEN COMPANY LIMITED, Defendants.	)	Case No.: 8:06-cv-01950-JSM-TGW

X/OPEN'S COMBINED MOTION AND MEMORANDUM OF LAW
REQUESTING SUMMARY JUDGMENT ON LIABILITY AND DAMAGES

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I. Introduction

Defendant X/Open Company Limited moves for summary judgment on liability and damages against Plaintiff Wayne R. Gray.

Plaintiff Gray's lawsuit is founded on the legal theory that X/Open is not the lawful owner of the UNIX trademark and that X/Open (along with alleged co-conspirators Novell, Inc. and The SCO Group, Inc.[1]) has conspired to fraudulently conceal this from the public and Gray.

Accepting his theory as established fact, Gray posits that X/Open's administrative challenge to his application to register INUX before the U.S. Patent and Trademark Office ("PTO") and demands that Gray cease use of the infringing mark INUX (allegedly made by X/Open under a false trademark ownership claim) have damaged Gray to the tune of $100,000,000.00. Gray stoops to assert that X/Open's challenge to Gray's INUX mark rendered his INUX business worthless because Gray was forced to change his occupation from software engineer to full-time litigant. However, Gray's blame-game damage claim is transparent, especially given that Gray had yet to launch a commercially successful computer product under any name, let alone INUX. Instead of investing his time and energy into bringing his product to market under a non-infringing name or, if UNIX and INUX were truly believed to be dissimilar and non-infringing, allowing the PTO to reach a decision on confusing similarity many years ago, Gray opted for this kitchen-sink of a suit seeking a jackpot payoff.

However, X/Open's trademark ownership is not open to material factual dispute. It is supported by documents negotiated at arm's length, and no trier could reasonably conclude otherwise. Whether X/Open lawfully owns the UNIX trademark can be resolved on summary

[1]The Court has stayed this action as to SCO given that bankruptcy proceedings involving SCO are currently pending. (Ord., Sept. 18, 2008; Dkt. 53.)

judgment because, when Gray's case is stripped of its red-herring clutter, no genuine issue of material fact exists that X/Open (and no other) is the lawful owner of the UNIX trademark. And because X/Open is the lawful owner of the trademark UNIX, Gray's conspiracy claims that Defendants fraudulently conspired to conceal the ownership of the UNIX mark (as well as Gray's other remaining factually inter-dependant claims) must fail as a matter of law.

Gray's damage claims likewise cannot survive summary judgment as a matter of law. Gray's $100,000,000.00 damage claim is completely devoid of evidentiary support. Gray claims that X/Open's challenge to Gray's INUX trademark rendered his INUX business valueless because Gray needed to drop his business and, instead, defend his alleged rights to use and register his INUX mark (an issue not even at bar in this lawsuit). Yet Gray need only look in the mirror to find the party responsible for his woes, as no genuine issue of material fact exists that Defendants have had no hand in the collapse of Gray's business. In choosing to defend his alleged rights (which Gray may do), Gray accepted the consequences of abandoning his business to ruin and pursuing his surrogate life as a conspiracy litigator.

The time has come to end Gray's farcical lawsuit. Continuing this suit will needlessly result in further judicial waste and party financial recourses, including those of the self-portrayed indigent Gray.

II. Summary of Undisputed Material Facts

It is undisputed that American Telephone and Telegraph Company was the original owner of the UNIX mark and was granted two U.S. trademark registrations for the mark in 1986, that AT&T assigned the mark to UNIX System Laboratories in 1990, and that Novell became the owner of the UNIX mark in 1994 as a result of the merger of UNIX System Laboratories into Novell. (Raynes Decl., Ex. 1-3.)

It is undisputed that, in 1993, X/Open, Novell, and several other computer companies agreed that Novell would license the UNIX mark to third parties through X/Open (provided that the third party products conformed to certain quality-control standards), as well as assign the UNIX mark to X/Open, and that, in 1994, Novell granted X/Open a license ("1994 Novell-X/Open Agreement") to use the UNIX mark and license the mark on Novell's behalf and agreed to assign the UNIX mark to X/Open in a few years. (Raynes Decl., Ex. 4 at 2-3, Ex. 5 at 1-9, 18.)

It is undisputed that the reference to the UNIX mark in the 1995 Novell-SCO Asset Purchase Agreement ("APA") (which Gray claims transferred the UNIX mark from Novell to SCO) was expressly limited by the phrase "*as and to the extent held by [Novell]* (excluding any compensation [Novell] receives with respect of *the license granted to X/Open regarding the UNIX trademark*)" (emphasis added). (Raynes Decl., Ex. 6, Schedule 1.1(a) at 3.) This is a clear and unambiguous reference to the earlier 1994 Novell-X/Open Agreement indicating that the APA did not transfer the UNIX mark to SCO.

It is undisputed that, in 1996, Novell, SCO, and X/Open signed a Confirmation Agreement, providing, inter alia, that (1) Novell would accelerate the assignment of the UNIX mark to X/Open and (2) the assignment would not be considered breach of Novell's obligation to SCO under the APA, and that, in 1998, Novell assigned the UNIX mark and registrations to X/Open. (Raynes Decl., Ex. 7, Ex. 8 at 1.)

These undisputed facts are all that is required for this Court to grant X-Open's motion for summary judgment for liability on all of Gray's factually inter-dependant false trademark ownership claims.

It is also undisputed that Gray (even before X/Open's challenge) had never commercially launched a successful computer product under any name, let alone his proposed INUX mark. It is undisputed that, rather than invest the time and energy to bring his product to market under a non-infringing name or allowing the PTO to decide whether the marks UNUX and INUX were confusingly similar many years ago (which Gray himself prevented by moving the PTO to suspend that case), Gray let his business lie fallow. (See §§ III.E., F., infra.)

These facts are all that is required for this Court to grant X/Open's motion on Gray's damage claim since any damage to Gray occurred not as a consequence of X/Open's actions, but of Gray's own making in occupationally transitioning to full-time litigant.

III. Statement of Facts

A. Background

X/Open, which does business as The Open Group, is an international consortium of computer companies and other organizations such as Apple, Boeing, BP International, Hewlett-Packard, IBM, MIT, NEC, Nissan, Oracle, and Rolls-Royce. (Raynes Decl., Ex. 9.) X/Open owns trademarks for various computer systems, and licenses those marks to companies whose products conform to its quality-control standards. (Raynes Decl., Ex. 10.)

X/Open owns the UNIX trademark, and grants licenses to use the UNIX mark for various computer systems, provided those systems conform to its quality-control standard for UNIX-brand products—currently Version 3 of the "Single UNIX Specification." (Raynes Decl., Ex. 11.) X/Open currently licenses use of the UNIX mark for over 30 products. (Raynes Decl., Ex. 12.)

On April 29, 1999, Gray filed an application for the trademark INUX. (Raynes Decl., Ex. 13.)

On April 11, 2001, X/Open filed an opposition (an administrative proceeding before the Trademark Trial and Appeal Board ("TTAB") of the PTO) based on its rights to the UNIX mark, alleging that Gray's INUX mark for an operating system was confusingly similar to its UNIX mark for an operating system. (Raynes Decl., Ex. 14.)

B. Gray's Claims

After more than five years of litigation in the TTAB, Gray filed this lawsuit on October 19, 2006. (Compl., Dkt. No. 1.) Gray's 83-page, 11-count complaint claims that Defendants:

- Violated and conspired to violate the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") under 18 U.S.C. §§ 1962(c) and 1962(d) (Counts 1-2) (Compl. at ¶¶ 184-195);
- Falsely or fraudulently procured its U.S. trademark registration and made false representations to the PTO under 15 U.S.C. §§ 1120 and 1125(a), and 18 U.S.C. § 1001 (Counts 3-4) (Compl. at ¶¶ 196-206);
- Engaged in unfair competition against Gray under 15 U.S.C. § 1125(a) (Count 5) (Compl. at ¶¶ 207-213);
- Engaged in common-law fraud and conspiracy to commit fraud (Counts 6-7) (Compl. at ¶¶ 214-227);
- Violated and conspired to violate the Florida RICO Act under Fla. Stat. §§ 895.03(3) and 895.03(4) (Counts 8-9) (Compl. at ¶¶ 228-239); and
- Violated the Florida Communications Fraud Act under §§ 817.034(4)(a) and 817.034(4)(b) (Counts 10-11) (Compl. at ¶¶ 240-246).

C. Gray' Factual Allegations Regarding the Ownership of the UNIX Trademark

Gray alleges that X/Open does not own the UNIX mark. Gray gives three reasons why this is the case: (1) Novell "abandoned" the UNIX mark in 1994 when it gave X/Open responsibility for licensing the mark to third parties because the UNIX mark was no longer being used as Novell had previously used it (Compl. at ¶¶ 33, 35), (2) Novell transferred the UNIX mark to SCO in the 1995 Novell-SCO Asset Purchase Agreement ("APA") (Compl. at ¶ 55), and

(3) the UNIX mark "automatically" transferred from Novell to SCO when Novell allegedly sold its entire UNIX business to SCO in the APA (Raynes Decl., Ex. 15 at 33-34). Gray also alleges that Defendants entered into a scheme to conceal the true owner of the UNIX mark to, among other things, "appropriate Gray's iNUX trademark and domain name property [i.e., "inux.com" and "inux.net"] for their use" (Compl. at ¶ 8) (presumably through X/Open's opposition against Gray's INUX mark in the TTAB, though the TTAB has no jurisdiction over or power to decide domain name ownership issues).

All of Gray's claims are premised on Defendants' alleged scheme to conceal the true owner of the UNIX mark. According to Gray, "[t]he present claims are based on Defendants' long-running scheme . . . to conceal the identity of the lawful owner of the UNIX trademarks, their false claims relating to the UNIX marks and fraudulent federal filings, and false UNIX mark acknowledgements [i.e., trademark attribution statements indicating that X/Open is the licensor or owner of the UNIX mark] implying and/or stating publicly that X/Open owns the UNIX marks." (Compl. at ¶ 2.)

Specifically, Gray's federal and Florida RICO claims (Counts 1-2, 8-9) are based on his contention that Defendants sought "to conceal the lawful owner of the UNIX trademarks" to defraud Gray of his property and joined in a conspiracy to conceal such efforts. (Compl. at ¶¶ 187, 192, 230, 235.) Similarly, Gray's Florida Communications Fraud Act claims (Counts 10-11) are based on his allegation that Defendants "conceal[ed] the lawful owner of the UNIX marks and certain UNIX assets" to defraud Gray of his property. (Compl. at ¶¶ 241, 245.) Likewise, Gray's fraud-on-the-PTO claims (Counts 3-4) are premised on his allegation that Defendants sought "to defraud the PTO" by recording the 1998 assignment of the UNIX mark from Novell to X/Open. (Compl. at ¶¶ 198, 204.) Finally, Gray's unfair competition, common-

law fraud, and common-law conspiracy-to-commit-fraud claims (Counts 5-7) are premised on his contention that Defendants made false public statements concerning the ownership of the UNIX mark (e.g., in press releases and documents concerning X/Open's licensing of the UNIX mark), that Defendants used false "mark acknowledgements," and that X/Open falsely claimed ownership of the UNIX mark in various documents submitted to the PTO. (Compl. at ¶¶ 208-209, 215, 221.)

D. Undisputed Facts on the Ownership of the UNIX Trademark

Documents on the ownership of the UNIX mark establish:

- American Telephone and Telegraph Company was the original owner of the UNIX mark and procured U.S. Trademark Registration Nos. 1,392,203 and 1,390,593 for the UNIX mark in 1986. (Raynes Decl., Ex. 1.)

- In May 1990, AT&T assigned the UNIX mark and registrations to UNIX System Laboratories and recorded the assignment in the PTO. (Raynes Decl., Ex. 2.)

- In April 1994, UNIX System Laboratories merged into Novell and, in July 1994, Novell recorded the merger in the PTO. (Raynes Decl., Ex. 3.)

- In October 1993, Novell, X/Open, and non-parties Digital, HP, IBM, and Sun Microsystems signed a term sheet agreeing that (1) Novell would license the UNIX trademark to X/Open, (2) X/Open would license the UNIX mark to companies whose products conform to certain quality-control standards on Novell's behalf, and (3) Novell would assign the UNIX mark to X/Open in a few years. (Raynes Decl., Ex. 4 at 2-3.)

- In May 1994, Novell and X/Open entered into an agreement embodying the terms of the October 1993 term sheet. Under the agreement, Novell (1) gave X/Open an *exclusive*, *irrevocable*, and *perpetual license* to use and license the UNIX trademark, (2) gave X/Open responsibility for licensing the mark to companies whose products conform to certain quality-control standards on Novell's behalf (first an "interim" standard, then "SPEC 1170," and then X/Open's "Single UNIX Specification"), and (3) agreed to assign the UNIX mark to X/Open in a few years. The agreement also authorized X/Open to use the trademark attribution statement "UNIX is a registered trade mark licensed exclusively by X/Open" pending the assignment of the mark to X/Open. (Raynes Decl., Ex. 5 at 1-9, 18.)

- In May 1995, X/Open, having determined that SCO's OpenServer Release 5 software satisfied the quality-control standards administered by X/Open (i.e., the Single UNIX

Specification), granted SCO a license to use the UNIX mark. (Raynes Decl., Ex. 16.) Since that time, SCO's press releases, printed materials, and websites have stated that X/Open is either the exclusive licensor or the owner of the UNIX mark. (Raynes Decl., Ex. 17.)

- In September 1995, Novell and SCO concluded the Asset Purchase Agreement, which transferred certain assets to SCO, including, in Schedule 1.1(a) ¶ V, the UNIX trademark "*as and to the extent held by [Novell]* (excluding any compensation [Novell] receives *with respect of the license granted to X/Open regarding the UNIX trademark*)"—i.e., the 1994 Novell-X/Open agreement. (Raynes Decl., Ex. 6, Schedule 1,1(a) at 3.)

- In September 1996, Novell, SCO, and X/Open concluded the Confirmation Agreement. The Confirmation Agreement confirmed that the 1995 APA was subject to the 1994 Novell-X/Open agreement and provided, inter alia, that (1) Novell would assign X/Open the rights to the UNIX mark that were subject to the 1994 Novell-X/Open agreement and (2) the assignment of the UNIX mark from Novell to X/Open would not be considered a breach of Novell's obligation to SCO under the APA. (Raynes Decl., Ex. 7 at 1.)

- In November 1998, Novell assigned the UNIX mark and registrations to X/Open and, in June 1999, X/Open recorded the assignment in the PTO. (Raynes Decl., Ex. 8.)

- Novell, SCO, and X/Open all understood (and understand today) that X/Open was at all times to be the owner of the UNIX mark and did in fact become the owner of the UNIX mark.

E. Gray's Allegations Regarding Damages

Gray alleges that he had "no alternative but to suspend most INUX business activities in June 2001 until a settlement could be reached with X/Open [in the TTAB opposition]," and that, as a result of suspending his business, he has been financially harmed. (Raynes Decl. Ex. 15 at 63.)

Counts 1-2 and 6-11 allege (with minor variations) that:

> [Gray] suspended iNUX related business activities which directly resulted in Gray's loss of his significant financial and other investments therein; Gray continued suspension of iNUX business activities and committed his limited financial and other resources to defending his iNUX property and good name in X/Open's objectively baseless sham TTAB opposition of his iNUX trademark application which directly resulted in Gray expending

> significant financial and other resources therein; and Defendants' [sic] have deprived and continue to deprive Gray of his valuable iNUX property . . . directly resulting in his continuing significant financial loses.

(Complaint at ¶¶ 177, 189, 194, 200, 205, 211, 218, 224, 232, 238, 242, 245.)

Specifically, Counts 1-2 and 8-11 allege that Gray's losses are "believed to be substantially greater than $225,000" per count and contends he is entitled to treble damages, "with interest thereon, plus reasonable attorneys' fees and reasonable experts' fees in connection with this suit" (Compl. ¶¶ 190, 195, 233, 239, 243, 246), and Counts 6-7 allege that his losses are "estimated to be in substantial excess of $75,000" per count (Compl. ¶¶ 219, 227). Thus, Gray's Complaint alleges that he is entitled to a minimum of $4,500,000.00 in damages.[2]

Further, in Gray's responses to Novell's interrogatories, Gray alleges that he has invested "over one hundred thousand dollars [in his INUX business], and the investment expenditures include, among others, product research and development, product promotion, sales and marketing, legal [expenditures] and [preparation of] contracts, business and financial partnership development, and legal cost[s] incurred concerning [the TTAB opposition] *X/Open v. Gray*." (Raynes Decl., Ex. 15 at 60.)

Gray further alleges that he has devoted "over 6,500 hours" of his time to his INUX business and "over 8,600 hours" on "the legal defense of his iNUX property" at "$200.00/hour" (a total of $3,020,000.00), that one of his contractors invoiced him for 700 hours of work at "$2,500.00/hour" (a total of $1,750,000.00), and that another contractor billed him for 344 hours of work at "$120.00" (a total of $41,280.00). (*Id.*) Thus, Gray's interrogatory responses allege

[2] In addition, Counts 3-5 request cancellation of X/Open's registrations (Compl. at ¶¶ 201, 206, 213), and Counts 4-5 allege that Gray is entitled to "compensatory damages, treble damages, disgorgement of profits and attorney's fees." (Compl. ¶¶ 206, 213.)

that he spent a minimum of $4,811,280 on his INUX business and defending against X/Open's opposition in the TTAB (and presumably this lawsuit).

Finally, Gray alleges in his responses to Novell's interrogatories that he "began selling version one of his iNUX software in December 1999 and that, by June 2001, when he suspended his INUX business activities, "iNUX product development cost was hundreds of thousands of dollars and iNUX marketing and promotion . . . totaled over two million dollars. Gray believes that total damages to Gray's iNUX business and property, including continuing injury and accrued interest now exceeds *one hundred million dollars [$100,000,000.00]*." (Raynes Decl., Ex. 15 at 62-63) (emphasis added).

F. The Documents Regarding Gray's Damages

The documents Gray identified in his responses to Novell's interrogatories show that:

- Gray rented a car on May 20, 1999. No amount appears on the service agreement. (Raynes Decl., Ex. 18: GRAY 006473.)

- The New Enterprise Forum's October 1999 newsletter indicated that Gray would be a presenter at the next meeting of the forum to be held on October 21, 1999. (Raynes Decl., Ex. 19: GRAY 006474 – GRAY 006477.)

- "INUX inc" sent Alan Skaare an invoice for $1,433.44 on December 23, 1999 for "X SURFER PRO 2," "ZIP 100," "JOYSTICK," "Internet Carrier," and "upgrade," and Mr. Skaare wrote "INUX Computers" a check for the same amount on December 27, 1999 for "X surfer pro 2 + option on 200 [illegible]." (Raynes Decl., Ex. 20: GRAY 006478 – GRAY 006479.)

- Gray (or someone residing at Gray's address) owned a bank account in the name of "MEGACHOICE INC." from March 1, 1999 through October 31, 1999. (Raynes Decl., Ex. 21: GRAY 007781 – GRAY 007795.) None of the account statements indicate whether the deposits were from the sale of INUX products or services, or whether the withdrawals were INUX-related business activities.

- Gray (or someone residing at Gray's address) owned a bank account in the name of "INUX, INC." from November 1, 1999 through January 31, 2002. (Raynes Decl., Ex. 22: GRAY 007796 – GRAY 007846.) None of the account statements indicate whether the deposits were from the sale of INUX products or services, or whether the withdrawals were INUX-related business activities.

- William P. Killian sent Gray an e-mail in February 2008 indicating that "[m]y time spent on your and iNUX's behalf during 2000 & 2001 was 700 hours. My hourly rate is $2,500 which totals to $1,700,000 [sic]." (Raynes Decl., Ex. 23: GRAY 008467.)[3] Other than this email, no other supporting documentation exists.

IV. Argument

A. Summary Judgment Standard

Summary judgment is appropriate when the record establishes there are no issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (citations omitted).

The party seeking summary judgment bears the initial burden of identifying those portions of the record which it believes demonstrate there are no genuine issues of material fact for trial. Id. Rule 56 permits the moving party to satisfy its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. Id.; Fed. R. Civ. P. 56(c).

Once the moving party shows there is an absence of evidence to support the non-moving party's case, to avoid the entry of summary judgment the non-movant must come forward with specific facts "beyond the pleadings" (i.e., affidavits, depositions, answers to interrogatories, and/or admissions) showing that there are genuine issues for trial. See Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Clark v. Coats & Clark, Inc., 929 F.2d

[3] Defendant X/Open's counsel takes great comfort in knowing that the rates charged for its services literally pale next to Mr. Killian's rate of $2,500 per hour. Perhaps as an historic first, but attorney hourly rates can be said to be a bargain by comparison.

604, 608 (11th Cir. 1991); Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220, 1225 (11th Cir. 1999); Fed. R. Civ. P. 56(e).

"[A]ll reasonable inferences" should be drawn in favor of the non-moving party when there is a conflict in the evidence, Shotz v. City of Plantation, Fl., 344 F.3d 1161, 1164 (11th Cir. 2003) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). However, a court "need not permit a case to go to a jury . . . when the inferences that are drawn from the evidence, and upon which the non-movant relies, are '*implausible.*'" Cuesta v. School Bd. of Miami-Dade County, 285 F.3d 962, 970 (11th Cir. 2002) (emphasis added) (citing Mize v. Jefferson City Bd. of Education, 93 F.3d 739, 748 (11th Cir. 1996). See also Blackston v. Shook and Fletcher Insulation Co., 764 F.2d 1480, 1482 (11th Cir. 1985) ("[A]n inference based on speculation and conjecture is not reasonable."). Nor are conclusory allegations based on subjective beliefs sufficient to create a genuine issue of material fact. Scott v. Harris, 127 S. Ct. 1769, 1776 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."); Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1217 (11th Cir. 2000) ("This Court has consistently held that conclusory allegations without specific supporting facts have no probative value.").[4]

Summary judgment is thus appropriate where the non-movant's evidence is merely colorable, conclusory, speculative, or not significantly probative. Anderson v. Liberty Lobby,

[4] Similarly, the Supreme Court recently held, in Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1960 (2007), that the plaintiff must plead a "plausible" set of facts, not merely *any* conceivable set of facts, to avoid dismissal of its claims on a Rule 12(b)(6) motion. Twombly is a motion-to-dismiss case and, as such, is not controlling here. However, the logic of Twombly is already embodied in the summary-judgment standard, see, e.g., Shotz v. City of Plantation, Fl., 344 F.3d 1161, 1164 (11th Cir. 2003) (a court "need not permit a case to go to a jury . . . when the [non-movant's evidence and inferences] are implausible"), and should be applied here.

Inc., 477 U.S. 242, 249-50 (1986). A dispute over irrelevant or unnecessary facts will not preclude summary judgment. Id. at 247 ("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."). Moreover, the non-movant cannot rely on the possibility of "some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

B. X/Open Owns the UNIX Mark Even Assuming Gray's Allegations Are True

Written, executed agreements regarding the ownership and licensing of the UNIX mark establish that X/Open owns the UNIX mark and that Gray's allegations concerning the ownership of the mark are pure speculation. Summary judgment is, therefore, appropriate. However, even assuming Gray's allegations are true, X/Open still owns the UNIX mark and is still entitled to summary judgment.[5]

1. Novell Did Not "Abandon" the UNIX Trademark in the 1994 Novell-X/Open Agreement

Gray alleges that the assignment of the UNIX mark from Novell to X/Open in 1998 was unlawful because Novell "abandoned" the UNIX mark in 1994. (Compl. at ¶ 33, 35.) Specifically, Gray alleges that, when Novell and X/Open agreed X/Open would administer Novell's new business of licensing the UNIX mark to third parties whose products conform to certain quality-control standards in the 1994 Novell-X/Open agreement, Novell "abandoned" the UNIX mark, which had previously not been licensed and had only been used to identify computers and computer programs (namely, operating systems). (Id.)

[5] See Exhibit A for a summary of the documents in the chain of title to the UNIX trademark showing that X/Open owns the UNIX trademark, as well as the documents outside the chain of title showing that, even if Gray's allegations are taken as true, X/Open still owns the UNIX mark.

Gray's allegation that X/Open's operation of Novell's new licensing business worked an abandonment of the UNIX mark ignores basic trademark law. It is black-letter law that a trademark licensee's use of a mark inures to the benefit of the trademark owner. J. Thomas McCarthy, McCarthy on Unfair Trademarks and Unfair Competition (4th ed. 2004) § 18:45.50 ("A licensee's use [of a mark] inures to the benefit of the licensor-owner of the mark . . . . This is the rule at common law and has been codified in Lanham Act §5."). Thus, when Novell transitioned to the business of licensing the UNIX mark to third parties through X/Open pursuant to the 1993 Digital-HP-IBM-Novell-Sun-X/Open term sheet, all of X/Open's use of the UNIX mark in connection with that business inured to Novell's benefit. In other words, all of X/Open's use of the UNIX mark in connection with the licensing business was undertaken on Novell's behalf (until Novell's assignment of the UNIX mark to X/Open in 1998). As such, Novell did not (in fact, could not) abandon the UNIX mark simply because *X/Open* (and not Novell) used the UNIX mark to administer Novell's licensing business under the agreement.

2. The 1995 Novell-SCO APA Did Not Transfer the UNIX Trademark from Novell to SCO

Gray also alleges that Novell improperly assigned the UNIX mark to X/Open because Novell previously transferred the mark to *SCO* in the 1995 Novell-SCO Asset Purchase Agreement ("APA").

Gray's allegation that SCO and not X/Open owns the UNIX mark rests on his myopic and blindered reading of the APA. According to Gray, given that the UNIX mark is mentioned in the "included assets" section of the APA, the UNIX mark transferred to SCO. Gray further contends that, after that transfer, Defendants conspired to conceal the identity of the true owner of the UNIX brand and have done so over the past 13 years. (Compl. at ¶ 55, 58-59.)

The APA did no such thing. The transfer of the UNIX mark under the APA was *conditional*, being limited by the phrase "*as and to the extent held by [Novell]* (excluding any compensation [Novell] receives with respect of *the license granted to X/Open regarding the UNIX trademark*)" (emphasis added). This phrase is a plain and unambiguous reference to the earlier 1994 Novell-X/Open agreement, in which Novell gave X/Open an *exclusive*, *irrevocable*, and *perpetual* license to use and license the UNIX mark to third parties, and agreed to assign the UNIX mark to X/Open in a few years.[6]

All this is made plainly clear by the 1996 Novell-SCO-X/Open Confirmation Agreement, which *confirms* that the 1995 APA was subject to the 1994 Novell-X/Open agreement, and that the 1994 agreement required Novell to assign the UNIX mark to X/Open, with all three signatories acknowledging that X/Open in fact owns the mark.

3. The UNIX Trademark Did Not Automatically Transfer from Novell to SCO as a Result of the Alleged Sale of Novell's Entire UNIX Business to SCO in the 1995 Novell-SCO APA

Finally, Gray contends that, even if the APA did not explicitly transfer the UNIX mark from Novell to SCO, the mark "automatically" transferred to SCO by operation of law as a result

[6] Assuming for the moment that the UNIX mark transferred to SCO by operation of law or otherwise, X/Open's *license* from Novell was exclusive, irrevocable, and perpetual. As such, even SCO could not have used the UNIX mark *other than as licensed to it by X/Open.* Further, as an exclusive licensee, X/Open has independent standing to enforce its rights in UNIX. See McCarthy on Unfair Trademarks and Unfair Competition § 27:21 ("Courts have held that an exclusive licensee of a mark may have standing to sue under §43(a) for acts which cause injury to the licensee.") So assuming Gray's tortured claim that SCO owns the mark and not X/Open, X/Open would still have had the authority to enforce the UNIX mark against Gray's confusingly similar INUX mark.

of the alleged sale of Novell's entire UNIX business to SCO in the APA.[7] (Raynes Decl., Ex. 15 at 34.) Gray's "automatic" transfer contention is fatally flawed for several reasons.

First, the alleged sale of Novell's UNIX business to SCO did not include the UNIX mark because, as discussed above, the transfer of the mark was *subject to* the 1994 Novell-X/Open agreement. Further, the "UNIX business" sold to SCO did not include the *business of licensing the UNIX mark* because, again, the transfer of the UNIX mark was subject to the 1994 Novell-X/Open agreement.

Assuming for the sake of argument that the UNIX mark transferred to SCO by operation of law, as Gray contends, SCO never used the UNIX mark for any of its products (including the OpenServer operating system for which it obtained a UNIX trademark license in 1995), *except as a licensee of X/Open*. (Raynes Decl., Ex. 16-17.) As such, whatever "ownership" rights Gray posits SCO obtained in the UNIX mark for *the business of computers and software* have long since been abandoned, such that Novell's and then X/Open's continuing use of the UNIX mark for the *licensing business* were all that remained under the UNIX brand.

Further, whether Novell retained ownership of the UNIX mark after the APA, or SCO obtained ownership of the mark through the APA as Gray contends (either explicitly or by operation of law), the 1996 Novell-SCO-X/Open Confirmation Agreement signed by SCO, Novell, and X Open establishes that X/Open owns the UNIX mark. Specifically, the Confirmation Agreement states that the APA was "subject to rights and obligations established in a May 14, 1994 NOVELL-X/OPEN Trademark Relicensing Agreement," that Novell will accelerate the assignment of the UNIX mark to X/Open, that Novell's assignment of the mark to

[7] Gray presents no evidence that Novell transferred its entire UNIX business to SCO in the APA. Indeed, Novell and SCO have been involved in heated litigation for several years regarding the scope of the APA. (Raynes Decl., Ex. 24.)

X/Open will not be considered a breach of Novell's obligations to SCO under the APA, and that the Confirmation Agreement supersedes all prior agreements. Thus, whether the Confirmation Agreement is read as meaning the parties acknowledge that Novell retained ownership of the UNIX mark, or whether (as Gray appears to contend) the parties acknowledged that SCO somehow acquired and retained ownership of the UNIX mark and then transferred whatever rights Novell gave to SCO to X/Open instead, the result is the same: the UNIX mark and registrations were assigned to X/Open in 1998.

Finally, there is no material factual support for Gray's contention that SCO ever *owned* the UNIX mark. SCO has never behaved as the licensor or owner of the UNIX mark in communications with X/Open or in printed publications or on its website. To the contrary, SCO has treated X/Open as either the exclusive licensor or the owner of the UNIX mark.

C. Gray's Conspiracy Theory is Pure Speculation

If SCO owned or owns the UNIX mark, as Gray alleges, why has SCO not challenged X/Open's rights since it allegedly acquired the mark in 1995? Why has SCO for over 15 years used the trademark attribution statement acknowledging X/Open's license or rights in the UNIX mark?

Rather than see the obvious for what it is—i.e., SCO really does understand and believe that X/Open owns the rights to the UNIX mark—Gray resorts to tortured and layered supposition and innuendo to conclude that SCO has not challenged X/Open's rights to the UNIX mark because, get this, SCO is part of a conspiracy to conceal the true ownership of the UNIX mark. But for what reason would SCO do such a thing? The extraordinarily painful and time-consuming task of reading Gray's 83-page complaint and his 70-page single-spaced responses to Novell's interrogatories reveals that Gray's screen-play conspiracy theory is completely void of

any reasoned explanation of any credible motive that SCO (let alone Novell and X/Open) would concealing ownership of the UNIX mark.

The reason for Gray's inability to simply explain his conspiracy theory is obvious: There is no conspiracy. Gray's convoluted theories aside, what happened in real life is exactly what the documents show: Novell transferred ownership of (1) the UNIX mark to X/Open (and only X/Open) for the benefit of the computer industry to apply uniform standards and specifications under the UNIX brand and (2) other assets related to the AT&T System V version of the old UNIX operating system to SCO (which, at the time of the transfer, was no longer a product identified by the UNIX mark because "UNIX" had considerably evolved since the introduction of AT&T Systems V).

Gray's conspiracy theories are simply *theories*, not fact. The title transfer documents establish the facts and Gray cannot avoid summary judgment based on pure speculation.

D. Gray's Damages Claims Fail As a Matter of Law

Gray's eye-popping assertion that his damages claims total more than *$100,000,000.00* as a result of the alleged conspiracy is pure folly. According to documents produced by Gray himself, Gray sold *less than $1,500* of INUX product before X/Open opposed Gray's INUX trademark application in 2001. Bent on proving the fiction that X/Open did not own the UNIX mark, Gray abandoned his business to assume the role of litigant. Any financial despair suffered by Gray is of his own making and cannot be attributed to X/Open. Gray's outlandish damages claims are neither supported by record evidence nor applicable law. Summary judgment on all of Gray's damages claims is thus appropriate.

1. Gray's Documents Contain No Evidence of Damages

Gray's pie-in-the-sky $100,000,000.00 damage claim is easily exposed by the very documents that allegedly support his claim. Gray's interrogatory responses identify about 80

pages of documents in support of his damages claim. (Raynes Decl., Ex 15 at 60-63.) Yet these documents contain no evidence of any business activity in terms of income or profitability that could conceivably establish damages in the hundred million dollar range.

For instance, the vast majority of the withdrawals and deposits shown in the bank account statements produced by Gray (all from 1999-2002) are for less than $3,000 and only two monthly balances are for more than $4,300. Further, it is unclear how many of Gray's documents relate in any way to Gray's damages claims, including 14 pages of bank account statements in the name of Megachoice, Inc. (a company that has no apparent relation to this lawsuit) and a car rental ticket and a newsletter containing Gray's name (both from 1999).

Similarly puzzling is the February 2008 e-mail from William Killian to Gray indicating that Killian spent 700 hours "on your and iNux's behalf" during 2000 and 2001, at an astounding hourly rate of $2,500 per hour. There is no indication of what services Killian provided, no written agreement between Killian and Gray regarding such services, and no payments to Killian reflected in the bank records produced by Gray.

The only document that even remotely suggests any INUX business activity is the single invoice dated December 23, 1999 from "INUX Inc." to Alan Skaare in the amount of $1,433.44, and a check dated December 27, 1999 from Skaare to "INUX Computers" in the same amount. Thus, Gray's own documents show that his INUX business activities totaled, at most, *less than $1,500*—a figure that, by itself, unequivocally refutes Gray's "belief" that "total damages to [his] iNUX business and property, including continuing injury and accrued interest now exceeds one hundred million dollars." (Raynes Decl., Ex. 15 at 62.)

Moreover, there is no legal basis for Gray to recover the types of damages he seeks. As made clear by Gray's interrogatory responses, Gray's damages claims consist almost entirely of

(1) the legal expenses he incurred in defending the action before the TTAB and in bringing this lawsuit, and (2) the anticipated profits of his INUX business from 2001 onward had Gray not abandoned that business after X/Open challenged Gray's federal application for the INUX mark and asserted infringement of its famous UNIX mark. As detailed below, the law provides no basis for recovery of either type of damage.

2. Gray's Legal Expenses Are Not Compensable "Damages" at Common Law

It is a well-settled principle of unfair-competition law that "a party may not recover the value of the party's own time spent pursuing the litigation." J.D. Lee and Barry A. Lindahl, Modern Tort Law § 46:14 (2d ed. 2002) (citing Committee for Idaho's High Desert, Inc. v. Yost, 92 F.3d 814, 823 (9th Cir. 1996) (rejecting plaintiff's claim for "damages" based on "the amount of hours that representatives of [plaintiff] have had to spend on this lawsuit, valued at some reasonable hourly rate" and finding that "[n]o authority suggests that a plaintiff's time spent in litigation over trademark infringement is compensable as damages for the infringement."). As such, there is no legal basis for Gray's claim that his damages include the "over 6,500 hours" he has thus far devoted to this litigation. While Gray was certainly entitled to abandon his business in favor of full-time litigation, he is not entitled to claim that time as an element of his damages.

Further, it is well-settled that, at common law, a plaintiff cannot recover attorney fees as damages. Dan B. Dobbs, Law of Remedies § 3.10(3) (2d ed. 1993) ("Under the American Rule, a plaintiff who prevails in ordinary tort or contract litigation does not recover the attorney fee expense incurred in the litigation, either as awardable court costs or as damages."); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 257 (1975) (noting that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser" and the "general rule that, absent statute or enforceable contract, litigants pay their own

attorneys' fees"). While attorney fees are available under some of the statutory claims Gray has asserted (i.e., the federal RICO and Florida RICO statutes), Gray, as discussed above, has failed to prove a violation of these statutes. Accordingly, Gray also has no statutory basis to recover attorney fees.

3. Gray Cannot Recover the Anticipated Profits From His INUX Business As a Matter of Law

It is well-settled that anticipated-profit damages, like all damages, cannot be speculative and must be proved with reasonable certainty. Nebula Glass Int'l, Inc. v. Reichhold, Inc., 454 F.3d 1203, 1213 (11th Cir. 2006). Given this "reasonable certainty" rule, new businesses with no track record of profitability face an extremely high hurdle in recovering damages for anticipated profits:

> Under the traditional new-business rule, which applies to any business without a history of profits, evidence of expected profits from a new business is too speculative, uncertain, and remote to be considered, and does not meet the legal standard of reasonable certainty. Thus, recovery for lost profits is not traditionally allowed for injury to a new business with no history of profits, even if the defendant's wrongful act prevented the plaintiff from ever operating the business.

22 Am. Jur. 2d Damages § 445 (citing cases); see also TAS Distributing Co. v. Cummins Engine Co., 491 F.3d 625, 633 (7th Cir. 2007) ("[A]s a general rule, expected profits of a new commercial business are considered too uncertain . . . and remote to permit recovery."); Benham v. World Airways, Inc., 432 F.2d 359, 360 (9th Cir. 1970) (reversing district court's award of future profits where plaintiff's proof of such profits "never rose above the level of hope and conjecture" and "rested on a series of assumptions" that were not supported by the evidence).

While the Eleventh Circuit does not completely foreclose new businesses from recovering anticipated profits, Nebula Glass, 454 F.3d at 1214-15, in practice, such damages are rarely awarded to a new business given the difficulty of proving anticipated profits with

reasonable certainty. See, e.g., Biomedical Disposal, Inc. v. Mediq/PRN Life Support Servs., Inc., 202 Fed. Appx. 347, 348 (11th Cir. 2006) (affirming district court's grant of summary judgment for defendant on plaintiff's expected profits claim because plaintiff was a "new company" whose expected profits were "speculative"); Dictiomatic, Inc. v. United States Fidelity & Guaranty Co., 127 F. Supp. 2d 1239, 1243 (S.D. Fla. 1999) ("Florida law is clear that a claim for lost profits must be shown with a reasonable degree of certainty. . . . The law is further well established that in order to recover lost profits, there must be an on-going business with an established sales record and proven ability to realize profits.") (citations omitted); Life Systems, Inc. v. Fisher Scientific Group, Inc., 1988 U.S. Dist. LEXIS 2326, at *44 (S.D. Ga. Mar. 16, 1988) ("Generally, when lost profits are recovered, they are recovered for an established business. This is because established businesses have a proven track record of profitability from which to measure lost profits. The loss of anticipated profits from a new business, on the other hand, are generally thought to be too speculative and conjectural to permit recovery.") (citations omitted).

To prove damages in the form of anticipated profits in the Eleventh Circuit, Gray must show (1) that X/Open caused the damage and (2) that there is some standard by which the amount of damages may be adequately determined. Nebula Glass at 1214-15 (citation omitted).

As to the first element, any damage to Gray's INUX business was caused not by X/Open, but by Gray's *voluntary* act of ceasing business after X/Open challenged Gray's INUX application at the TTAB and asserted infringement of its famous UNIX mark. Gray's assertion that he "had no choice" but to suspend his INUX business activities is highly disingenuous, at best. Gray could have easily selected another name and proceeded to conduct business under that name rather than dropping his business and assuming the role of full-time litigant. Indeed,

X/Open's trademark opposition in the TTAB (like all trademark oppositions) was directed at the *registration* of Gray's INUX mark, not the *use* of the mark.[8] There is absolutely no evidence that Gray's business fortunes were inextricably tied to his use of the INUX mark, nor is such an assertion even plausible.[9]

As to the second element, Gray's discovery responses do not even remotely suggest what standard should be used to calculate the profits his INUX business *would have made.* Gray operated his INUX business for *less than two years*, from 1999-2001, and Gray produced no documents from this or any other time period (such as profit-and-loss statements, tax returns, etc.) that would enable a trier of fact to determine the amount of anticipated profits with any degree of certainty, let alone "reasonable certainty." Gray's claim of anticipated profits amounts to pure conjecture. Given the scant financial data Gray has produced regarding his INUX business, his anticipated profits could only be based on inappropriate speculation. See Brough v. Imperial Sterling Ltd., 297 F.3d 1172, 1177 (11th Cir. 2002) (reversing jury's award of expected profits because the award "was based on speculation").

Given that there is no basis for Gray to recover his legal expenses as an element of his damages and that Gray cannot prove X/Open directly caused damage to his INUX business, let alone prove the amount of any such damage with "reasonable certainty," summary judgment on Gray's claims for damages is warranted.

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[8] For X/Open to have challenged Gray's rights to *use* his INUX mark, it would have had to bring a trademark infringement action in federal court (which it never did).

[9] The most plausible explanation is, of course, that Gray was well aware his INUX mark was a dead knockoff of X/Open's UNIX mark. As such, Gray's "fortunes" were hitched to a free, but unfair, ride on the coattails of the famous UNIX mark.

E. Gray's Damage Claims Are Pure Speculation

Gray's pipedream claim of $100,000,000.00 in business losses from the alleged conspiracy defies common sense. Gray's interrogatory responses confirm that Gray sold little, if any, product under his INUX mark before electing to abandon his business and setting off to prove fiction as fact. Just how much success had Gray's INUX product garnered before X/Open opposed his application? At most, $1,500 over two years, according to Gray's own documents. Just how much success has Gray's product garnered since such time? None, there apparently being time only to litigate.

It is undisputed fact that Gray wallows in a financial despair of his own making. His $100,000,000.00 damage claim is grounded in pure speculation rather than rigorous, established fact. As such, summary judgment is appropriate on all of Gray's damage claims.

V. Conclusion

For the reasons set forth in detail above, X/Open's motion for summary judgment should be granted in full.

Respectfully submitted,

Dated: June 26, 2008

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CERTIFICATE OF SERVICE

I certify that on June 26, 2008, I electronically filed this document with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to:

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WAYNE R. GRAY v. X/OPEN COMPANY LIMITED, ET AL.
CASE NO.: 06-1950 (JSM) (TGW)

X/OPEN'S COMBINED MOTION AND MEMORANDUM OF LAW
REQUESTING SUMMARY JUDGMENT ON LIABILITY AND DAMAGES

EXHIBIT A

Exhibit A

Documents in the Chain of Title to the UNIX Trademark Establishing X/Open's Ownership

AT&T	UNIX Systems Labs	Novell	X/Open
April 22, 1986 Registration – AT&T obtains U.S. Trademark Registration No. 1,390,593 for UNIX covering "computers." **May 6, 1986 Registration** – AT&T obtains U.S. Trademark Registration No. 1,392,203 for UNIX covering "computer programs."	**May 1990 Assignment –** Assignment of UNIX mark and registrations from AT&T to UNIX System Laboratories (recorded in the PTO in May 1990).	**April 1994 Merger –** UNIX System Laboratories merges into Novell (merger recorded against UNIX mark and registrations in the PTO in July 1994).	**November 1998 Assignment –** Assignment of UNIX mark and registrations from Novell to X/Open (recorded in the PTO in June 1999).
Registrations identify AT&T as the original owner of the UNIX trademark and registrations. No dispute.	**Assignment shows transfer of the UNIX mark and registrations to UNIX System Laboratories. No dispute.**	**Merger shows the transfer of the UNIX mark to Novell. No dispute.**	**Assignment shows the transfer of the UNIX mark to X/Open.**

Gray alleges the transfer of the UNIX mark from Novell to X/Open was fraudulent because: (1) Novell abandoned the mark as used for computers and computer programs by giving X/Open responsibility for administering Novell's business of licensing mark to third parties, (2) the Asset Purchase Agreement ("APA") explicitly transferred the mark to SCO, and (3) the APA transferred the mark to SCO by operation of law.

Documents Outside the Chain of Title to the UNIX Trademark Establishing X/Open's Ownership

May 1994 Novell-X/Open Agreement – Novell (1) gives X/Open an exclusive, irrevocable, and perpetual license to use and license the UNIX mark to third parties, (2) gives X/Open responsibility for administering the licensing program, and (3) agrees to assign the mark to X/Open in three years. **Agreement shows (1) Novell did not abandon the UNIX mark used for computers and computer programs, but transitioned from the business of selling UNIX operating systems to the business of licensing the UNIX mark to third parties, and (2) X/Open was responsible for administering the new business on Novell's behalf (until the 1998 Novell-X/Open assignment).**

May 1995 X/Open-SCO License – X/Open licenses the UNIX mark to SCO for use with SCO's OpenServer Release 5 software, and SCO subsequently identifies X/Open as exclusive licensor or owner of mark. **Documents show SCO's acknowledgement of X/Open's rights in the UNIX mark.**

September 1995 Novell-SCO APA – Novell transfers various assets to SCO, including UNIX mark, but only "*as and to the extent held by [Novell].*" **Qualifying language shows the APA did not transfer the UNIX mark to SCO explicitly or by operation of law and, instead, the transfer was subject to 1994 Novell-X/Open agreement.**

September 1996 Novell-SCO-X/Open Confirmation Agreement – Parties confirm that the APA was "subject to rights and obligations established in a May 14, 1994 NOVELL-X/OPEN Trademark Relicensing Agreement," that the UNIX mark will be transferred to X/Open in three years, and that the Confirmation Agreement supersedes all prior agreements. **Agreement confirms that the APA did not transfer the UNIX mark to SCO and that, even if it did (explicitly or by operation of law), the parties agreed that X/Open owns the mark.**