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

_____)	
THE SCO GROUP, INC., a Delaware)	
corporation,)	
)	
Plaintiff and)	
Counterclaim-defendant.))	
)	
vs.)	Case 2:04-cv-139dak
)	
)	
NOVELL, INC., a Delaware)	
corporation,)	
)	
Defendant and)	
Counterclaim-plaintiff.))	
_____)	

BEFORE THE HONORABLE DALE A. KIMBALL
APRIL 30, 2008
REPORTER'S TRANSCRIPT OF PROCEEDINGS
TRIAL TRANSCRIPT
VOLUME II
(Daily copy)

Reported by: KELLY BROWN, HICKEN CSR, RPR, RMR

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A P P E A R A N C E S

FOR NOVELL:

MORRISON & FOERSTER LLP
BY: MICHAEL A. JACOBS
ERIC M. ACKER
DAVID E. MELAUGH
Attorneys at Law
3625 Market Street
San Francisco, California 94105

FOR SCO:

BOIES, SCHILLER & FLEXNER LLP
BY: STUART H. SINGER
EDWARD J. NORMAND
JASON CYRULNIK
Attorneys at Law
401 East Las Olas Blvd, Suite 1200
Fort Lauderdale, Florida 33301

HATCH, JAMES & DODGE, P.C.

BY: BRENT O. HATCH
Attorney at Law
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

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1 Salt Lake City, Utah, Wednesday, April 30, 2008

2 * * * * *

3 THE COURT: You may resume the stand, Mr. Sontag.

4 You may proceed, Mr. Acker.

5 Good morning, everyone.

6 MR. ACKER: Good morning, Your Honor. Thank you.

7 CHRISTOPHER S. SONTAG,

8 called as a witness at the request of Novell,

9 having been previously duly sworn, was examined

10 and testified further as follows:

11 REDIRECT EXAMINATION

12 BY MR. ACKER:

13 Q. Good morning, Mr. Sontag.

14 A. Good morning.

15 Q. You testified yesterday in response to questions of
16 counsel that the price for the SCO intellectual property
17 licenses, that series of licenses we looked at yesterday
18 afternoon, those prices were set as the price equal to the
19 most current version of UnixWare; is that right?

20 A. The most current and applicable version of
21 UnixWare. So single CPU or multi CPU version of UnixWare.

22 Q. So if a potential licensee was using an older
23 version of SVRX, say an older version of 1992 or 1994, and
24 wanted to take one of these licenses, under the SCOSource
25 program, SCO would still charge that licensee the same price

1 they would pay for the most current version of UnixWare;
2 correct?

3 A. That is correct.

4 Q. And that was true for all of the SCOSource IP
5 licenses; correct?

6 A. Yes.

7 Q. Counsel asked you a very direct question yesterday
8 regarding whether or not there is any UnixWare code in Linux.
9 And I wrote down your answer, and you said that there very
10 well could be; correct?

11 A. Yes.

12 Q. But the bottom line is that you simply do not know
13 if there was any unique UnixWare code in Linux; right?

14 A. I believe your question was about uniquely UnixWare
15 code. Given that UnixWare has developed out of, you know,
16 many versions of the UNIX, you know, development tree, much of
17 that code is uncommon. And to uniquely parse out something
18 that's different with UnixWare versus previous releases, I've
19 never done that analysis, never seen this analysis.

20 Q. Do you know if that analysis has ever been done,
21 that is, someone has sat down and parsed out what is unique to
22 the most recent version of UnixWare as opposed to what exists
23 in pre APA SVRX?

24 A. I don't know if that has been done.

25 Q. But the bottom line is that given that testimony,

1 you simply don't know if there's any code that is unique to
2 UnixWare that is in Linux; correct?

3 A. I do not.

4 Q. Counsel also asked you a series of questions about
5 the first phase of the SCOSource program that was referred to
6 initially in late 2002 and early 2003 as the SCO Tech program;
7 correct?

8 A. Yes.

9 Q. And you answered his questions regarding the
10 licensing of libraries of UNIX code; correct? Do you recall
11 that testimony?

12 A. Yes.

13 Q. Now, no licenses were ever issued under that
14 program, that is, the first phase of the program in which it
15 was contemplated that the libraries would be licensed; isn't
16 that right?

17 A. I do not believe there was any specific licenses
18 under that first release of the SCO Tech or early SCOSource
19 license.

20 Q. So the SCO Tech or the SCOSource licenses that
21 actually were issued were the Sun and the Microsoft license as
22 well as the series of additional licenses that we looked at
23 yesterday; correct?

24 A. Yeah. And I would separate out the Sun and the
25 Microsoft licenses from the series that you speak of. They're

1 separate types of licenses.

2 Q. But they were all SCOsource licenses; right?

3 A. They were all under the SCOsource division.

4 Q. Now, regarding the Sun agreement, if we could put
5 up Exhibit 187, Attachment 1, please.

6 Mr. Sontag, we put up on the screen Attachment 1 to
7 the 2003 Sun agreement. The first page of Attachment 1. And
8 you've testified that all of this software license, the 2003
9 license, was included in this attachment and licensed Sun
10 simply as legacy software or older versions of SVRX software
11 that was licensed along with the most recent version of
12 UnixWare.

13 A. Correct. And they already had a license to most of
14 this, anyways.

15 Q. And that was my next question. It's true, isn't
16 it, that Sun already had a license to all of this software on
17 the first page of Attachment 1 of 2002 license; right?

18 A. Yes. And that is -- again, that license for the
19 previous versions was just a standard practice. So, again,
20 licensing the latest version of UnixWare and incidentally
21 licensing all the previous versions.

22 Q. But because -- and that previous license, the 1994
23 Sun license to this exact same 30 versions of software was
24 fully paid up; correct?

25 A. Yes.

1 Q. And so Sun didn't need -- there was no need for Sun
2 to obtain a license. They didn't need a license, a re-license
3 to this additional 30 pieces of legacy software in 2004 except
4 that they wanted to expand their rights to distribute the
5 software; correct?

6 A. Again, this was all included just because it was a
7 standard practice of licensing the UnixWare source code.

8 Q. But Sun already had a license for this software;
9 right?

10 A. Yes.

11 Q. And what they wanted in the 2003 agreement was to
12 expand or, in your words, to soften the confidentiality
13 provisions relating to this software; correct?

14 A. Primarily, they wanted a license to the latest
15 version of UnixWare for their Intel work that they were doing.

16 Q. And with respect to this 30 versions of legacy
17 SVRX, they wanted to soften the confidentiality provisions
18 relating to the software; correct?

19 A. It was a minor part of the agreement.

20 Q. That's what Sun wanted; right?

21 A. Yes.

22 Q. And that's what SCO gave to them; correct?

23 A. Yes. It's all part of the agreement.

24 Q. Now, it's true, isn't it, that not all of this
25 pre-APA SVRX software is in the current version of UnixWare?

1 Correct?

2 A. Probably not. But I would suspect, you know,
3 anything that is valuable and important would still be in the
4 current version of UnixWare.

5 Q. But you've never done a line-by-line comparison to
6 determine what portions of this software, the legacy SVRX
7 software, is actually in the current version of UnixWare;
8 correct?

9 A. I have not.

10 Q. And you're not aware of anyone else having done
11 that analysis; correct?

12 A. I'm not aware of that analysis.

13 Q. And Sun didn't do that analysis, as far as you
14 know; correct?

15 A. Not that I know.

16 Q. And you're not aware of any expert for SCO doing
17 that analysis?

18 A. I'm not aware.

19 Q. And you're not aware of any technician or technical
20 person or engineer of SCO doing this analysis; correct?

21 A. No, I'm not.

22 Q. Now, you testified yesterday and you've already
23 testified today that SCO has a history of including older
24 versions of software when it licenses the most recent versions
25 of software; correct?

1 A. Yes. And SCO's predecessors in the UNIX business
2 did the same thing.

3 Q. But you also testified in answer to your questions
4 to counsel that you'd seen older licenses in which the legacy
5 software was routinely licensed, but recently there had been
6 contracts in which that hadn't been done; correct?

7 A. My understanding was in the most recent release,
8 most versions of the UnixWare source license, they removed the
9 long listings and prior products solely for the purpose of
10 reducing the size of the contract, though the older versions
11 were still implicitly included in those contracts.

12 Q. Well, when you say most recent, what time frame are
13 we talking about?

14 A. I think the chain was made with 7.1.3 versions of
15 the UnixWare source agreements.

16 Q. And what time frame was that?

17 A. That would be within the last, you know, five to
18 seven years. Prior versions 7.1.2, 7.1.1, my understanding is
19 that they did include the listings of all of the prior
20 releases.

21 Q. When you say listings, they would have that long
22 laundry list of the prior SVRX software?

23 A. That's correct.

24 Q. If I could show what we've marked and been admitted
25 as Exhibit 69.

1 (Time lapse.)

2 THE WITNESS: Okay.

3 Q. BY MR. ACKER: Exhibit 69 is a SCO license with a
4 company called CyberGuard; correct?

5 A. Yes.

6 Q. And what is being licensed with CyberGuard is
7 UnixWare 7.0; correct?

8 A. Yes.

9 Q. And this agreement was entered into 10 years ago;
10 right? 1998? Look at the bottom of the first page. See on
11 the signature page?

12 A. Yes.

13 Q. Mr. Broderick signed the license March of '98?

14 A. Yes.

15 Q. And if we take a look at -- we go back to SCO,
16 SCO 0978321. It's Paragraph 4.7 in the attachment.

17 A. 4.7?

18 Q. Yes.

19 A. Okay.

20 Q. See there's a heading there, Prior Products;
21 correct?

22 A. Yes.

23 Q. And the only prior products listed there are
24 UnixWare; correct?

25 A. Yes.

1 Q. And so there is no -- in this contract 10 years
2 old, there is no list of all the prior legacy software;
3 correct?

4 A. It appears to not be the case.

5 Q. So your testimony or your understanding about SCO's
6 practices isn't that always all the legacy software is
7 licensed is not accurate; right?

8 A. It appears in this case for this one particular
9 license. However, my understanding on this practice comes
10 from Bill Broderick who is the one who signed this contract.

11 Q. Kind of curious, isn't it?

12 A. And what he had told me was even if they did not
13 include it, if somebody asked for it, they would provide them
14 with a supplement that did include it.

15 Q. Let me show you what we've marked and admitted as
16 Exhibit 70. Will you take a look at that?

17 A. Okay.

18 Q. Exhibit 70 is another license. And this time it's
19 on behalf of Santa Cruz' predecessor to SCO, an entity called
20 DASCUM, Inc.; correct?

21 A. Yes.

22 Q. And again, this license was entered into 10 years
23 ago; correct?

24 A. Yes.

25 Q. And what was licensed was UnixWare operating

1 system; correct?

2 A. 7 operating system.

3 Q. And then if you go to the attachment,
4 paragraph 4.7, which is on SCO 1043328 --

5 A. Yes.

6 Q. -- do you have that? We have it on the screen.
7 Again, the only prior products listed are SCO UnixWare
8 Release 2.1 and 2.0; correct?

9 A. Those are the only ones listed.

10 Q. And again, we don't have a laundry list of all the
11 prior SVRX product; correct?

12 A. Not in this case.

13 Q. So this is another example that is inconsistent
14 with your understanding of what you've been told about SCO's
15 historical licensing practices; corrects?

16 A. Again, I was told that it was removed at some point
17 to simplify the contract. However, it was provided to any
18 customer that requested those prior releases.

19 Q. Let me show you what we've marked and has been --
20 of what SCO has marked and been admitted as SCO Exhibit 369.

21 A. Okay.

22 Q. SCO Exhibit 369 is a license between a Japanese
23 subsidiary of SCO and an entity called Alps Electric Company;
24 correct?

25 A. Yes.

1 Q. It's dated March 29th, 1996; right?

2 A. Yes.

3 Q. And if you take a look at SCO 1042588, you see --

4 we have it on the screen. This is a license for UNIX

5 Release 2.0. Do you see that?

6 A. Yes.

7 Q. And then if you go back to SCO 1042612, and the

8 attachment here is actually a listing of these prior products,

9 and this exhibit was intentionally left blank. So there was

10 no legacy software included in this license in 1996; correct?

11 A. In this particular license, no.

12 Q. Is it fair to say what we have here in Exhibits 69,

13 70 and 369 are examples that are inconsistent with your

14 understanding of SCO's historical licensing practices?

15 Correct?

16 A. Yes.

17 Q. And you weren't at SCO until 1992; correct?

18 A. At SCO?

19 Q. I mean you weren't at SCO until 2002; correct?

20 A. That is correct.

21 Q. So anything that you've learned about historical

22 licensing practices of the company were simply as a result of

23 something that's been told to you; correct?

24 A. That is correct.

25 Q. In questioning by counsel yesterday, you were asked

1 about -- I want to turn your attention to Section 2.2 of the
2 Microsoft agreement. In response to questions from counsel
3 you testified yesterday that the release and license in
4 Section 2 pertained to UnixWare. Do you recall that
5 testimony?

6 A. Yes.

7 Q. But it's true, isn't it, that Microsoft -- that
8 release and license didn't pertain just to UnixWare, it also
9 pertained to prior SR VX products because Microsoft's concerns
10 about those products being in their products would not have
11 assuaged unless they got released from the earlier products?

12 A. Actually I think the release was for all of SCO's
13 intellectual property rights.

14 Q. And when it includes all of SCO's intellectual
15 property rights that means both UnixWare and prior SVRX
16 products; correct?

17 A. And OpenServer and all of SCO's units and
18 intellectual property rights.

19 Q. And you also testified yesterday that Section 4 of
20 the Microsoft agreement, in that section Microsoft wanted to
21 use UnixWare and other System 4 products in their products;
22 right? Excuse me. They wanted to use UnixWare and other
23 System V products in their products, which is why they took
24 out the license in Section 4 in the Microsoft agreement?

25 A. They took out the license in Section 4 to expand

1 their rights for UNIX to a broader set of products.

2 Q. But your testimony yesterday was Microsoft was
3 considering including in their products both UnixWare and
4 other System V products; right?

5 A. No. The only thing that I would expect that they
6 were intending to include in their products was the latest
7 version of UnixWare. They also might possibly have included
8 some of the OpenServer source code software that we licensed
9 to them. The prior versions would not make sense to include
10 in new products.

11 Q. But it's true you're not aware of Microsoft ever
12 including any of either OpenServer, UnixWare or prior SVRX
13 products in their products; correct?

14 A. I do not know what they have done.

15 MR. ACKER: That's all I have, Your Honor.

16 THE COURT: Thank you, Mr. Acker.

17 Mr. Normand?

18 RE-CROSS-EXAMINATION

19 BY MR. NORMAND:

20 Q. Good morning, Mr. Sontag.

21 A. Good morning.

22 Q. Could you pull up Novell 187? Attachment 1.

23 Mr. Sontag, do you recall being asked about this
24 attachment this morning?

25 A. Yes.

1 Q. This is a list of System V prior products you said
2 earlier?

3 A. Yes.

4 Q. Do you know whether under the 1994 agreement with
5 Sun, Sun had already obtained copies to these System V
6 releases?

7 A. Source tapes or just rights to them?

8 Q. Either.

9 A. My understanding was that they had rights to all
10 these previous releases. I do not know if they had source
11 tapes for any of these previous versions.

12 Q. They had rights to use these -- do you have a view
13 as to whether or not they had rights to use these releases on
14 their CPUs?

15 A. Yes.

16 Q. You were asked about what was described as softened
17 confidentiality restrictions in the 2003 Sun agreement. Do
18 you recall that?

19 A. Yes.

20 Q. Were the confidentiality restrictions that
21 pertained to the older System V technology the same as the
22 confidentiality restrictions that pertained to UnixWare in the
23 2003 agreement?

24 A. I don't necessarily know. My understanding is
25 applied to all the new confidentiality provision in the 2003

1 agreement. My understanding is it applied to all the
2 versions.

3 Q. In your view, was there any difference in the way
4 that Sun could deal with the UnixWare source code as opposed
5 to the older System V releases?

6 A. No.

7 MR. NORMAND: Would you pull up Novell 369.

8 MR. ERIC WHEELER: 369?

9 MR. NORMAND: Yes.

10 THE COURT: SCO 369?

11 MR. NORMAND: Yes, Your Honor.

12 Q. BY MR. NORMAND: Do you recall being shown this
13 document by counsel?

14 A. Yes.

15 Q. This is the Alps agreement, the Nihon Alps
16 agreement?

17 A. Yes.

18 Q. Do you know whether Alps ever told Santa Cruz in
19 the negotiations of this agreement that they had no interest
20 in listing the prior products?

21 A. I do not know.

22 Q. That's not something that you ever discussed with
23 Mr. Broderick?

24 A. No.

25 Q. Pull up the bottom half.

1 What is the date of this agreement, Mr. Sontag?

2 A. March 29th, 1996.

3 MR. NORMAND: Could you pull up SCO 141. Go to the

4 next page. Blow up the bottom half.

5 Q. BY MR. NORMAND: What is the date of this document,

6 Mr. Sontag?

7 A. March 31st, 1997.

8 MR. NORMAND: And could you blow up the top half.

9 Q. BY MR. NORMAND: What do you understand this

10 document to be?

11 A. This is a supplement.

12 Q. Which company is it with?

13 A. With NCR. And I'm not sure what specifically it

14 would be related to.

15 Q. BY MR. NORMAND: Are you able to recognize now what

16 this document pertains to?

17 A. This looks like a UnixWare Release 2.1

18 International Edition right to use sublicensing-type fees and

19 agreement.

20 MR. NORMAND: Would you go to Page 24. Can you

21 blow up the top two thirds.

22 Q. BY MR. NORMAND: And do you recognize what this

23 represents on this page, Mr. Sontag?

24 A. A list of prior products.

25 Q. Now, this document is dated after the Alps license;

1 correct?

2 A. That is correct.

3 Q. And is this document dated after the APA?

4 A. No, it is not.

5 Q. Is it dated after the asset purchase agreement?

6 A. I'm sorry. Yes, it is. Yes, it is.

7 Q. Do you have any idea as to of all the UnixWare
8 licenses that were executed how many of them list the earlier
9 releases of System V?

10 A. I don't specifically, no. But my impression was it
11 was the majority.

12 Q. Who would be the person at SCO who would know that?

13 A. Bill Broderick is the person who would know.

14 Q. Mr. Sontag, who was the principal negotiator for
15 SCO in the 2003 Sun and Microsoft agreements?

16 A. I was.

17 Q. Did either Microsoft or Sun have any UnixWare
18 license prior to entering into those 2003 agreements?

19 A. No, they did not.

20 Q. How much did Microsoft pay for its limited UnixWare
21 license in Section 3?

22 A. In Section 3?

23 Q. Including the option to exercise section.

24 A. About \$8 million, I believe.

25 Q. If I told you 7 million, would that --

1 A. That's, yeah.

2 Q. Now, as between Microsoft's limited license to
3 UnixWare in Section 3 and Sun UnixWare license, who had the
4 broader license?

5 A. Can you repeat the question?

6 Q. As between Microsoft's Section 3 UnixWare license
7 and the UnixWare license that Sun obtained under its 2003
8 agreement, who had the broader license?

9 A. Sun did.

10 Q. In your view, did Microsoft obtain any additional
11 UnixWare rights under Section 4 of its agreement?

12 A. Yes.

13 Q. In your view, did Microsoft pay additional money
14 for its additional UnixWare rights under Section 4 on top of
15 the 7 million in Section 3?

16 A. Yes, it did. I mean, it was significantly
17 broadened, as I testified before.

18 Q. As between Microsoft's full UnixWare license under
19 Sections 3 and 4 and Sun's license, who had the broader
20 license?

21 A. I would view them as being equal.

22 Q. And how much did Sun pay under its 2003 agreement?

23 A. About \$10 million.

24 MR. NORMAND: No further questions, Your Honor.

25 THE COURT: Thank you, Mr. Normand.

1 Anything else of this witness?

2 MR. ACKER: Just a second, Your Honor.

3 (Time lapse.)

4 MR. ACKER: One question.

5 REDIRECT EXAMINATION

6 BY MR. ACKER:

7 Q. You just testified in response to counsel that you
8 viewed the rights that Microsoft obtained under Section 4 of
9 its license as being equal to what Sun obtained; is that
10 right?

11 A. Effectively, yes.

12 Q. Do you believe that Microsoft had open source
13 UnixWare under Section 4?

14 A. No, I don't.

15 MR. ACKER: Nothing else, Your Honor.

16 THE COURT: Thank you. I guess you meant two
17 questions.

18 MR. ACKER: I did. I apologize.

19 THE COURT: Mr. Normand?

20 That's all right.

21 RECROSS-EXAMINATION

22 BY MR. NORMAND:

23 Q. Mr. Sontag, having considered the question that was
24 just asked of you, in your view as between the full UnixWare
25 license that Microsoft had under Sections 3 and 4 and Sun's

1 UnixWare license, who had the broader UnixWare license?

2 A. Specifically to UnixWare, I view that they were
3 about equal. I mean, you also have to take into account,
4 which I don't think I fully explained with the previous
5 question, that Sun had significantly more rights in terms of
6 sublicensing and software distribution rights for their UNIX
7 technologies. So they're way further ahead in many ways. But
8 in terms of just distribution of UnixWare, they were
9 effectively comparable.

10 Q. All right. Would it be accurate to say that Sun
11 had broader rights with respect to UnixWare as to what counsel
12 described as open sourcing?

13 A. Modestly. I think I'm not an attorney, so it would
14 be difficult for me to be able to determine the differences in
15 terms of those agreements.

16 Q. Thank you.

17 THE COURT: Thank you.

18 Anything else?

19 MR. ACKER: No, Your Honor.

20 THE COURT: Thank you.

21 You may step down, Mr. Sontag.

22 I assume this witness may be excused?

23 MR. ACKER: Yes, Your Honor.

24 THE COURT: You can stay or go as you choose,

25 Mr. Sontag.

1 You may call your next witness.

2 MR. ACKER: We would call Mr. Darl McBride, Your
3 Honor.

4 THE COURT: Come forward and be sworn, please,
5 right here in front of the clerk of court.

6 THE CLERK: Come stand up here. Please raise your
7 right hand.

8 DARL CHARLES McBRIDE,
9 called as a witness at the request of Novell
10 having been first duly sworn, was examined
11 and testified as follows:

12 THE WITNESS: Yes, I do.

13 THE CLERK: Thank you. Please take the witness
14 stand right there.

15 Please state your name and spell it for the record.

16 THE WITNESS: Darl Charles McBride. D-A-R-L,
17 C-H-A-R-L-E-S, M-C-B-R-I-D-E.

18 THE CLERK: Thank you.

19 DIRECT EXAMINATION

20 BY MR. ACKER:

21 Q. Good morning, Mr. McBride.

22 A. Good morning.

23 Q. You're currently the CEO of SCO; is that right?

24 A. That's correct.

25 Q. And you came to the company then called Caldera in

1 that same position in June of 2002; right?

2 A. That's correct.

3 Q. And at that time, when you joined Caldera, it was
4 not in great financial shape; correct?

5 A. That is correct.

6 Q. In fact, the company was in somewhat of a
7 turn-around situation. Would that be accurate?

8 A. Yes.

9 Q. The company had not been profitable for the fiscal
10 year ending October 31st; 2002; right?

11 A. Yes.

12 Q. And, in fact, the company had suffered a net loss
13 of more than \$24 million for that year; right?

14 A. I don't remember exactly, but it wasn't in good
15 shape. I know that.

16 Q. And when you first came to Caldera, you met with
17 the top dozen or so managers of the company and asked them
18 what they would do if they were running the company.

19 A. Yes.

20 Q. And during those conversations, one of the
21 managers, John, I believe his name is Terpstra?

22 A. Terpstra.

23 Q. Terpstra, told you that he believed that the UNIX
24 intellectual property exists inside of Linux; right?

25 A. Yes, that's correct.

1 Q. And one of your takeaways or your findings from
2 your meetings with managers was although that the prior
3 management or regime had been focusing on marketing Linux,
4 most of the company's revenue was coming from UNIX; correct?

5 A. Yes, that's correct.

6 Q. And you believed that the course of action had to
7 change in the company in order to become profitable had to
8 turn its attention in protecting its UNIX assets; right?

9 A. That was clearly one of the key strategies
10 that we identified, yes.

11 Q. Let me show you what we have marked and has been
12 admitted as Exhibit 139. Mr. McBride, if you would take a
13 look at that, please, sir.

14 (Time lapse.)

15 THE WITNESS: Okay.

16 Q. BY MR. ACKER: Exhibit 139 is a letter that you
17 wrote to Caldera shareholders on August 12th, 2002; correct?

18 A. Yes, that's correct.

19 Q. And in the first paragraph of the letter or the
20 first numbered paragraph, you wrote:

21 Caldera owns the technology and other key
22 intellectual property rights to UNIX, one of the world's
23 largest, most popular computing platforms.

24 Correct?

25 A. Yes, that's correct.

1 Q. And in the last sentence of that first numbered
2 paragraph, you wrote:

3 We can and will be much more aggressive in
4 marketing and protecting those valuable assets.

5 Right?

6 A. That's correct.

7 Q. And you delineated what those assets were in the
8 prior paragraphs; right?

9 A. Yes.

10 Q. And you delineated them in three groups, UNIX SVRX;
11 right?

12 A. Yes. I wouldn't articulate it exactly the way you
13 are.

14 Q. Well, my question was you separated it out in three
15 separate buckets, didn't you?

16 A. Well, the precursor of those three buckets is the
17 statement right before it, which is the umbrella to those
18 three buckets or really the foundation of those three buckets,
19 which is our UNIX intellectual property. And then we talk
20 about three brands that they may have heard, which are UNIX,
21 SVRX or System V. We use that interchangeably, UnixWare and
22 SCOSource. I call these brands that are on top of the UNIX
23 intellectual property.

24 Q. So the core assets of the company on the bottom is
25 the UNIX intellectual property; is that fair?

1 A. Yes, fair enough.

2 Q. And then built on top of that was UNIX SVRX;
3 correct?

4 A. Well, this is a brand. Again, if you go back to
5 the first thing here, we're talking -- I think it's important
6 that we don't -- we get the right distinction between a brand
7 and, you know, the core assets that we're talking about here.

8 Q. But the core assets, the UNIX core intellectual
9 property underlies all three of these brands; correct?

10 A. The core intellectual property is what is tied into
11 each of these brands, that's correct.

12 Q. And it was the core intellectual property tied into
13 each of these brands that you told shareholders in August of
14 2002 that you sought to protect.

15 A. Yes.

16 Q. And the brands that you delineated were three
17 separate brands, UNIX SVRX; right?

18 A. Yes.

19 Q. UnixWare; correct?

20 A. Yes.

21 Q. And SCO OpenServer; right?

22 A. Yes.

23 Q. And it's true, isn't it, that on several prior
24 occasions, you have described SCO's UNIX assets using a tree
25 analogy?

1 A. Yes.

2 Q. Why don't we bring up Exhibit 421, if we could.
3 Let me give you a copy.

4 And if you take a look at the third page of
5 Exhibit 421, Mr. McBride, or fourth page, that's the tree;
6 right?

7 A. Yes.

8 Q. And in the diagram, the trunk labeled as SCO IP
9 UNIX, that's the core UNIX System V software code; correct?
10 That's what that represents?

11 A. Yes.

12 Q. And the branches on this diagram are derivative
13 works that are based on the core UNIX software code; correct?

14 A. Yes.

15 Q. And those branches include both SCO UnixWare;
16 correct?

17 A. SCO -- that is correct. SCO UnixWare is a little
18 bit unique in this diagram in that it serves both as the trunk
19 of the tree and also as a branch.

20 And so if somebody came to the company and said, we
21 want to get the core intellectual property to UNIX, and we
22 want to take a license for that, for example, IBM did that
23 with us in 1998, we said, okay, if you want to get core access
24 to the UNIX intellectual property or the trunk code, the way
25 you do that is through a UnixWare license.

1 So UnixWare is unique compared to any of these
2 other branches in that the core trunk is where the UNIX
3 intellectual property was held was inside of UnixWare.

4 Q. Well, isn't it true that when you arrived in
5 Caldera in late 2002, you realized that the revenues from the
6 branches UnixWare and OpenServer were, in your words, marching
7 south and dying off; correct?

8 A. They were under severe competition from primarily
9 Linux but also from others. But, yes, they had been going
10 south for a number of years.

11 Q. And because the revenues from the branches UnixWare
12 and OpenServer were marching south and dying off, your
13 strategy was to focus on maximizing the value of the trunk;
14 correct?

15 A. In part, that's correct.

16 Q. And the trunk of the tree is the core SVRX code;
17 correct?

18 A. We call it different things along the way.
19 Sometimes we call it SCO UNIX; sometimes we call it System V;
20 and sometimes we call it SVRX; sometimes we call it UnixWare.
21 But it's all basically the core IP UNIX.

22 Q. And that's the core IP that dates back at AT&T?

23 A. It started at AT&T, but it had evolved dramatically
24 over the years.

25 Q. And it was the core UNIX IP that you and Mr. Sontag

1 and others sought to mine with the SCO source program at SCO
2 in 2002 through 2004; correct?

3 A. We sought to take the core UNIX ownership rights
4 that we had that were primarily embodied in UnixWare and be
5 able to get more value in the marketplace out of that core
6 intellectual property.

7 Q. But you don't know, do you, whether all of the code
8 from the core UNIX IP exists in UnixWare; correct?

9 A. The core -- no, that's not correct. The core code
10 of UnixWare is where the older versions of UNIX have been
11 embodied. It's been that way for years. I worked at Novell,
12 and it was the case then and it's the case now 15 years later.

13 Q. But my question is, do you know if every line of
14 code of the trunk here, do you know if every line of code in
15 this trunk exists in UnixWare?

16 A. I know that if you want to license the trunk code,
17 you'd have to do it through UnixWare.

18 Q. That wasn't my question. My question was, do you
19 know if every line of code in the UnixWare, this core trunk
20 exists in UnixWare?

21 A. That's my understanding.

22 Q. Have you ever done any study to determine that?

23 A. I'm not an engineer. We have some engineers that
24 will be here in the next couple days. I suppose you could ask
25 them that.

1 Q. Do you know if anyone's ever done that?

2 A. Again, that's something you'd have to ask the
3 engineers. What I do know is that the way the core UNIX
4 property was licensed -- I worked for Novell for eight years.
5 I was there when we bought it from AT&T. I was at Novell as
6 an executive when we sold the UNIX property to SCO. And I
7 know that when we were at Novell we made a conscious decision
8 to take the core UNIX code that we bought from AT&T and have
9 it embodied in UnixWare. It was part of the strategy. And
10 that strategy has continued on over the years.

11 Q. And that was UnixWare that existed prior to the
12 APA; correct?

13 A. It started prior to the APA in UnixWare. It has
14 continued on that way.

15 Q. Let me show you what we've marked as Exhibit 173.

16 (Time lapse.)

17 Q. BY MR. ACKER: Exhibit 173 is a press release
18 announcing the SCOSource licensing program dated January 22nd
19 of 2003; correct?

20 A. Yes.

21 Q. Would you take a look at the paragraph under
22 SCOSource. This is was a description that the company gave of
23 what SCOSource was; correct?

24 A. Yes.

25 Q. And how you described it in January of 2003 was

1 that:

2 SCO patents, copyrights and core technology
3 date back to 1969 when Bell Laboratories created
4 the original UNIX source code.

5 Correct?

6 A. Yes.

7 Q. And it was that software, that is the core
8 technology dating back to 1969 that would be licensed in the
9 SCOsourc program; correct?

10 A. Part of it was that. There was other things in
11 there.

12 Q. Let me show you what we've marked Exhibit 194.

13 (Time lapse.)

14 Q. BY MR. ACKER: This is a letter that you wrote to
15 over 1,000 companies in May of 2003; correct?

16 A. Yes.

17 Q. And this is a letter written in conjunction with
18 the SCOsourc licensing program; correct?

19 A. In part.

20 Q. And in the first sentence you wrote:

21 SCO holds the rights to the UNIX operating
22 system originally licensed by AT&T to
23 approximately 6,000 companies and institutions
24 worldwide, the UNIX licenses.

25 Correct?

1 A. Yes.

2 Q. And if we could go down to the last two paragraphs,
3 in the fifth paragraph, you write:

4 Many Linux contributors were originally UNIX
5 developers who had access to UNIX source code
6 distributed by AT&T and were subject to
7 confidentiality agreements including
8 confidentiality of the methods and concepts
9 involved in software design.

10 And then you continue:

11 We have evidence that portions of the UNIX
12 System V software code have been copied into
13 Linux.

14 That's what you told these 1,000
15 companies; correct?

16 A. That's correct.

17 Q. And in the last paragraph, you wrote:

18 As a consequence of UNIX' unrestricted
19 authoring process, it is not surprising that the
20 Linux distributors do not warrant the legal
21 integrity of the Linux code provided to the
22 customers. Therefore, legal liability that may
23 arise from the Linux development process may also
24 rest with the end user.

25 That's what you sold these companies;

1 correct?

2 A. That's what the general license says.

3 Q. And the companies were the end users; right?

4 A. Yes.

5 Q. So what you're telling these companies in May of
6 2003, is, look, our core intellectual property dating back to
7 AT&T is in Linux; right?

8 A. Yes.

9 Q. And you're using Linux; correct?

10 A. That's correct.

11 Q. Therefore, you're going to have to take a license
12 from us.

13 A. I don't see anything in here that says you have to
14 take a license from us.

15 Q. You're telling them you should consider whether or
16 not you should take a license from us; right?

17 A. You have to show me where that is. I don't see it.

18 Q. What was the intent for writing the letter other
19 than to put these companies on notice that you believe that
20 your core intellectual property was in Linux and they were
21 using Linux and may be, in your words, legal liability for the
22 end user?

23 A. I think "notice" is the right word you used there.
24 That's what we were trying to do is put them on notice. I had
25 met with IBM several months prior to this. And IBM said to me

1 directly that you cannot come after us because we do not do
2 Linux distributions. That's between you and an end user. And
3 because we don't do distributions, you can't sue IBM. That's
4 one of the things they told us. And, you know, if you read
5 the general public license, it does say that. It says, a
6 caveat emptor phrase in the general public phrase that says
7 you are getting this license for Linux for free, and be aware
8 if somebody comes after you for intellectual property problems
9 we're absolved from that. I'm paraphrasing now, but that's
10 essentially what it says.

11 Q. But you not only told these 1,000 companies that
12 our, SCO's, technology is in Linux, and you're using Linux and
13 you may have liability, you also gave them a specific example
14 where you initiated legal action in this letter; didn't you?

15 A. Yes, we did.

16 Q. Why don't we turn to the second page.

17 In the first sentence of this paragraph, you wrote:

18 We believe that Linux infringes our UNIX
19 intellectual property and other rights.

20 Correct?

21 A. Yes, that's correct.

22 Q. And there you're talking about the trunk of the
23 tree, the core UNIX intellectual property; right?

24 A. I don't believe it says that in there.

25 Q. But that's what you're referring to; correct?

1 A. I'm referring to a number of things.

2 Q. Isn't it true --

3 A. I'm referring to things that are in the trunk and
4 I'm referring to things in the branches and things that may
5 have been in the leaves.

6 Q. You're referring to all three, the whole tree?

7 A. There were a lot of things going on. And when you
8 go into a bookstore and you go to the section in the bookstore
9 that says, how to program in UNIX. And then you go to the
10 section that says, how to program in Linux, there's not one.
11 It's the same thing. It's the same book. It's the same
12 thing. Linux is a replica of our UNIX, period.

13 Q. But let me just make this clear. When you wrote:
14 We believe that Linux infringes our
15 intellectual property rights.

16 You were referring in part to the core intellectual
17 property that existed in the trunk of your tree diagram;
18 correct?

19 A. As I said earlier, I was referring to all parts of
20 the tree.

21 Q. Including the core in the trunk?

22 A. Including System V that was embodied in UnixWare
23 that was in the trunk, that's correct.

24 Q. And then you told them you not only put them on
25 notice, you flat-out told them:

1 We intend to aggressively protect and enforce
2 these rights.

3 A. That's absolutely correct.

4 Q. You're basically telling them, take a license or
5 we're going to sue you.

6 A. You're going to have to show me where it says that.

7 Q. Well, you then told them:

8 We intend to aggressively protect and enforce
9 our rights.

10 And then you told them:

11 We already sued IBM.

12 Correct?

13 A. Yes. So where does that say we're going to go out
14 and sue everybody else? I don't see that in there.

15 Q. Well, when you wrote the letter, the user did not
16 take a license, was it your intent to bring legal action?

17 A. Our intent when we started the SCOSource licensing
18 program was very simple. We wanted very much to protect the
19 property. In fact, I had a meeting with IBM weeks after I
20 joined the company with Mr. Steve Solazzo, who was a senior
21 executive over there. And I talked to him about the idea of
22 going out and protecting our intellectual property, UNIX and
23 asked his advice on it.

24 And he said he thought that was a great idea. He
25 said IBM does that, and we collect over a billion dollars a

1 year from our licensing efforts. Now occasionally, you have
2 to file a lawsuit, yes. It's not the preferred path. It can
3 be very expensive, as we found out in the cases we're dealing
4 with here. But you also find that if you don't stand up and
5 protect yourself and you don't protect your rights, then you
6 are going to have a property that is going to get run over,
7 and you're not going to have any value left in it.

8 So the core idea here was to protect these rights
9 through a licensing program as the IBM executive had given me
10 the idea.

11 Q. And that licensing program was SCOSource; correct?

12 A. That's correct.

13 Q. And although it was not the preferred route to go,
14 you understood that there may be the need to bring action if
15 these companies who you believe were infringing SCO's
16 intellectual property refused to take a license under
17 SCOSource; correct?

18 A. That's how IBM played the game, and that's how we
19 were trying to play the game.

20 Q. And in June of 2003 -- excuse me -- in 2003, after
21 SCO announced the SCOSource licensing deals with Sun and
22 Microsoft and public filings, SEC filings, and press releases,
23 Novell through its general counsel asked you for copies of
24 those agreements; correct?

25 A. Which agreements are you talking about?

1 Q. Sun and Microsoft.
2 A. Yes.
3 Q. And Sun and Microsoft are SCOsource licenses;
4 right?
5 A. They were UnixWare licenses.
6 Q. Well, isn't it true that the Sun and Microsoft
7 licenses are SCO's -- are licenses under the SCOsource
8 licensing program?
9 A. They were UnixWare licenses that were embodied in
10 the SCOsource division.
11 Q. Well, I guess I'm going to have to ask the question
12 again.
13 Were the Sun and Microsoft licenses SCOsource
14 licenses or not?
15 A. No. They were UnixWare licenses.
16 Q. Let me show you what we marked as Exhibit 215.
17 THE COURT: 215?
18 MR. ACKER: Yes, sir. It's been admitted.
19 (Time lapse.)
20 Q. BY MR. ACKER: Have you had a chance to look at
21 215, sir?
22 A. Yes.
23 Q. It's a letter to you from Mr. LaSala, the general
24 counsel of Novell, dated June 24, 2003; correct?
25 A. Correct.

1 Q. And in the first sentence in the first section of
2 the letter, Mr. LaSala references Section 416(B) of the asset
3 purchase agreement; correct?

4 A. Yes.

5 Q. And then look at the next slide, please. Next one.

6 And in the second page of the letter at the bottom,
7 Mr. LaSala demands to see copies of the Sun and Microsoft
8 agreements; correct?

9 A. Yes.

10 Q. And you refused to provide those; correct?

11 A. Yes.

12 Q. And at the time that you refused to provide those,
13 you were -- SCO was the fiduciary of Novell; correct?
14 Fiduciary relationship between with two entities; is that
15 right?

16 MR. SINGER: Objection. It calls for a legal
17 conclusion which the Court has already determined.

18 THE COURT: It does call for a legal conclusion.
19 I'll let you ask him about his understanding about that if he
20 has one.

21 Q. BY MR. ACKER: Well, you understood that under the
22 APA you were the agent for Novell to collect licenses or
23 collect royalties for SVRX licenses; correct?

24 A. Correct.

25 Q. And you understand now, don't you, that this Court

1 has determined that you were actually -- there was a fiduciary
2 relationship between the two companies; correct?

3 A. For those licenses.

4 Q. But you refused to provide the Sun and Microsoft
5 licenses to Novell; correct?

6 A. Correct.

7 Q. Now --

8 A. And can I explain?

9 THE COURT: Yes.

10 Because he understands my order doesn't mean he
11 agrees with it, though.

12 MR. ACKER: I'm fully aware of that, Your Honor.

13 THE WITNESS: Can I explain?

14 THE COURT: Yes. You weren't done with your
15 answer, so go ahead and answer.

16 THE WITNESS: Yes.

17 So my view of those two licenses was that Novell
18 had no more standing to ask us to produce those licenses to
19 them than the court reporter here has standing to ask for
20 those. So it didn't make any sense that we would send it to
21 them.

22 Q. BY MR. ACKER: So it was your position that the
23 court reporter here in this courtroom today has the same
24 standing to ask for those licenses as Novell did in 2003?

25 A. For the UnixWare licenses with Sun and Microsoft,

1 absolutely correct.

2 Q. Okay. Why didn't you provide those copies of those
3 licenses to Novell and explain your position?

4 A. Same reason I wouldn't provide them to her if she
5 asked for them. She didn't have any standing, and Novell
6 didn't have any standing with respect to those licenses. Why
7 would we send them to her? Why would we send them to you?
8 Why would we send them to Novell? We had all the standing in
9 the world to do those UnixWare licenses.

10 And what -- the other thing, the context I would
11 like to bring this out in is this letter comes in a series of
12 about two dozen letters over a couple months. And it comes on
13 the heels of Novell sending out a letter to the world telling
14 them that they, in fact, are the copyright owner of UNIX and
15 that they're going to use that copyright ownership to come
16 after SCO and attack us for the good of the Linux community.
17 They were currying favor with the Linux community.

18 Five days after that, my secretary found
19 Amendment 2 that amends the asset purchase agreement that says
20 in part SCO has the copyrights necessary to exercise its
21 rights under the asset purchase agreement for UNIX and
22 UnixWare.

23 Upon finding that agreement, that amended agreement
24 to the asset purchase agreement, I called the CEO of Novell,
25 Jack Messman and asked him if he had read Amendment 2. And he

1 said, no, I have not seen Amendment 2. What is that? And I
2 said essentially what I just said to you, that it talks about
3 us having the rights to the copyrights.

4 He said, I've never seen that. Is this a trick?
5 And I said, no, it has Novell's signature on it. Tim Tolman
6 had signed it. Will you fax it to me? This is 7 o'clock at
7 night his time.

8 I faxed it to him. Jack Messman, CEO of Novell,
9 called me back within five minutes after reading Amendment 2,
10 and he said to me, okay, Darl, SCO has the copyrights, what do
11 you want? That's what he said. And I -- I don't need to go
12 into detail about everything that we talked about. But I
13 basically said, we need a retraction. We need you to come
14 back and tell the world that you, in fact, don't own the
15 copyrights, that we do. And then we need to talk about
16 damages. And when I said damages, he got upset and hung up.

17 But within 12 hours of that phone call, Novell
18 issued a press release to the world that said, SCO has
19 produced to us an amendment to the copyrights -- or to the
20 asset purchase agreement. It wasn't in our files, but it
21 appears that it is correct that SCO owns some copyrights. And
22 so we're backing down off from this.

23 Within days after that -- so that was the immediate
24 reaction from Novell. That's why I it was always interesting
25 to me the immediate reaction from not an attorney that is paid

1 to litigate, but from the guy on top said, okay, you've got
2 the copyrights. What do you want me to do about it?

3 They immediately send out -- he gets with his
4 general counsel. They immediately send out a press release to
5 the world that says, SCO owns the copyrights. And then a few
6 days later, realizing that they're in litigation, I presume,
7 with their outside attorneys, we get a series of letters that
8 come at us one after another after another. It's like, it's
9 like carpet bombing. Carpet bombing of legal letters of one
10 thing after another after another including a reversal of
11 their position that they say on the copyrights which they say,
12 well, I know we said that you're right. We know we sent the
13 letter out. But the more we think about it, the more we think
14 we still own the copyrights.

15 Then they sent out a letter like this that says,
16 oh, and we want to see the Sun and Microsoft things. And, oh,
17 by the way and by the way and by the way. There were dozens
18 of those letters that came at us.

19 So how serious did I take this? Well, I took it
20 about as serious as I took the other two dozen, which is
21 they're in litigation. They're attacking. They're in full
22 attack mode. Did we read every letter? Did we respond to
23 every letter as necessary? Yeah. There were some in there
24 that had some legitimacy to them. I didn't view this as one
25 of them.

1 Q. BY MR. ACKER: In response to this letter, you
2 never responded back to Mr. LaSala and said, you're not
3 entitled to see those, did you?

4 A. Every one of these letters that came in I took over
5 and handed to Mr. Tibbits over here, the general counsel, and
6 I don't know what happened to them after that. So you have to
7 ask him.

8 Q. And you never wrote a letter back and said, you're
9 not entitled to those Sun and Microsoft agreements because
10 they're UnixWare agreements. You never said that; correct?

11 A. I personally don't know what happened. Again, this
12 is a legal letter that's coming at me. I gave it to my
13 general counsel. You'd have to query him on what he did with
14 them because I really don't know.

15 Q. So if we wanted to understand what it was with
16 SCO's response to Novell's request to see the Sun and
17 Microsoft agreements, we have to look at what Mr. Tibbits said
18 in his letters back to Novell; correct?

19 A. Again, that would be the place I would go.

20 Q. Okay. We'll take a look at that.

21 If we could bring up Exhibit 294, please.

22 (Time lapse.)

23 THE WITNESS: Okay.

24 Q. BY MR. ACKER: Exhibit 294 is a letter from
25 Mr. Tibbits written to Mr. LaSala on February 5th, 2004;

1 correct?

2 A. Yes.

3 Q. And if we could go to the last paragraph from the
4 bottom of the first page carrying over to the second page.
5 And in that letter, Mr. Tibbits writes:

6 In your letter you assert that SCO has
7 unilaterally amended and modified SVRX licenses
8 with Sun, Microsystems and Microsoft. You claim
9 this characterization is based on public
10 statements by SCO, but you do not identify where
11 SCO made these alleged statements. By your
12 citation of Paragraph 4.16(B) of the APA and
13 Section B of the Amendment 2, it appears you are
14 concerned about the proper flow of royalty
15 revenues to Novell under the APA.

16 And you understand that at the time that when Mr.
17 LaSala and others at Novell were repeatedly writing letter to
18 you and others at SCO, they were concerned about the flow of
19 the SVRX royalties; correct?

20 A. I didn't know that at the time. You'd have to ask
21 Mr. Tibbits about that.

22 Q. That's what Mr. LaSala said in his letters to you;
23 correct?

24 A. That wasn't my view.

25 Q. And in response to that concern from Novell that

1 these were SVRX licenses and that Novell was entitled to SVRX
2 royalties, Mr. Tibbits wrote:

3 To the limited extent that Novell may have
4 rights under Paragraph 4.16 of the APA to protect
5 its revenue stream from SVRX licenses that were in
6 existence at the time of the APA, those rights do
7 not extend to the new contract with Sun and the
8 new contract with Microsoft.

9 Correct?

10 A. Correct.

11 Q. So it was SCO's position back in 2003 that the
12 reason that Novell was not entitled to these licenses is
13 because these were licenses that were entered into after the
14 date of the APA; correct?

15 A. Yes.

16 Q. And there was no mention in this letter from
17 Mr. Tibbits to Novell in 2003 that Novell was not entitled to
18 that revenue because they were UnixWare licenses; correct?

19 A. Well, it says the Microsoft agreement is the new
20 agreement not covered by the APA.

21 All the licensing going forward was done for UNIX
22 to a UnixWare license. Novell had no rights to do that.
23 So --

24 Q. But SCO's position back in 2003 is that Novell was
25 not entitled to these monies because they were licenses that

1 were entered into after the date of the APA; correct?

2 A. The new license would be a UnixWare license. And
3 so if it was done after the APA, it would be a UnixWare
4 license and it wouldn't be covered. The only thing that
5 Novell had rights to was the preexisting royalties that SCO
6 didn't buy out as part of the '95 transaction.

7 Q. But what Mr. Tibbits told to Mr. LaSala was not
8 that. What Mr. Tibbits told to Mr. LaSala is, these were new
9 agreements after the APA; therefore, you're not entitled to
10 royalties; right?

11 A. That's what it says there.

12 Q. And what Mr. Tibbits said to Mr. LaSala was not
13 that we licensed some SVRX, but it was incidental to UnixWare,
14 but rather these are new agreements after the date of the APA;
15 therefore, you don't get money; right?

16 A. Well, I think you can take bits and pieces of words
17 and say, here's what it was then. But if you take the
18 approach that the company has done over the years, it is to
19 license UnixWare. And if incidentally along the way, there is
20 SVRX that ties to those things incidentally, then, yes, we
21 have a right to license them.

22 Q. But that's not what Mr. Tibbits told Mr. LaSala.

23 A. I don't see that in there, no.

24 Q. And that was the position of SCO in 2003;

25 correct?

1 A. That's what Mr. Tibbits' letter says.

2 Q. So it's true, isn't it, that six times between 2003
3 and November of 2004 Novell asked SCO to provide it with a
4 copy of the Sun and Microsoft agreements; true?

5 A. I'm not sure. I wasn't involved in the
6 discussions.

7 Q. But the existence of those agreements had been
8 disclosed in press releases, articles and SEC filings;
9 correct?

10 A. Yes.

11 Q. Yet, SCO refused to provide copies of those
12 agreements to Novell, an entity it owed fiduciary duty to;
13 correct?

14 A. We didn't have a fiduciary duty to Novell for these
15 contracts and licenses, so why would we?

16 Q. And it's true, isn't it, that never before had SCO
17 refused to provide a contract or to provide information
18 regarding a contract to Novell when asked by Novell; correct?

19 A. I don't know the history of that.

20 Q. Let me show you Exhibit 326.

21 (Time lapse.)

22 Q. BY MR. ACKER: It's an article that you're quoted
23 in from eWEEK, dated April 13th, 2005; correct?

24 A. Correct.

25 Q. And in the article there's a discussion about Sun's

1 plans to open source its OpenSolaris products; correct?

2 A. Yes.

3 Q. And there's a quote attributed to you where you
4 say:

5 We have seen what Sun plans to do with open
6 Solaris, and we have no problem with it.

7 Do you see that?

8 A. Yes, I do.

9 Q. Is that quote accurate?

10 A. Yes.

11 Q. And is it true -- it's true, isn't it, that the
12 bottom line is you don't believe there's anything improper
13 about Sun's open sourcing of its Solaris product; correct?

14 A. No.

15 Q. And SCO does not have a problem with what Sun did
16 in open sourcing Solaris after the execution of 2003 Sun
17 licensing deal; right?

18 A. Correct.

19 Q. And you would agree, wouldn't you, that what Sun
20 has done with its OpenSolaris products it has the right to
21 package that Sun obtained from SCO in its 2003 license?

22 A. That's what I said.

23 Q. And it's true, isn't it, that Sun's OpenSolaris is
24 a derivative of UNIX System V?

25 A. Yes, it is.

1 Q. As --

2 A. I'd like to -- are you off that thread, or can I
3 explain why I made those statements?

4 Q. Well, counsel is going to have an opportunity to
5 ask all the questions you want. I'm sure you can make all the
6 statements you want.

7 A. Okay. That's fine.

8 Q. As the CEO of either Caldera or SCO, have you ever
9 certified an SEC filing, either a Form 10K or 10Q with the
10 knowledge that it contained a false statement?

11 A. Not that I'm aware of.

12 Q. If we could take a look at Exhibit 190.

13 Mr. McBride, feel free to look at any portion of
14 that, but I'm going to ask you about specific sections of it.

15 A. Do I have to read this again? These are brutal
16 enough to go through the first time.

17 Q. Why don't you take a look at the second-to-the-last
18 page of the document. You see there's a certification by you
19 of Caldera's Q for the period ending April 30th, 2003. Do you
20 see that?

21 A. Yes.

22 Q. And before signing -- or having the electronic
23 signature affixed to the certification, did you read the Q?

24 A. Yes, I did.

25 Q. And when you read it I assume sometime in May or

1 June of 2003, did you think everything in it was accurate?

2 A. I hope so or I wouldn't have signed it.

3 Q. Okay. Why don't you take a look at Page -- the
4 paragraph beginning on Page 20 and running over to Page 21 of
5 Exhibit 190.

6 A. Okay.

7 Q. This is a description of the SCOSource program;
8 correct?

9 A. Yes.

10 Q. And in 2003 when describing that program, you
11 included in it the Sun and Microsoft agreements; correct?

12 A. Yes.

13 Q. And how you describe the SCOSource program was, the
14 Q was written:

15 One of the assets that we acquired from
16 Tarantella --

17 And that happened in 2001; correct?

18 A. Yes.

19 Q. -- was the intellectual property rights to UNIX.
20 Correct?

21 A. Yes.

22 Q. And those rights that you're referring to that SCO
23 acquired in 2001 were rights that initially had been developed
24 according to the Q by AT&T Bell Labs, and over 30,000
25 licensing and sublicensing had been entered into with

1 approximately 6,000 entities.

2 Do you see that?

3 A. Yes.

4 Q. So the rights that you're talking about protecting
5 in the SCOSource program are the rights acquired in 2001 from
6 Tarantella; correct?

7 A. Yes.

8 Q. And those rights date back to code that had been
9 developed in AT&T labs; right?

10 A. It started in AT&T Labs. But at the point in time
11 that we were talking about in 2001, if you were going to try
12 to run the software in the 1968 AT&T Labs code, you would have
13 to have a punch card to make it work.

14 Q. Okay.

15 A. The point is this was a continuous effort. It
16 didn't stop in 1969. And that's all of the things we were
17 licensing. It started at AT&T, and clearly there were a
18 number of contracts that were tied to that period of time.
19 But the technology clearly evolved.

20 Q. But the rights that you are referring to here are
21 rights that you obtained in 2001 from Tarantella.

22 A. Yes. But what I'm saying is the Tarantella
23 property itself had evolved in time, as well. So, yes. Some
24 of those were done in AT&T days; some were done in Novell
25 days; some were done in SCO, Tarantella and ultimately

1 Caldera.

2 Q. And then the last sentence of this paragraph you
3 wrote or was written:

4 We believe these operating systems are all
5 derivatives of the original UNIX source code owned
6 by us.

7 Do you see that?

8 A. Yes.

9 Q. And the UNIX source code that you're referring to
10 there, again, were the rights that were obtained in 2001 from
11 Tarantella?

12 A. Yes.

13 Q. And then you write:

14 We initiated the SCO source efforts to review
15 the status of these licensing and sublicensing
16 agreements and to identify others in the industry
17 that may be currently using our intellectual
18 property without obtaining the necessary licenses.

19 Do you see that?

20 A. Yes.

21 Q. And again, that intellectual property that you're
22 referring to again is that UNIX source code; correct?

23 A. Yes.

24 Q. And this effort resulted in the execution of two
25 licenses during the April 30th, 2003, quarter; right?

1 A. Yes.

2 Q. And those two licenses were the Microsoft license
3 and the Sun license; right?

4 A. Correct.

5 Q. And the way that you described -- or the Microsoft
6 license was described in 2003 or the Sun license was
7 described, even though its's not identified as such here is:

8 The first of these licenses was with a long
9 time licensee of the UNIX source code which is a
10 major participant in the UNIX industry and was a
11 cleanup license to cover items that were outside
12 of the scope of the initial license.

13 That's the way it was described in 2003; correct?

14 A. Uh-huh (affirmative).

15 Q. That's the Sun license. In 2003 SCO described it
16 as a cleanup license; is that right?

17 A. That's what it says.

18 Q. A cleanup license referring back to its original
19 license from 1994; correct?

20 A. It says:

21 A cleanup license to cover items that are
22 outside of the scope of the initial license.

23 Well, if you want to put a magnifying glass and
24 say, what are the things that were outside of the scope of the
25 initial license? It would have been the work that was done

1 from the time of the '94 agreement up to 2003. And primarily
2 the value of the technology in those Jonathan Schwartz, the
3 president and CEO of Sun, has said multiple times, was
4 relating to the software drivers that attached to UnixWare.
5 Those were the things that were outside of the scope of that
6 initial license.

7 Q. But it also provided Sun with the ability to open
8 source Solaris, which it hadn't been able to do under the 1994
9 license; correct?

10 A. Sun had more broad rights than anybody in the
11 industry with respect to how widely they could distribute
12 their product. They paid nearly \$100 million for these
13 rights. And what Sun had that was unique that when they did
14 the original deal for \$83 million was they got the right to
15 redistribute source. That was very unique.

16 And so although it was not exactly open sourcing,
17 it was so broadly spreading the source out there that it was
18 going to be very hard for the company to protect that. That's
19 why they paid so much for it at the time they did it.

20 So there was a very broad opening in the technology
21 with Sun that was finished off at the point in time that we
22 did the agreement in 2003.

23 Q. Why don't we take a look at Page -- if we go to
24 Page 22. If we could highlight the bottom two paragraphs.

25 Here later in the Q in this paragraph above, you

1 describe what the revenue is for UnixWare products for the
2 Court; right?

3 A. Yes.

4 Q. That does not include the Sun or Microsoft
5 agreements; correct?

6 A. Let me look at it here for a second.
7 Right.

8 Q. So in the Q in 2003, we're describing what the
9 revenue was for UnixWare licensing. Did you not include
10 either the Sun or Microsoft revenues? Correct?

11 A. Correct. Can you bring up the tree picture again?

12 Q. And then when you do talk --

13 THE COURT: Your counsel can do it if he wants to
14 when he asks you questions.

15 THE WITNESS: Can I describe it then?

16 Q. BY MR. ACKER: When we talk about licensing, which
17 is the SCOSource program --

18 A. Right.

19 Q. -- that's where the Sun and Microsoft revenues
20 were; correct?

21 A. These were tied into the trunk, if you will, of the
22 tree licensing, which is UnixWare. There was also the branch
23 UnixWare. So if you were going to put this back on the tree
24 picture, you would take the first two versions up there and
25 say, OpenServer was a branch, UnixWare was a branch. Those

1 were kept out in the marketplace. Those were sold through our
2 channels. When you're talking about licensing programs, those
3 were different channels, it was the trunk code. But those
4 were always 100 percent. Those contracts were driven off of a
5 UnixWare license.

6 Q. Let me understand your testimony. So when you're
7 talking about the UnixWare and OpenServer licensing revenue in
8 the Q, you're talking about the branches of the tree; correct?

9 A. Yes.

10 Q. But when you're talking about the Sun and Microsoft
11 and SCOsource licensing, you're talking about the trunk, the
12 core UNIX IP; correct?

13 A. That's the way I would depict it, yes.

14 Q. And the core trunk or UNIX IP dates back to AT&T;
15 correct?

16 A. It started at AT&T and evolved over time.

17 Q. Let me show you what we've marked as Exhibit 304.
18 It's also been admitted.

19 A. So I'm a little bit troubled that you were trying
20 to imply that I was not telling the truth in my 10Q here. I
21 don't understand what --

22 Q. I'm not implying anything, Mr. McBride. I'm asking
23 questions --

24 A. You said that.

25 Q. I asked you if you have ever not told the truth in

1 your Q.

2 A. Right.

3 Q. And what you're telling me is that you have told
4 the truth in your Q.

5 A. Okay. I just wanted to make sure it was clear.

6 Q. Let me ask you that. You always have told the
7 truth; correct?

8 A. Yes.

9 Q. And so what we read to you is accurate; is that
10 right?

11 A. Yes.

12 Q. And the Sun and Microsoft licenses, those were not
13 included as UnixWare licensing revenue; correct?

14 A. They were included as part of the licensing revenue
15 that went to the trunk code of UnixWare.

16 Q. They were not included in the Q as UnixWare or
17 OpenServer licensing revenue; correct?

18 A. Not as part of the branch revenue, no.

19 Q. And that was accurate; right?

20 A. Pardon?

21 Q. That was accurate?

22 A. Yes.

23 Q. When you said that in 2003, it was accurate; right?

24 A. Yes.

25 Q. And it's still accurate as you sit here today?

1 A. Yes. I wanted to make sure we were clear on that.

2 Q. Why don't we take a look at Exhibit 304. This is
3 another Q for the quarterly period ending April 30th, 2004.
4 And again, you would have read this before it went out;
5 correct?

6 A. Yes.

7 Q. Why don't we go to Page 40. Do you see on Page 40,
8 Mr. McBride, there is -- at the top of the chart, there is a
9 depiction of what revenue was generated for UnixWare revenue
10 for the quarter ending April 30th, 2004; correct?

11 A. Yes.

12 Q. And you had it both for the three months ending
13 April 30th, 2003, and for the three months ending April 30th,
14 2004, as well as for the six months ending April 30th, 2003,
15 and for the six months ending April 30th, 2004; correct?

16 A. Yes.

17 Q. And this UnixWare revenue in the Q for April 30th,
18 2004, none of that involves the Sun or Microsoft licenses;
19 right?

20 A. Those would have been done through our licensing
21 program, not through the products program.

22 Q. Okay.

23 A. This is more of a branch revenue out here.

24 Q. The branch of the tree; correct?

25 A. Yes.

1 Q. Why don't we take a look at the bottom of the page.
2 And when you talk about SCOSource licensing revenue, as
3 distinct from UnixWare revenue, you describe it as:

4 SCOSource licensing revenue consists of
5 revenue generated from vendor licenses to use our
6 proprietary UNIX System V code as well as IP
7 licenses.

8 Correct?

9 A. Yes.

10 Q. Accurate statement; right?

11 A. Yes.

12 Q. You're licensing the trunk of the tree; correct?

13 A. Correct.

14 Q. And this revenue does include the Sun and Microsoft
15 licenses; right?

16 A. Yes. Yes. Along the way we created a division,
17 and we put as many licensing revenue pieces that we could in
18 the SCOSource division.

19 Q. Let me show you what we've marked and been admitted
20 as Exhibit 313.

21 Mr. McBride, there is your Form 10Q for the period
22 ending July 31st, 2004; correct?

23 A. Yes.

24 Q. And if we go to -- we'll go to your certification
25 on Page 61.

1 Again, on September 14th, 2004, you read the
2 document; correct?

3 A. Yes.

4 Q. And you wouldn't allow someone to place your
5 electronic signature on it unless you read it and believed it
6 to be accurate; correct?

7 A. Correct.

8 Q. Why don't we go to Page 32 -- I'm sorry. We'll
9 start on Page 31.

10 On Page 31 of the Q, it was written:

11 Our product revenue consists of software
12 licenses of our UNIX products primarily OpenServer
13 and UnixWare as well as sales of UNIX related
14 products.

15 Correct?

16 A. Correct.

17 Q. So when you're talking in the financials about what
18 products revenue is, it's software license of OpenServer and
19 UnixWare.

20 A. Everything in software turns on a license. So,
21 yes, it was UNIX products and OpenServer UnixWare.

22 Q. But when the term products revenue is used, it's
23 specific to OpenServer and UnixWare licensing; right?

24 A. That's typically how we do did it, yes.

25 Q. Why don't we turn to the next page, Exhibit 32 --

1 Page 32.

2 So you see on the next page, Mr. McBride, there's a
3 listing there of the UnixWare revenue and OpenServer revenue
4 for the nine months ending July 31st, 2003, and 2004. And
5 neither of those numbers or those line items include the Sun
6 and Microsoft agreements; correct?

7 A. What period of time is this talking about?

8 Q. Well, at the top it's the nine months ending
9 July 31st, 2003, and 2004. So nine months prior to July 31st,
10 2003, and 2004. And there is a line item for UNIX revenue,
11 UnixWare revenue and OpenServer revenue; correct?

12 A. This thing is so dark on the screen I can't even
13 read it. Let me go to the page. Which page are we on here?

14 Q. 32.

15 (Time lapse.)

16 THE WITNESS: Okay. So what's the question then?

17 Q. BY MR. ACKER: When you're talking about these line
18 items up here, UnixWare revenue and UNIX licensing --

19 A. Right.

20 Q. -- that does not include the Sun and Microsoft
21 agreement?

22 A. That is the UnixWare branch revenue up there.
23 Again, the only way you can get System V code license company
24 is through UnixWare.

25 Q. Let's go back to Page 31. Go back one page.

1 In the Q how you describe products revenue is:

2 Our products revenue consists of software
3 licenses of our UNIX products primarily OpenServer
4 and UnixWare.

5 Correct?

6 A. Okay.

7 Q. We go to the next page, Paragraph 32, this UnixWare
8 revenue line does not include the Sun or Microsoft licenses,
9 the revenue from those licenses; right?

10 A. No; because it was trunk revenue, not branch
11 revenue. This is referring to branch revenue.

12 Q. And again, branch revenue is the derivative works
13 including OpenServer and UnixWare; correct?

14 A. Yes.

15 Q. And the trunk is the core UNIX IP; correct?

16 A. I believe you keep trying to shift my words on
17 this. If we go back to the very beginning, I believe what I
18 said very clearly and I said a number of times here is that
19 UnixWare runs throughout the entire tree, okay. It runs
20 throughout the entire tree. So I know you're trying to catch
21 me saying things the wrong way here, but let me come back to
22 the same statement, that UnixWare runs through the entire
23 tree. UnixWare is also a branch. Any time we're talking
24 about the core licensing of the code that's running through
25 the branch, the trunk, it's always going to be through

1 UnixWare licensing.

2 Q. But when you told the SEC in 2003 and 2004 that you
3 had a body of UnixWare licensing, you did not include the Sun
4 and Microsoft agreements in that licensing; correct?

5 A. No. And we didn't put a picture of the tree in
6 there, either. This is not inconsistent with the statement
7 that I'm making.

8 Q. Let me just get it clear. It's true, isn't it,
9 that when you told the SEC and investing public in 2003 and
10 2004 that the Sun and Microsoft licenses were not UnixWare
11 licensing revenue, that was an accurate statement?

12 THE COURT REPORTER: An or inaccurate?

13 MR. ACKER: Inaccurate statement, that it was true.

14 THE WITNESS: Say that again.

15 Q. BY MR. ACKER: Was it true when you told the SEC
16 and the investing public in 2003 and 2004 that the revenue
17 from the Sun and Microsoft agreements was not UnixWare
18 licensing revenue?

19 A. No. It was -- System V was always licensed through
20 UnixWare. UnixWare here is described -- if you want to go
21 back --

22 Q. Well, let me ask you. So the statement was
23 inaccurate?

24 A. I was saying something. Can I finish?

25 Q. Was the statement accurate? I'm asking a simple

1 question. Was it true or false?

2 A. Can I finish my statement?

3 Q. Was it true or false when you told the federal
4 government and the investing public that the Sun and Microsoft
5 licensing revenue was not UnixWare licensing revenue?

6 THE COURT: You can finish your statement. You
7 need to answer his question, but go ahead and finish your
8 statement.

9 THE WITNESS: Okay.

10 If you go back and -- have you listened to the
11 conference call --

12 Q. BY MR. ACKER: The way this works is I ask
13 questions and you answer them. It's unfortunate that way.

14 A. If you listen to the conference call from the time
15 we were doing this licensing, you go back and listen to them.
16 And we were always very clear that the licensing -- a lot of
17 the SEC thing evolves around disclosure, and we've done
18 nothing to not disclose where these are coming from. The code
19 from the licenses, the only which -- you couldn't walk into
20 the company and buy a System V license by itself. There
21 wasn't such a thing on the price list. It would be like
22 walking into Chevrolet and saying, I'd like to buy a Duramax
23 engine. It's not there. You buy a Duramax engine by buying
24 Chevy Silverado, and that's how you get your Duramax.

25 And that's the same way it happens here. We were

1 always very clear on that. This is not deceiving the
2 investing public. I know where you're trying to go with it.
3 But the statements that I'm making are not inconsistent with
4 our licensing practices.

5 Q. And I'd just like an answer to the question.

6 A. What's the question?

7 Q. Is it true when you told the investing public in
8 2003 and 2004 that the Sun and Microsoft revenue was not
9 UnixWare licensing revenue?

10 A. We didn't say it was not UnixWare revenue.

11 Q. Well, you have a list of what UnixWare revenue is
12 in the Q; correct?

13 A. These were UnixWare branch products.

14 Q. Let me finish.

15 You have a list of what UnixWare is in the Q;
16 correct? There's a line in there that includes UnixWare
17 revenue; right?

18 A. The UnixWare branch revenue is what we're talking
19 about.

20 Q. And it doesn't include the Sun and Microsoft
21 licenses; right?

22 A. They were down in the licensing part of SCOSource,
23 and the way you got that was through UnixWare.

24 Q. But if you go back to the prior page, go back.
25 When you describe what is included in UnixWare licensing and

1 your products revenue, that product line that does not include
2 Sun and Microsoft, it's the software license of our UNIX
3 products including OpenServer and UNIX and UnixWare; correct?

4 A. And this is referring to the branch revenue. We
5 had the System V revenue that was manifested in a UnixWare
6 license that was part of that, as well. The investing public
7 looked at UnixWare, when you say UnixWare to our investors,
8 what they think is what's coming out of the UnixWare product
9 line, okay. We were trying to -- we were not trying to play
10 trick plays with legalisms here with where you're trying to go
11 with. We're trying to inform the investing public they know
12 what our UnixWare product is. And the fact that we use
13 UnixWare as the wrapper to sell a System V license is not
14 confusing to our investors. It might be confusing to you, but
15 it's not to our investors.

16 Q. Simple question. In your Q, you said that the
17 products revenue included UnixWare licensing revenue; correct?

18 A. Say that again.

19 Q. The products revenue in your Q includes UnixWare
20 licensing revenue; correct?

21 A. Which means it was a product. It was a branch.

22 Q. And that did not include, that line item from
23 products revenue did not include the Sun and Microsoft
24 revenue; correct?

25 A. No, it did not.

1 Q. Mr. McBride, with your approval SCO filed this
2 lawsuit against Novell alleging slander of title; correct?

3 A. Correct.

4 Q. And the basis for that claim was that Novell
5 allegedly slandered SCO's claim to ownership of the copyrights
6 for the UNIX System V software; correct?

7 A. Yes.

8 Q. And SCO claimed that Novell's actions in
9 challenging SCO's ownership of the UNIX System V software cost
10 SCO hundreds of millions of dollars in damages; correct?

11 A. Correct.

12 Q. And the basis for that hundreds of millions of
13 dollars of damages claimed that Novell's actions harmed or
14 destroyed SCO's SCOSource licensing program; right?

15 A. Yes. That was a major, major factor.

16 Q. But it's true, isn't it, that the only copyrights
17 that Novell have claimed ownership of are the copyrights of
18 the software that were in existence before the 1995 APA;
19 correct?

20 A. They have filed copyrights that step all over the
21 top of our UNIX copyrights, the foundation of our SCOSource
22 program.

23 Q. But the copyrights that Novell has claimed
24 ownership to existed prior to the 1995 APA?

25 A. They have claimed copyright ownership to the

1 copyrights that in the asset purchase agreement, if you go to
2 the included assets, says, SCO is hereby transferred all
3 rights and ownership to all copies of UNIX and UnixWare. It
4 doesn't say Novell gets all the previous versions and SCO gets
5 the latter versions. It says in the first part of the
6 included assets of the asset purchase agreement, included in
7 the asset list is all copies of UNIX and UnixWare and all
8 rights and ownership of UNIX and UnixWare. There is nowhere
9 in there --

10 Q. I wasn't asking about that. All I was asking you,
11 isn't it true that the basis for your slander of title claim
12 is that Novell claimed ownership to software, but it only
13 claimed ownership to software that existed prior to the APA;
14 correct?

15 A. That's not -- they have claimed -- well, the way
16 you're dicing it, I would say that's correct. But it steps on
17 a number of copyrights we believe we have ownership rights to.

18 Q. And Novell has never claimed copyrights to SCO
19 produced UnixWare created after the APA; correct?

20 A. They have claimed ownership to copyrights that are
21 a major part of UnixWare. They sold us -- they said to us in
22 1995, you go to UnixWare. At that point in time, System V has
23 gone through a number of iterations. The version of System V
24 in 1995 was a thing called System V Release 5. System V
25 Release 5 is also known as UnixWare.

1 So there's an evolution, System V Release 1, 2, 3,
2 4, 5. Each time this code base gets broader and deeper. What
3 Novell did is they told us in 1995, they didn't just tell us,
4 they told all of their customers that they had sold UNIX and
5 their interest in UNIX to SCO. They sent out letters to
6 Prentice Hall, they sent a letter to Prentice Hall and dozens
7 of other companies that said in part, we have sold our
8 interest and our ownership in UNIX and UnixWare to the
9 Santa Cruz Operation. It makes immeasurably more sense for
10 you to be dealing with the owners of UNIX and UnixWare than
11 us. And so here's their numbers. And Novell signed this.
12 SCO signed it; Novell signed it.

13 Then it lists, in this Prentice Hall letter that
14 goes out in 1996, it lists numerous versions of what Novell
15 said to the customers, to Prentice Hall in this case, was
16 transferred. It was sold. And it lists all of the things
17 that your client went out and filed copyrights on, not in '95.
18 Why didn't they do it in '95? Why didn't they do it in '96?
19 '97? Why didn't they do it in '98 when we had a licensing
20 deal going on with Monterey or IBM. Maybe in 2001 when SCO
21 transferred the company to a new company called Caldera. They
22 could have said something then.

23 They only did it after we filed suit against IBM in
24 2003 and IBM paid Novell \$50 million to come and work with
25 them. And that copyright ownership letter that Novell sent

1 out to Prentice Hall could not be more clear that SCO is the
2 owner of those products. And ownership in my mind and in the
3 APA says that it includes all rights and ownership.

4 Q. And the products we're talking about are products
5 that were in existence before 1995; correct?

6 A. Part of them, yes. Part of them are subsequent
7 versions.

8 Q. So because of this claim that SCO was damaged for
9 hundreds of millions of dollars by Novell's actions, there
10 must be significant value to that software that existed before
11 1995; correct?

12 A. Again, what you're doing is taking pre 1995
13 technology called System V, and up to that point we've had
14 System V Release 1, 2, 3, 4. And in '95, Novell sells to SCO
15 System V Release 5 and calls it UnixWare. Now they're trying
16 to recreate the playing field. The business people at Novell
17 are not doing this. The business people 100 percent line up
18 with our story. There's a couple of attorneys coming in and
19 trying to recreate the story that they own the previous
20 copyrights. But yet, that contradicts the proposition that
21 our company acquired UnixWare and UNIX and all the rights that
22 go with that in 1995.

23 And so what Novell would have you believe is that
24 all of the money, the 100-plus million dollars that we spent
25 and paid to get rights to all of the versions of UNIX are now

1 stripped away. And all we have is what we created after that.

2 Q. And because --

3 A. It's incredible that they even made that argument,
4 let alone that it's standing up.

5 Q. And because of those actions, Novell's actions in
6 claiming ownership to these products that existed before 1995,
7 you believe SCO has been damaged in hundreds of millions of
8 dollars?

9 A. Absolutely.

10 MR. ACKER: Nothing else, Your Honor.

11 THE COURT: Thank you.

12 Let's take our first break. We'll be in recess for
13 15 minutes.

14 (Recess.)

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1 THE COURT: You may proceed, Mr. Singer.

2 MR. SINGER: Thank you, Your Honor.

3 CROSS EXAMINATION

4 BY MR. SINGER:

5 Q. Good morning, Mr. McBride.

6 A. Good morning.

7 Q. You were asked some questions about the public
8 filings of SCO in which there's references to license
9 agreements with two licensees, Sun and Microsoft, to
10 clean up IP issues. Do you remember that line of
11 examination?

12 A. Yes, I do.

13 Q. Was the manner in which those IP issues cleared
14 up with Sun and Microsoft through a license to UnixWare
15 technology?

16 A. Yes.

17 Q. And, with respect to Microsoft, was there also
18 a license to OpenServer technology?

19 A. Yes.

20 Q. And, with respect to Sun, was there also a
21 provision of drivers for UnixWare technology?

22 A. Yes.

23 Q. Now, anywhere in the SEC filings you are aware
24 of, has SCO sought any amount of money from those
25 licenses as actually being SVRX license money in the

1 meaning of the APA?

2 A. No.

3 Q. I'd like to direct your attention back to the
4 eWEEK article, which is Novell's Exhibit 326. Do you
5 remember being asked a few questions about your comments
6 in that article about what Sun obtained from SCO?

7 A. Yes.

8 Q. And you remember, at one point you wanted to
9 explain what those rights were, and it was suggested
10 would better be done during my examination rather than
11 Novell's counsel?

12 A. Yes.

13 Q. Well, that time has now come, and I would like
14 you to provide that explanation.

15 A. I remember the advice well.

16 Q. Can you explain what you understood Sun was
17 getting from the 2003 rights, as you were expressing them
18 with reregard to the E-Week article?

19 A. Yes. The key thing that they were looking for
20 was how to take their Solaris operating system and make
21 it more compliant with the Intel chip set, which is what
22 SCO has a deep history of doing. And the way you do
23 that, the way it's substantiated, is by taking the
24 drivers that attach to SCO's operating systems and allow
25 Sun to move that over to Solaris.

1 Q. With respect to open sourcing rights and the
2 ability to distribute source code, did Sun have
3 substantial rights from the 1994 agreement in that
4 regard?

5 A. Yes, they did.

6 Q. And you mentioned \$82.5 million being paid in
7 the 1994 agreement; is that right?

8 A. Yes.

9 Q. Was all of that paid to Novell?

10 A. Yes.

11 Q. At the very beginning of the direct
12 examination, you were asked about the tree analogy and
13 UnixWare technology in there. When SCO licenses
14 UnixWare, is it your understanding that it licenses all
15 the core intellectual property in the trunk of that tree?

16 A. Yes.

17 Q. Has anyone come in to you and said: We want to
18 simply go back and license that technology in the form of
19 the old SVRX licenses from the 1980's and early 1990's,
20 as opposed to licensing UnixWare.

21 A. No.

22 Q. Have you ever told shareholders that the way in
23 which you're going to commercially exploit that
24 intellectual property is from selling those old SVRX
25 licenses, as opposed to through UnixWare technology?

1 A. No.

2 Q. You were asked some questions about UnixWare
3 having started before the Asset Purchase Agreement was
4 executed in 2005. Do you remember those questions?

5 A. Yes.

6 Q. Is it your understanding that Santa Cruz, and
7 now SCO, bought the rights to UnixWare in the APA?

8 A. Yes.

9 Q. And that included the business as it was before
10 the APA was executed?

11 A. That's what they told us.

12 Q. And was a fair amount of consideration paid for
13 that business?

14 A. Yes. It was well over a hundred million
15 dollars.

16 Q. In addition, were there royalty rights in the
17 APA for the sale of UnixWare products that Novell would
18 get under certain conditions?

19 A. Yes.

20 Q. And were those conditions, first of all, a
21 floor that had to be exceeded in UnixWare sales?

22 A. Yes.

23 MR. ACKER: I'm just going to object to
24 leading. The last five questions have been leading.

25 THE COURT: Try not to lead.

1 Q. Was there a floor in the agreement?

2 A. Yes.

3 Q. And can you explain how the floor operated?

4 A. Yes. There had to be a certain threshold hit
5 before Novell would receive any of those royalties.

6 Q. Was there also a -- was there any time limit on
7 the time during which those royalties would accrue to
8 Novell?

9 A. Yes.

10 Q. And do you remember how many years that time
11 limit existed for?

12 A. I know that it expired December 31, 2002.

13 Q. Did Novell ever qualify for any royalties on
14 UnixWare sales, as provided in that provision of the
15 APA?

16 A. No.

17 Q. Has, to your knowledge, Novell, at any time,
18 ever suggested to you that you owed Novell any royalties
19 under that provision?

20 A. No.

21 Q. Outside of that provision, has Novell ever
22 suggested to you, in any way, that you owed UnixWare
23 licensing money to Novell on sales of UnixWare
24 products?

25 A. No.

1 Q. Even if some of those products were UnixWare
2 products that started at Novell prior to the sale?

3 A. No.

4 Q. There was a line of questioning about the
5 request for the Sun and Microsoft agreements. And I want
6 to ask you a couple of questions about that. Mr. Acker
7 asked that -- if SCO had ever refused before to provide a
8 contract when provided by Novell. I'd like to ask you,
9 had Novell ever requested any UnixWare licenses prior to
10 the Sun and Microsoft agreement?

11 A. Not that I'm aware of. We did a deal with IBM
12 in '98 over Project Monterey, and I never saw anything
13 where they came in and requested to see what was going on
14 with that.

15 Q. Now, in connection with the Sun and Microsoft
16 agreements, you were asked some questions about, first of
17 all, the June 24, 2003 letter to you from Mr. LaSala.
18 And that is Novell's Exhibit 215. That was in June of
19 2003?

20 A. Yes.

21 Q. Prior to that time, had there been
22 conversations that you had with Novell regarding the
23 SCOSource program?

24 A. Yes.

25 Q. Who did you have those conversations with at

1 Novell?

2 A. Greg Jones.

3 Q. Can you tell me when the first conversations
4 occurred?

5 A. Yes. It would have been in the fall of 2002,
6 probably early November.

7 Q. Who initiated the conversation?

8 A. I first called in to Greg Jones, who was an
9 attorney at Novell.

10 Q. Okay. And what did you tell him or ask him?

11 A. Well, I told him that I was the CEO of SCO, SCO
12 had acquired the UNIX properties, as we remembered from
13 the '95 time frame, and we were preparing to enforce our
14 intellectual property rights and, in the process of going
15 through the related agreements, I had come across a
16 head-scratcher, if you will, something in the agreements
17 that did not make sense to me.

18 There was competing language, where the
19 majority of the Asset Purchase Agreement seemed to appear
20 that all of the property went to the Santa Cruz
21 operation, and there was really just one word in one
22 small section that was conflicting that, and that was
23 relating to the copyrights in the excluded asset list.

24 And I explained that to Mr. Jones and, at the
25 same time, explained to him what we were trying to do

1 with our SCOSource program.

2 Q. Now, at the time you had this conversation,
3 were you aware of amendment number 2?

4 A. No, I was not.

5 Q. What did you ask Mr. Jones for Novell to do?

6 A. I asked him if he would help us find all of the
7 documents that related to the Asset Purchase Agreement in
8 1995, so we could try and get some clarity to what was
9 clearly an erroneous problem. Something was in error
10 because there was conflicting statements.

11 Q. What did Mr. Jones say to you?

12 A. He agreed with me and said he would do his best
13 to see how he could help.

14 Q. Okay. Was there a follow-up conversation with
15 Mr. Jones or anyone else from Novell?

16 A. Yes. Over the period of the next, I would say,
17 two to three months, there were a number of discussions I
18 had with Greg. And then, eventually, there was someone
19 else from Novell, a Dave Wright came in, and I had some
20 discussions with him, but primarily it was with
21 Mr. Jones.

22 Q. Can you relate the substance of that
23 conversation -- conversations?

24 A. The substance, if you put a thread through it,
25 was basically us asking them to clarify this language

1 that we felt was conflicting and that we had bought the
2 technology, SCO had bought it, Novell had sold it. I
3 went through that with Greg. Greg agreed with me and
4 said: Yeah. That doesn't make sense. Let's try and
5 figure out if there's a document out there somewhere.

6 So, the first part was going out to try and
7 find some documents that would help that. So if there
8 was a thread through it, it was Greg was very helpful
9 every step along the way to try and help us resolve the
10 issues.

11 Q. Well, did they express a willingness to go back
12 and search for documents?

13 A. Yes, they did. The first part of of it was
14 Mr. Jones telling me: Let me go see what I can find out.

15 I worked with Greg at Novell, and I knew him
16 well. A lot of people had left over the ten years since
17 I had worked there, so -- eight years, whatever it was.
18 So -- but I did know Greg, and Greg was very helpful to,
19 first of all, go try and find any documentation that
20 would explain what was going on at the time of the deal.

21 Q. Did there come a time when Novell said they
22 were not willing to provide any assistance in doing
23 that?

24 A. Yes.

25 Q. When did that occur?

1 A. The first come back from Greg was that they had
2 gone -- he had gone down the path of trying to find the
3 documents, and he came back and said to me that all the
4 documentation around the UNIX stuff was old and in
5 archives and wasn't even on property anymore and so it
6 was going to be extremely difficult for them to go out
7 and even find the documentation around the UNIX
8 technologies.

9 Q. At that time, did you ask them if they would
10 take any further steps to clarify the ownership of the
11 copyrights?

12 A. Yes. Well, we talked about it, and so the
13 first step that I took was to try and explain to them why
14 there would be an incentive for them to do it, and that
15 was that Novell's royalties from the preexisting
16 royalties from '95, they obviously had been coming down
17 over the years. And the way I described it to Greg was
18 that if we're able to support, in the industry, the
19 defense of the intellectual property for UNIX, vis-a-vis
20 Linux, then anybody who has anything to do with UNIX will
21 benefit from that, so their declining revenue stream
22 might slow down.

23 So I was trying to explain to them that it
24 wasn't just in our interest, but it was in fact in
25 Novell's interest to get involved with us to support us

1 in what we were doing with SCOSource.

2 Q. Did you explain the SCOSource program to
3 Mr. Jones?

4 A. Yes, I did.

5 Q. That it would involve licensing individuals who
6 are using Linux to make use of whatever UNIX intellectual
7 property existed in Linux?

8 MR. ACKER: Same objection. Leading, Your
9 Honor. He can ask, simply: What did you say?

10 Q. Did you describe the SCOSource program?

11 A. Yes, I did. I explained to Greg what we were
12 doing. I believe he understood it. At the point in time
13 we were talking, the tight focus that we had on the
14 intellectual property problems in Linux related to our
15 UNIX was around our library licensing, and I went through
16 and described generally what we were doing with SCOSource
17 and then also specifically what the first program would
18 be around.

19 Q. Did Novell, through Mr. Jones or anyone else,
20 respond to you with respect to their interest in helping
21 on the SCOSource program?

22 A. Well, again, Greg was extremely helpful along
23 the way to try and help us clarify what the problems were
24 in the Asset Purchase Agreement. And with respect to the
25 SCOSource program -- well, in order -- what came back was

1 Mr. Jones said that SCO -- Novell was not interested in
2 participating in anything to do with UNIX. That was
3 yesterday's story, that they had taken it all the way up
4 to the top of the company. And I can't remember if he
5 said executive committee or the CEO.

6 Somebody at a very high level had reviewed the
7 request for both things; to get involved in what we were
8 doing with our licensing program, but also to help us try
9 and get some clarity around what was clearly some
10 incorrect documents.

11 Q. Did Novell agree or refuse to provide any
12 clarification, through any subsequent documentation, on
13 the ownership of the copyrights?

14 A. Greg agreed, but higher-ups disagreed. So,
15 Greg, after basically saying that it's in the archives,
16 we can't find them, and after we kept pressing and saying
17 that we really want to get this cleared up, Greg had an
18 idea which I thought it was a good one, which was: Why
19 don't you guys just draft a statement -- maybe we can
20 include it as a side letter -- and clarify what is
21 clearly a problem in the documents, and I'll get somebody
22 to sign it, and we'll be done with it.

23 We went through that step per Mr. Jones'
24 request. We actually created a one-page, I believe. It
25 was a document that was a little side letter to attach

1 that said: Both parties agree that, at the time of the
2 transaction, it was the intent of the parties to -- that
3 the copyrights were part of this transaction.

4 Over the course of the last several years, it's
5 been proposed --

6 Q. I'm not asking about the last several years,
7 Mr. McBride, just those questions.

8 A. Okay.

9 Q. With respect, though, to that request for
10 clarification, did Novell ultimately agree or refuse to
11 provide it?

12 A. They ultimately refused.

13 Q. Did -- at any time in these conversations that
14 occurred in late 2002 and early 2003, did Novell ever say
15 that you, SCO, are not able to engage in a SCOsource
16 licensing program because we, Novell, own that
17 intellectual property?

18 A. No, they did not.

19 Q. Did Novell, at any time during those
20 discussions, ever say: You, SCO, if you go forward with
21 that program, have to give us, Novell, the revenue that
22 comes out of it?

23 A. Not at all. In fact, what they did say was:
24 UNIX is yesterday's story. We're going forward. We're
25 interested in Linux. We don't want to get involved in

1 UNIX.

2 Q. Now, moving forward to June 24, 2003 and Novell
3 Exhibit 215, Mr. McBride, you were asked about this
4 letter, which talked about receiving copies of the
5 agreements, the two license agreements.

6 A. Correct.

7 Q. At that time, did Novell ever say to you: We
8 think the SCOSource licenses that are publicly being made
9 available are licenses which violate our SVRX rights.

10 A. Say that again.

11 Q. Did Novell ever say to you, either in the June
12 24, 2003 letter, or at that time, that the SCOSource
13 licenses, which are publicly available, that you're
14 selling to the public, violate our SVRX rights in the
15 APA?

16 A. No.

17 Q. In fact, if you turn to Exhibit 272, which is
18 Mr. Tibbitts' letter that you were asked about,
19 Mr. Tibbitts' letter of February 5, 2004, to
20 Mr. LaSala --

21 A. I think it's 272. It appears -- oh, here it
22 is.

23 Q. It's Deposition Exhibit 272. It's Trial
24 Exhibit 294. It should be.

25 If you turn to the second page, you see even in

1 February, 2004, Mr. Tibbitts is saying to Mr. LaSala:
2 You also question SCO's introduction of
3 intellectual property license for Linux and whether that
4 was a USVRX license.

5 Do you see that?

6 A. Yes.

7 Q. Had Novell, even as late as February, 2004,
8 ever told you that the publicly available SCOSource
9 licenses, that SCO was marketing at that time, were
10 things that you were not authorized to offer to the
11 public because of their SVRX rights?

12 A. No.

13 Q. Did they ever tell you, at that time, that if
14 you marketed those, they would get the revenue?

15 A. No.

16 Q. Or they believed they were entitled to the
17 revenue?

18 A. No.

19 MR. SINGER: Thank you very much.

20 THE COURT: Thank you.

21 Anything else, Mr. Acker?

22 MR. ACKER: Just a few questions, Your Honor.

23 THE COURT: Is it Acker or Acker?

24 MR. ACKER: Spelled Acker, pronounced Acker.

25

1

REDIRECT EXAMINATION

2 BY MR. ACKER:

3 Q. Mr. McBride, if you still have Exhibit --

4 Could you bring up Exhibit 215, please.

5 And Exhibit 215 is the letter to you from
6 Mr. LaSala, dated June 24, 2003, that counsel just asked
7 you about. If we could take a look at the second page
8 under the "therefore" clause, it's true, isn't it, that
9 what Mr. LaSala wrote in June of 2003:

10 Immediately provide to Novell copies of the two
11 agreements in question -- the Sun and Microsoft
12 agreements -- and any other agreements in which SCO
13 purports to amend, modify or waive rights under any SVRX
14 license or to enter into any new SVRX license.

15 Do you see that?

16 A. Yes.

17 Q. So, it was the case in June of 2003 that Novell
18 asked you not only for the Sun and Microsoft license, but
19 for any other licenses, correct?

20 A. You're looking under A?

21 Q. Yes, sir.

22 A. Yes, uh-huh.

23 Q. And Counsel asked you about conversations that
24 you had with folks at Novell in late 2002, going into
25 2003. At that point, the SCOSource program was still in

1 its infancy, correct?

2 A. Yes.

3 Q. And, in fact, you were still playing with this
4 idea of licensing UNIX libraries, correct?

5 A. Right.

6 Q. And that plan, that licensing of UNIX
7 libraries, that never went forward, right?

8 A. That's not correct.

9 Q. Well, there was never any license issued under
10 that program, correct?

11 A. That's not correct.

12 Q. The licensing of the UNIX libraries in the
13 SCOTech program, it's your testimony there were licenses
14 entered into?

15 A. No. There were licenses made available. There
16 was no one that licensed it.

17 Q. So this early first version of SCOTech, there
18 were never any licenses actually executed, correct?

19 A. The licensees that were interested in it were
20 ultimately interested in getting more than just the
21 libraries. They wanted the license to all of the UNIX
22 intellectual property that was related to all of the
23 Linux.

24 Q. And so, when you had this conversation --
25 conversations with folks from Novell in late 2002 and

1 early 2003, the SCOSource program wasn't even really
2 formally in existence yet, correct?

3 A. No. That's not correct. It was in existence.
4 Before we went out with it, we went and visited with
5 various people, industry partners, and explained to them
6 what we were doing, but we eventually launched it in
7 January of 2003.

8 Q. And what was launched in January of 2003
9 changed in the summer of 2003?

10 A. It got bigger as we went along.

11 Q. And the -- when you had the conversations with
12 folks from Novell in late 2002, you didn't disclose to
13 them what ultimately became the SCOSource program in the
14 summer of 2003, right?

15 A. When I talked to Greg, on the very first call
16 we talked about how we were going to protect our
17 intellectual property rights. I explained the SCOSource
18 program. At that point in time, I think it was actually
19 called SCOTech, but I explained very clearly what the
20 program was. And it was clear what we were doing. And
21 what I explained to him in the fall and winter of 2002 is
22 eventually what SCOSource became.

23 Q. Well, did you disclose, in those conversations
24 with Mr. Jones, that you intended to enter into a license
25 agreement with Sun that would modify and restate Novell's

1 license agreement with Sun from 1994?

2 A. We didn't talk about Sun when I talked to Greg.

3 Q. When you talked to Mr. Jones, did you disclose
4 to Mr. Jones that you had plans to enter into a licensing
5 agreement with Microsoft?

6 A. I didn't talk about specific companies. I
7 didn't talk about Sun. I didn't talk about Microsoft. I
8 did talk, in general terms, about being able to protect
9 our rights, whether it was vis-a-vis users or large
10 companies.

11 Q. And, after you were asked, when Novell became
12 aware of the Sun and Microsoft agreements, as you
13 testified earlier this morning, you got letter after
14 letter of them demanding to see copies of those
15 agreements, right?

16 A. I got letter after letter as a result of Novell
17 doing a flip flop on the copyright language. That's
18 exactly when the letters started. And that's when they
19 got very intense in litigating.

20 Q. And they also sent you letters that we looked
21 at this morning, Mr. LaSala's letter, where he asked for
22 copies of the Sun and Microsoft and any other agreements,
23 correct?

24 A. The question was?

25 Q. You also got a letter from Mr. LaSala --

1 A. Yes.

2 Q. -- asking for those agreements?

3 A. Yes.

4 Q. And you refused to provide those agreements,
5 correct?

6 A. We refused to provide those and a number of
7 other things.

8 Q. Let me show you, if I could, Exhibit 267.
9 Mr. McBride, Exhibit 267 is a letter from Mike -- it's
10 Bready, I believe -- to Robert Bench, the Chief Financial
11 Officer of SCO, dated November 21, 2003. Do you see
12 that?

13 A. Yes.

14 Q. And if you take a look at the first paragraph,
15 Mr. Bench wrote to SCO's CFO, in November of 2003:
16 We have completed significant portions of the
17 audit, but we are still lacking critical information and
18 documentation necessary to finish the audit.
19 Do you see that?

20 A. Yes.

21 Q. And if we take a look at the second page,
22 paragraph 1.4, there's a specific reference to the Sun
23 and Microsoft agreements, correct?

24 A. Yes.

25 Q. And then, in paragraph 1.5, just below it,

1 again Novell renews its request for the Sun and Microsoft
2 agreements. Do you see that?

3 A. Yes.

4 Q. And then, if we could take a look at Section
5 2.1, there's a specific reference in this letter from
6 Mr. Bready to Mr. Bench regarding the incidental clause
7 in the APA.

8 Do you see that?

9 A. Yes.

10 Q. And it's true, isn't it, that despite these
11 letters and requests for agreements and references to the
12 incidental clause in the APA; at no point, in either 2003
13 or 2004, did SCO respond to Novell and say: You're not
14 entitled to any of these revenues because this was a
15 UnixWare license, the Sun and Microsoft license were, and
16 any other software we licensed was simply incidental.

17 That never happened, right?

18 A. I don't know how we responded to all these.
19 Again, I wasn't involved in the response.

20 Q. Are you aware of that response ever being made?

21 A. Yes. I talked to Mr. Tibbitts.

22 Q. I asked you: Are you aware of that response
23 ever being made?

24 A. I don't know what they -- how they responded to
25 it.

1 MR. ACKER: I don't have anything else, Your
2 Honor.

3 THE COURT: Thank you.

4 Anything else, Mr. Singer?

5 REXCROSS EXAMINATION

6 BY MR. SINGER:

7 Q. Based on your conversations with Novell in
8 early 2003 and late 2002, do you believe that Novell
9 clearly understood that you were intending to license
10 UNIX intellectual property for use in Linux?

11 A. Absolutely.

12 Q. And it was in the context of that discussion
13 that Novell refused to provide clarification that the
14 copyrights were in SCO's possession; is that correct?

15 A. That's correct.

16 Q. And did you, at any time, ask Novell to
17 transfer to SCO copyrights?

18 A. No. I have to tell you, it makes me very upset
19 every time I read that in some kind of paper or anywhere
20 that is stated. Novell's papers -- you have Mr. Jones'
21 own testimony that contradicts that. So, the answer is:
22 No. I never asked them to transfer it. I always took
23 the approach that the property had been sold and all we
24 were seeking was a clarification. That was it.

25 MR. SINGER: Thank you very much. Nothing

1 further.

2 THE COURT: Anytning else -- thank you,
3 Mr. Singer.

4 Anything else, Mr. Acker?

5 MR. ACKER: No, Your Honor. Thank you.

6 THE COURT: Thank you. You may step down,
7 Mr. McBride. I assume this witness may be excused.

8 MR. ACKER: Yes, on behalf of Novell, Your
9 Honor.

10 MR. SINGER: Yes, Your Honor.

11 THE COURT: You may call your next witness.

12 MR. MELAUGH: Your Honor, we call Greg Jones

13 GREG JONES,

14 the witness hereinbefore named, being first
15 duly cautioned and sworn or affirmed to tell the truth,
16 the whole truth, and nothing but the truth, was examined
17 and testified as follows:

18 THE COURT: Let's see, now. You're
19 Mr. Melaugh, right?

20 MR. MELAUGH: Yes, I am. Good morning, Your
21 Honor.

22 THE COURT: Good morning.

23 THE CLERK: Please state your name and spell it
24 for the record.

25 THE WITNESS: Greg Jones. G-r-e-g.

1 J-o-n-e-s.

2 THE CLERK: Thank you.

3 DIRECT EXAMINATION

4 BY MR. MELAUGH:

5 Q. Good good morning, Mr. Jones.

6 A. Good morning.

7 Q. Mr. Jones, could you please introduce yourself
8 to the Court?

9 A. Yes. I am Greg Jones. I am Vice President of
10 Technology Law at Novell.

11 Q. Mr. Jones, could you please describe your
12 educational background.

13 A. Yes. I have a Computer Science Degree from
14 Brigham Young University and also a Juris Doctorate
15 Degree from BYU.

16 Q. Could you please describe briefly your work
17 history following graduation from law school.

18 A. Following law school, I had a law clerk/baliff
19 position in Utah County, which included being law clerk
20 to a State District Judge. In March of '92, I joined
21 Novell. I have been at Novell since then, always in a
22 position of advising on intellectual property and
23 licensing matters, and I currently lead a team of
24 attorneys that supports Novell's R&D efforts.

25 Q. Mr. Jones, could I ask you to expand a bit on

1 your responsibilities during the timeframe at issue in
2 this case; say, from 2002 to the present?

3 A. Again, leading this team of attorneys and
4 paralegals in supporting the R&D efforts. So, that
5 includes inbound licensing of technology and other
6 intellectual property licensing. Also, if there are
7 disputes that arise or things of that nature that affect
8 the R&D organization, then we offer counsel and advice.

9 Q. Mr. Jones, you have been present in the
10 courtroom since we began; isn't that right?

11 A. Yes.

12 Q. And so you've heard the testimony of Mr. Sontag
13 yesterday, and Mr. McBride today?

14 A. Yes.

15 Q. I'd like to ask you about a segment of that
16 testimony. I believe the substance of it is that, both
17 from Mr. Sontag and from Mr. McBride, that SCO explained
18 the details of the SCOSource program to you; that you or
19 anyone else from Novell didn't say no to SCOSource; and
20 that, therefore, SCO felt it could proceed with the
21 SCOSource program.

22 How does that testimony comport with your
23 memory of these communications that are being talked
24 about?

25 A. Well, they both did speak of their belief that

1 UNIX intellectual property or code may be found in Linux.
2 I recall Mr. McBride talking about the libraries that he
3 alluded to. And I recall their desire to enforce their
4 rights. And, at one point, I do recall them saying that
5 the enforcement may be by means of a licensing program.
6 But I didn't have a full understanding exactly what
7 SCOSource would be or what it would entail. I had never
8 seen anything that explained the exact terms of what that
9 program might be or anything of that nature.

10 Q. Did they ever suggest to you, during these
11 communications, that SCO might sue Linux users for
12 infringement of SVRX copyrights?

13 A. They were not that specific.

14 Q. As part of these communications, did they ever
15 suggest to you that SCO was going to go out and license
16 SVRX?

17 A. Again, they were never that specific. In those
18 2002 conversations, where they were introducing
19 themselves and what was happening, they never got that
20 specific with me.

21 Q. As well as the early 2003 communications; is
22 that right?

23 A. The only thing in 2003 was: There was this --
24 Mr. McBride alluded to a document they prepared and they
25 sent to Novell and, in looking at that document, which --

1 there is a reference to SVRX, but, again, it's not really
2 an explanation of what the SCOSource program is. It was,
3 instead, something they were proposing to do to define
4 the rights in a way that they wanted to see them
5 defined.

6 Q. And, and as a matter of fact, no one from
7 Novell signed that letter, no one from Novell agreed to
8 the letter that you're referencing?

9 A. That's correct.

10 Q. As part of these communications, did anyone
11 from SCO ever suggest to you or anyone else at Novell
12 that SCO was going to purport to authorize the open
13 sourcing of SVRX?

14 A. No.

15 Q. Did they ever suggest to you that they were
16 going to amend or -- and restate Sun's 1994 buyout
17 agreement?

18 A. No.

19 Q. Did they ever suggest to you, or anyone else at
20 Novell that you're aware of, that they were going to
21 enter into a license with Microsoft?

22 A. No.

23 Q. Mr. Jones, I'm going to show you an exhibit
24 that's not in the binder that you have. This has been
25 premarked as Exhibit 151 from Novell. I want to draw

1 your attention to the paragraph at the bottom of the
2 e-mail. This is from -- the paragraph right above that
3 that's from you.

4 THE COURT: This has not been admitted,
5 correct?

6 MR. MELAUGH: That's correct, Your Honor.

7 Q. Does this comport with your memory of the
8 communications that you have just described?

9 A. Yes.

10 Q. And I want to draw your attention to the top of
11 the e-mail. And this is a response from Chris Stone.
12 Does this comport with your memory of Novell's reaction
13 to SCO's proposal?

14 A. Yes.

15 MR. MELAUGH: Your Honor, I'd like to move
16 Exhibit 151 into evidence.

17 MR. NORMAND: No objection, Your Honor.

18 THE COURT: 151 is received.

19 (Novell's Exhibit 151 received in evidence.)

20 Q. Mr. Jones, if you could turn in your binder to
21 Exhibit 187. This is Novell Exhibit 187. It's been
22 pre-admitted. Mr. Jones, what is this?

23 A. This is a 2003 software license agreement
24 between Sun and SCO.

25 Q. Where did Novell obtain this document?

1 A. We obtained this document from SCO in discovery
2 in litigation.

3 Q. Did Novell have a copy of this document prior
4 to obtaining it in discovery in this litigation?

5 A. No.

6 Q. After receiving this agreement in discovery in
7 this litigation, what did you do?

8 A. Well, this agreement, you know, it relates back
9 to this 1994 agreement -- excuse me -- it relates back to
10 a 1994 agreement between Novell and Sun, and it says that
11 it meant to restate that agreement. So I went back and
12 looked at the 1994 agreement. Both of them identified
13 versions of SVRX as technologies that are being licensed,
14 so I also took a look at the Asset Purchase Agreement
15 between Novell and Santa Cruz, SCO.

16 Q. If you could turn for a moment to the next tab
17 in this Novell Exhibit 5, which has been pre-admitted,
18 what is this document, Mr. Jones?

19 A. This is a 1994 software license and
20 distribution agreement between Sun Microsystems and
21 Novell.

22 Q. Was this the 1994 agreement you were referring
23 to just a moment ago?

24 A. Yes.

25 Q. As a general matter, what is this agreement?

1 A. Well, this is an agreement under which Sun
2 bought out its royalty obligations for licenses to UNIX
3 technologies.

4 Q. After reviewing the Asset Purchase Agreement
5 and the 1994 agreement and the 2003 agreement, what was
6 your understanding of the relationship between these
7 three agreements?

8 A. Well, I guess, first of all, that indeed the
9 2003 agreement carries over many of the terms from the
10 1994 agreement, but it does, for all practical purposes,
11 remove the confidentiality obligations for the source
12 code that were part of the 1994 agreement.

13 I also note that the 2003 agreement, basically,
14 is a restatement of a buyout that was done. So this is
15 an agreement relating to a buyout of royalties that comes
16 under provisions of amendment number 2 to the Asset
17 Purchase Agreement, which requires that such agreements
18 not be entered without both parties' consent.

19 Also, the 2003 agreement relates to SVRX
20 technologies and substantial new rights being granted
21 with respect to them, independent of the UnixWare
22 technologies identified in the agreement. So, it is an
23 SVRX agreement.

24 The licensing of SVRXs is not merely incidental
25 to UnixWare. It's not minor. Expansive rights were

1 granted with respect to SVRX, that it could even be
2 released as open source. So, this is also an agreement
3 that, under the Asset Purchase Agreement, should not have
4 been entered without Novell's approval.

5 Q. So, let's walk through that again. You -- I
6 think, the first part of your answer referred to
7 confidentiality obligations that were in the 1994
8 agreement and in the 2003 agreement. Are you referring
9 to the -- at least, in part, to the sections that are on
10 the screen now?

11 A. Yes. This is from the 2003 agreement, right?

12 Q. Can you walk us through your understanding of
13 these sections?

14 A. Well, so -- well, so, first have all, 10.1 is
15 just a general -- I'm sorry 10.1 is --

16 Q. 10.1 is from 1994, to be clear, and the bottom
17 one is from 2003.

18 A. So 10.1 is from the 1994 agreement and imposes
19 confidentiality restrictions, of course. I'd add that
20 there are other provisions in the 1994 agreement that
21 also provide that any source code sublicensing has to be
22 done pursuant to terms at least as restrictive as those
23 that Sun uses for its most valuable proprietary source
24 code.

25 So, while there were significant sublicensing

1 rights in the 1994 agreement, they were very tightly
2 controlled. And, furthermore, Sun had an obligation to
3 police those licenses and to act on any violations of the
4 confidentiality.

5 And, by contrast, I look at Section 8, Roman 1,
6 towards the bottom, which basically says that if Sun
7 distributes these UNIX technologies under a license model
8 of Sun's choosing, then, at that point, those
9 technologies are no longer confidential, and there are no
10 longer any confidentiality requirements that apply to
11 that technology.

12 Q. I believe you said it was also your
13 understanding that SVRX plays a significant role in the
14 2003 SCOsource license. What led you to that conclusion?

15 A. Well, simply that the SVRX products are
16 identified on the schedules and that this dramatic
17 expansion of rights received by virtue of removing the
18 confidentiality applies across the board to all of the
19 technologies that are identified, whether it's UnixWare
20 or earlier versions of SVRX that predated the APA.

21 Q. Stepping back to this change in the
22 confidentiality obligations, what significance do you
23 attribute to this change?

24 A. What significance in terms of how it's
25 important?

1 Q. In the context of what you know about Sun's
2 business, the actions Sun took after entering into this
3 license?

4 A. So, Sun has an operating system known as
5 Solaris. It's a UNIX variant. It's competitive with
6 Linux. This 2003 agreement allows Sun, then, to release
7 Solaris as open source under an open source licensing
8 model, which they have done in a project called
9 OpenSolaris. So it poses a direct competitive challenge
10 to Linux and, certainly, to Novell, given that Linux is
11 an important part of Novell's business. We are a Linux
12 distributor.

13 Q. Do you know whether there is any SVRX code in
14 Sun's OpenSolaris product?

15 A. Yes.

16 Q. How do you know that?

17 A. Well, Novell has SVRX code in its possession,
18 and so I obtained source code files from Novell's
19 personnel, and then I downloaded source code from
20 OpenSolaris. I found those same files, and sometimes
21 with some degree of difference or change but, in the
22 majority's of instances, identical in the OpenSolaris
23 project. So I took those files, compared them
24 side-by-side, so I was able to find SVRX files in the
25 OpenSolaris project.

1 Q. You said you downloaded the OpenSolaris code.

2 Is that something anyone can do?

3 A. Yes. Anyone can do that.

4 Q. And do you have to pay any money to download
5 the OpenSolaris code?

6 A. No.

7 Q. Do you have to sign an agreement to download
8 the OpenSolaris code?

9 A. No. You don't have to do that.

10 Q. If you could turn to Exhibit 439 in your
11 binder. This is Novell Exhibit 439. It has not yet been
12 admitted. Mr. Jones, could you describe what 439 is.

13 A. Well, the right-hand side of this document
14 contains the -- just the contents of one of the SVRX
15 files that I looked at, this one called Auto Push.C, and
16 the left side of the document, the left column, is a
17 corresponding file that comes out of the OpenSolaris
18 project.

19 Q. And what's significant to you in the text of
20 the chart that we're looking at right now?

21 A. Well, one thing just of note is, of course, Sun
22 has included its open source license notice at the top of
23 the file, but then below that, on the left-hand side, we
24 see an AT&T copyright notice, with the latest year of
25 creation of code being 1989. And then we just jump

1 across the page to the SVRX side and see basically the
2 identical copyright notice.

3 And from there on, you can see what's striking
4 is that while there are places where there are some
5 additional text or a minor difference, there are just
6 extensive portions of the file where what you find is
7 that they are identical.

8 Q. And, moving to the second page of this chart,
9 is that what we're seeing here?

10 A. Yes.

11 MR. MELAUGH: Your Honor, I'd like to move
12 Exhibit 439 into evidence.

13 MR. NORMAND: No objection.

14 THE COURT: 439 is received.

15 (Novell's Exhibit 439 received in evidence.)

16 Q. Mr. Jones, if you could turn to Exhibit 440.
17 Could you tell us what this exhibit is?

18 A. Yes. Again, this is a document in which the
19 right column includes the contents of a source code file
20 from SVRX, Disk USG.C, and the left column is a -- the
21 corresponding file that I downloaded from the OpenSolaris
22 project. And, as with the previous exhibit, you look at
23 the copyright notices. You see the commonalities.

24 On this particular one, you see that Sun notes
25 that it made some modifications in 1999, so they are not

1 going to be identical in every respect, but you walk down
2 through the file and they are identical in many respects.
3 And it's evident that the OpenSolaris file is based on
4 the SVRX file.

5 Q. Mr. Jones -- I move Exhibit 440 into evidence,
6 Your Honor.

7 MR. NORMAND: No objection.

8 THE COURT: 440 is received.

9 (Novell's Exhibit 440 received in evidence.)

10 Q. Mr. Jones, if you could turn -- and we will
11 just address this briefly, to Exhibit 441. Is this
12 similar to what we've seen with the past two exhibits?

13 A. Yes. It's the same. Again, on the right-hand
14 side, the contents of a source code file from SVRX; on
15 the left-hand side, the contents of a source code file
16 from the OpenSolaris project. The file names are the
17 same, and it's quite clear, as you walk through, the
18 similarities show that the OpenSolaris file was based on
19 the SVRX file.

20 MR. MELAUGH: Your Honor, I move Novell Exhibit
21 441 into evidence.

22 MR. NORMAND: No objection.

23 THE COURT: 441 is received.

24 (Plaintiff's 441 Exhibit received in evidence.)

25 Q. Greg, if you could just page through the

1 exhibits that follow in this book. I'm going to list
2 them off for the record. They are Novell Exhibits 442,
3 443, 446, 447, 448, 449, 450, 451, 452, 453, 455, 456,
4 458 and 459.

5 Mr. Jones, are these exhibits similar to the
6 three that we have just taken a look at?

7 A. Yes.

8 MR. NORMAND: No, objection.

9 MR. MELAUGH: Your Honor, I move these exhibits
10 into evidence.

11 THE COURT: Same nature. Any objection?

12 MR. NOLRMAND: Your Honor, I said no objection.

13 THE COURT: I didn't hear you.

14 MR. NORMAND: I'm sorry.

15 THE COURT: 442, 443, 446, 447, 448, 449, 450,
16 451, 452, 453, 455, 456, 458 and 459 are received.

17 (Novel Exhibits 442, 443, 446, 447, 448,
18 449, 450, 451, 452, 453, 455, 456, 458
19 and 459 received in evidence.)

20 MR. MELAUGH: Thank you, Your Honor.

21 Q. Mr. Jones, do you know whether there is any SCO
22 UnixWare code in OpenSolaris?

23 A. I have not done a comprehensive search. I did
24 search on the OpenSolaris site for any reference to Santa
25 Cruze or SCO that would appear on a copyright notice. I

1 didn't find anything, but I didn't make a comprehensive
2 effort to identify UnixWare code in OpenSolaris.

3 Q. When you say "search on the OpenSolaris web
4 site," what do you mean?

5 A. There is a -- if you go to the OpenSolaris site
6 on the internet, there is a user interface there, and
7 there is a utility that allows you to do text searches
8 that searches through the text of the source code files
9 that are there on the OpenSolaris site.

10 Q. I'm sorry. What were the terms that you
11 searched for in that code?

12 A. Two of them, Santa Cruz and SCO. Yeah. I
13 also -- I also did Caldera. There was one Caldera
14 file.

15 Q. And by "file," are you referring to copyright
16 notices? What are you referring to when you say that?

17 A. Again, all I looked for is whether those terms
18 appeared in any copyright notices, and I could not see
19 them appearing in a copyright notice.

20 Q. Did SCO obtain Novell's permission to enter
21 into the 2003 Sun SCOSource license?

22 A. No.

23 Q. Would Novell have consented to the 2003 Sun
24 SCOSource license if SCO had asked?

25 A. No.

1 Q. Why not?

2 A. Well, it simply would not have been in Novell's
3 commercial interests. In the fall of 2002, Novell had
4 acquired Simeon a Linux desk top company. We were
5 exploring ways to get into the Linux market so enabling a
6 competitor to Linux simply would not have been in
7 Novell's interests. In the manner in which they entered
8 this agreement, when they did it, they kept all the
9 money. I assume that would have been their proposal but,
10 fundamentally, it simply would have been contrary to
11 Novell's business interests to enable something like
12 this.

13 Q. What amount does Novell seek from the Sun
14 SCOSource license?

15 A. Everything that was paid.

16 Q. Why does Novell believe it is entitled to that
17 amount?

18 A. Well, there were expansive rights granted with
19 respect to the versions of SVRX that pre-date --
20 post-date -- pre-date the Asset Purchase Agreement.
21 These were dramatically greater rights than were enjoyed
22 under the 1994 agreement, and there is nothing in the
23 agreement that assigns any value to anything other than
24 the SVRX technologies for which Novell is entitled to
25 receive royalties.

1 The customary 5 percent administrative fee that
2 SCO normally receives for collecting SVRX royalties just
3 doesn't seem to be germane in this particular instance.

4 Q. Based on your experience with software
5 licensing, would you describe the 2003 Sun SCOsource
6 license as a typical software license?

7 A. No. I mean, it's an extraordinary agreement.
8 When you enter an agreement where you take the step of
9 going from proprietary to open source, that is quite a
10 dramatic change. And so it's not something you would
11 custom -- certainly it would not be what you would
12 customarily see in an agreement. It's an extraordinary
13 agreement.

14 Q. 267, Novell's 267.

15 Did Novell ever ask SCO whether SCO considered
16 the Sun license an incidental license of SVRX?

17 A. Yes.

18 Q. Are you familiar with the letter -- we have had
19 testimony about this so far. Are you familiar with this
20 letter that's Exhibit 267?

21 A. Yes.

22 Q. This is a letter to Mr. Bench, dated November
23 21, 2003, correct?

24 A. Correct.

25 Q. If I could draw your attention to the second

1 page of the letter, paragraph 1.2. So, what's going on
2 in this paragraph, Mr. Jones?

3 A. Well, this simply -- it's an audit letter, of
4 course, so this is describing to SCO this particular
5 aspect of amendment 1 to the Asset Purchase Agreement
6 that does allow SCO to engage in certain SVRX licensing
7 activities if they are incidental -- well, just as it
8 says right there: As may be incidentally involved
9 through SCO's right to sell and license UnixWare
10 software.

11 So, this paragraph kind of says: Okay. Let's
12 talk about this topic here.

13 Q. Let's take a look at paragraph 1.6.

14 A. Okay.

15 Q. And so what's going on in Exhibit 1.6?

16 A. That is an invitation to SCO to say, you know,
17 if the activities -- any activities that you're
18 participating in that qualify for these exceptions, then,
19 you know, please make those known to us.

20 Q. And if we could take a look at paragraph 2.1.
21 And the same question here, Mr. Jones: What's going on
22 in this paragraph?

23 A. So, again, we're introducing the topic of:
24 We're aware that there is this exception in the context
25 of incidental licensing and so I think it's, again, going

1 to be an invitation for them to let us know if they
2 believe any of their activities would qualify for this
3 exception.

4 Q. So, after asking three times in this letter,
5 Mr. Jones, up and until this litigation, did SCO ever say
6 to Novell that the reason it was entitled to the Sun
7 SCOSource revenue was because that license was an
8 incidental SVRX license?

9 A. No.

10 Q. Mr. Jones, if you could turn to Exhibit 189 in
11 your binder. What is this exhibit, Mr. Jones?

12 A. This is a release, license and option agreement
13 between Microsoft and Caldera International d/b/a the SCO
14 group, now known as SCO.

15 Q. Where did Novell obtain this document?

16 A. We obtained this in discovery in this
17 litigation.

18 Q. Before obtaining this document in discovery in
19 this litigation, did Novell have a copy of this
20 document?

21 A. No.

22 Q. After receiving the 2003 Microsoft SCOSource
23 license, what did you do?

24 A. Well, this agreement -- again, you know, you go
25 through a license agreement to see what technology is

1 being licensed. And I observed there numerous versions
2 of SVRX identified as licensed technologies. So I then
3 took out the Asset Purchase Agreement between Novell and
4 SCO and looked at this agreement in light of the terms of
5 the Asset Purchase Agreement.

6 Q. After conducting that review, what was your
7 understanding of the 2003 Microsoft SCOSource license as
8 it concerns the Asset Purchase Agreement?

9 A. Well, it's certainly an SVRX agreement. I
10 think it's been found that an SVRX agreement is one that
11 relates to SVRX code. And this one certainly does. I
12 also look at it from the perspective of whether this
13 exception for licensing of SVRX incidental to UnixWare
14 might be germane.

15 In this instance, I look at the identification
16 of all of these SVRX technologies, and I look at the
17 broad intellectual property licenses that are granted
18 under the agreement. And I see that there is -- this is
19 not an amendment to an existing agreement. This is not
20 adding rights to rights already acquired. So, basically,
21 all of the rights to the SVRX technologies are new, and,
22 again, they are quite expansive as you march through the
23 options.

24 So I look at this as an SVRX agreement that
25 should not have been entered without Novell's approval.

1 There is a Section 3 that relates solely to UnixWare, but
2 the overall agreement is an SVRX agreement, and those
3 other parts are so substantial that I can't view them as
4 being really incidental to the UnixWare component of the
5 agreement.

6 Q. Did SCO obtain Novell's permission to enter
7 into the 2003 Microsoft SCOSource agreement?

8 A. No.

9 Q. Would Novell have consented to the 2003
10 Microsoft SCOSource agreement if SCO had asked?

11 A. No. I just can't see, again, any commercial
12 benefit to Novell from this particular agreement, and so,
13 no.

14 Q. What amount does Novell seek from the 2003
15 Microsoft agreement?

16 A. Well, I actually don't know the specific figure
17 myself. It's whatever amounts were paid under Section 2
18 and under Section 4 of the agreement, but not whatever
19 was paid under Section 3.

20 Q. So let's walk through those.

21 A. Okay.

22 Q. If we could put up Section 2, please. Why is
23 Novell entitled to the revenue from Section 2?

24 A. Well, here, you know, we have these licenses
25 that broadly relate to SCO's, you know, intellectual

1 property rights. And I think, at that point in time, I
2 simply -- I can't avoid looking at this in the context of
3 what was going on in the marketplace in terms of the
4 dramatic representation being made about SCO ownership of
5 UNIX technologies, historic UNIX and so forth.

6 And so, looking at that context, in combination
7 with Section 2, I say, basically, this is an invitation
8 for someone to use intellectual property when in the end
9 it has been found to be Novell's. There is no
10 apportionment, value-wise, in this agreement as to, you
11 know, how many dollars correspond to this or that. And I
12 think Novell is entitled to conclude that all of it
13 should come to Novell.

14 Q. What do you -- what conclusions have you come
15 to about the Section 3 revenue, Mr. Jones?

16 A. Well, as previously mentioned, you know, this
17 is something that Novell is not pursuing. It is -- it is
18 the case that the Section 4 rights that, again, relate to
19 SVRX, can't be obtained without these Section 3 UnixWare
20 optional rights being exercised or being purchased, but
21 we're not pursuing it.

22 Q. Are you at Section 4 now?

23 A. Yes.

24 Q. Mr. Jones, why is Novell entitled to the
25 revenue from Section 4?

1 A. Well, again, Section 4, the license grant
2 relates to all the technologies identified in the
3 agreement, including those in Exhibit C, which is a list
4 of SVRX, pre-APA SVRX technologies. And, again, these
5 are new rights. I don't see any evidence of -- that
6 these are merely restating rights previously obtained
7 under some separate agreement, that these are new rights
8 that are being received to SVRX technologies. I simply
9 cannot conclude that this is incidental to UnixWare.
10 They are substantial rights.

11 There is no -- there is nothing on the face of
12 the agreement, or otherwise, by which SCO has attempted
13 to assign value to the UnixWare-unique portion of this
14 section. So I think Novell is entitled to conclude that
15 Novell should receive all of this money.

16 Q. Mr. Jones, if you could turn to what's been
17 marked as Novell Exhibit 237, which has been
18 pre-admitted.

19 A. I think I -- I think I should add that, in
20 these instances, one thing that factors into my
21 conclusion in terms of Novell's being entitled to draw
22 these conclusions is that Novell was counting on SCO to
23 be our fiduciary, to look at these SVRX agreements, to
24 bring them to our attention if our rights were
25 implicated.

1 And, as demonstrated by our repeated requests
2 for these agreements, and those requests being rejected,
3 we had absolutely no visibility as to what was going on
4 with these transactions. And so, there was -- to me,
5 there is a heightened responsibility here, and it
6 lends -- and that lends to Novell's being entitled to
7 conclude that we should receive all these monies.

8 Q. And I asked you earlier -- we saw that letter
9 from Mr. Bready, and I asked you earlier whether SCO had
10 ever said that the Sun license was incidental up until
11 this litigation. Did SCO ever say that the Microsoft
12 license -- that it was entitled to the Microsoft money
13 because it was an incidental license of SVRX, up until
14 this litigation?

15 A. No.

16 Q. So now we're on Exhibit 237, Mr. Jones. What
17 is this document?

18 A. This is a SCO Group intellectual property
19 compliance license for SCO UNIX rights. The agreement is
20 between SCO, obviously, and Computer Associates.

21 Q. Where did Novell obtain this document?

22 A. In discovery in this litigation from SCO.

23 Q. And, prior to obtaining this document in
24 discovery in this litigation, did Novell have a copy of
25 this document?

1 A. No.

2 Q. After receiving this intellectual property
3 compliance license, what did you do?

4 A. Well, again, this is -- it's a license, so I
5 look for what technology is being licensed or what
6 intellectual property rights, and, you know, so I go
7 to -- and you'll see that, you know, a key term here is
8 that this is UNIX-based code.

9 Q. You're looking on the second page now?

10 A. Yeah, on the second page.

11 Q. And at 1.14, is that what you're looking at?

12 A. Right. And here, you know, there's a reference
13 to -- that the UNIX-based code is UNIX System V or
14 UnixWare. And so, these are, again, implicating versions
15 of pre-APA SVRX in a context in which there are no --
16 this is not enhancing a previous agreement. This is not
17 adding UnixWare rights on top of UNIX System V rights
18 that were previously obtained. It's just a brand new
19 grant. So I view this as an SVRX agreement.

20 Q. What's your understanding of the larger context
21 in which this SCOSource license and the SCOSource
22 licensing campaign is taking place?

23 A. Well, this was obviously a very public campaign
24 that SCO was undertaking, and in a very -- a public
25 campaign carried out in a very public way; a lot of

1 publicity and a lot of assertions of rights and a lot of
2 assertions that Linux included UNIX code. And so, it was
3 in that context that these types of agreements were being
4 offered to people.

5 Q. And do you have an understanding of what code
6 SCO claims is at issue in SCOSource, is at issue in
7 Linux?

8 A. Well, you know, clearly, Novell's assertion of
9 ownership to the SVRX -- the pre-APA SVRX copyrights
10 basically precipitated this litigation, and there were
11 claims that this was causing great damage to SCO as a
12 result of damaging the SCOSource program itself.

13 And so -- so, basically, it's quite evident
14 that the SVRX code was just critical to the SCOSource
15 project.

16 Q. Has Novell ever claimed to own copyrights to
17 SCO UnixWare?

18 A. No. If by "SCO UnixWare," you mean any
19 UnixWare code produced after the date of the Asset
20 Purchase Agreement, no.

21 Q. Did SCO obtain Novell's permission to enter
22 into the license that we're looking at right now?

23 A. No.

24 Q. Would Novell have consented if SCO had asked?

25 A. No.

1 Q. Why not?

2 A. Well, again, this is entered into in August of
3 2003, and, again, in the fall of 2002, Novell's going in
4 the direction of Linux, and this would simply be
5 completely contrary to Novell's business interests, among
6 other things. There's just no -- no benefit to Novell to
7 enter such an agreement, and a down side.

8 Q. What revenue from this agreement does Novell
9 seek?

10 A. All of it.

11 Q. Why is that?

12 A. Again, this is one where there are substantial
13 SVRX rights granted. There is no allocation or
14 identification of value uniquely associated with
15 UnixWare, and, again, all this is in the context of SCO
16 being Novell's fiduciary and entering SVRX-related
17 agreements and not disclosing them to us, and we are not
18 in a position to protect our rights

19 Q. If you could look briefly at the exhibits that
20 follow, Mr. Jones. For the record those are Novell
21 Exhibit 286, Novell Exhibit 300, Novell Exhibit 309,
22 Novell Exhibit 322, Novell Exhibit 349, Novell Exhibit
23 422 and Novell Exhibit 426, all of which have been
24 pre-admitted in this litigation.

25 As a general matter, what are these exhibits,

1 Mr. Jones?

2 A. These are all agreements of a like nature.
3 Their terms may vary in some, I think, immaterial
4 respects, for our purposes, but they are all -- well,
5 they are all agreements that purport to license the
6 licensee to use any UNIX code that is found in copies of
7 Linux that the licensee is using; and, again, whether
8 it's UNIX System V code or UnixWare code.

9 Q. Did SCO obtain Novell's permission to enter
10 into any of these licenses?

11 A. No.

12 Q. And would Novell have consented to these
13 licenses, if asked?

14 A. No.

15 Q. What revenue does Novell seek from these
16 licenses?

17 A. All of the revenue. There is no specification
18 in the agreements as to any specific amount that's
19 associated with UnixWare, and there are substantial SVRX
20 rights granted, and there's a fiduciary relationship
21 here. So I think we are entitled to all of them. Again,
22 the 5 percent administrative fee that Novell normally
23 allows SCO for collecting royalties doesn't seem germane
24 here.

25 MR. MELAUGH: Thank you, Mr. Jones.

1 THE COURT: Thank you, Mr. Melaugh.

2 Mr. Normand, you may cross examine.

3 MR. NORMAND: Thank you, Your Honor.

4 CROSS EXAMINATION

5 BY MR. NORMAND:

6 Q. Still good morning, Mr. Jones.

7 A. Good morning.

8 Q. You're a lawyer, right?

9 A. Yes.

10 Q. How long have you been a lawyer?

11 A. Since 1990.

12 Q. Did you ever work in selling any software
13 products since you have been at Novell?

14 A. No. I have been involved in the outbound
15 licensing of technologies for revenue. I've assisted --
16 I have assisted in a legal role in supporting sales
17 efforts, but it's not been, by any means, my primary
18 responsibility or my focus.

19 Q. Hve you been involved in pricing any software
20 products, while at Novell?

21 A. Very tangentially.

22 Q. Did you ever work in marketing any software
23 products at Novell?

24 A. Probably not even tangentially.

25 Q. Did you ever have occasion to negotiate the

1 terms of any software agreement regarding UNIX at your
2 time at Novell?

3 A. Yes.

4 Q. Can you please explain that?

5 A. It was -- there was a -- it was after the Asset
6 Purchase Agreement, there was a source code licensee that
7 had -- was involved in a buyout situation, and so I
8 participated to some extent in that. I was not the
9 primary person responsible for doing that.

10 Q. Do you remember the name of the licensee?

11 A. I think it was Silicone Graphics, Silicone
12 Graphics and Cray.

13 Q. And do you recall dealing with Santa Cruz on
14 that issue at all?

15 A. I believe Santa Cruz was involved, but I can't
16 recall whether I'm one of the people who spoke to them.

17 Q. How much familiarity with how computer
18 operating systems are developed do you have?

19 A. I have a general familiarity. I have been --
20 you know, I have a computer science degree. I have been
21 working in the industry. I have been legal counsel to a
22 company that develops and markets operating systems and
23 legal issues associated with the development process and
24 so forth. So, I don't know how to quantify my knowledge,
25 but I come from that background.

1 Q. Have you ever worked as a programmer,
2 professionally?

3 A. Yes.

4 Q. And when?

5 A. This was prior to law school, just working for
6 a small software company.

7 Q. What operating systems did you deal with?

8 A. There? Well, one was Solaris. And I can't
9 recall the other operating systems that we were using.

10 Q. Did you have an understanding, at that time, as
11 to the origins of Solaris?

12 A. At that point in time? No.

13 Q. Do you now?

14 A. To some extent, yes.

15 Q. What is that understanding?

16 A. Well, that Solaris is an SVRX-based operating
17 system.

18 Q. Which release?

19 A. Well, I generally understand SVRX 4. My
20 knowledge is no more specific than that, and that -- and
21 that, basically, Solaris is one of the many source code
22 licensees that takes a source code license and then will
23 create their own variant, and so Solaris is the Sun
24 variant of SVRX 4.

25 Q. Do you know how Solaris was developed?

1 A. I'm not sure what you mean.

2 Q. AT&T developed Solaris with Sun, correct?

3 A. You're saying -- if AT&T and Solaris worked
4 together, side-by-side, to develop Sun? I'm not aware of
5 that one way or another, so I don't know what you're
6 asking about.

7 Q. Let me ask it again because I think you flipped
8 Solaris and Sun in your answer. Do you know how the SVR
9 4 operating system was developed?

10 A. Well, I have a general understanding that AT&T
11 developed the base UNIX technologies and that, at a
12 certain point in time, there was a subsidiary, UNIX
13 System Laboratories, that was created. They would
14 advance the core UNIX technologies and then they would
15 license out that source code to the various UNIX OEMs.

16 Q. Now, when it came time for AT&T and USL to move
17 from Release 3 to Release 4, in developing Release 4,
18 they actually worked with Sun, didn't they?

19 A. I have no knowledge one way or another on
20 that.

21 Q. And when Sun developed Solaris, it did so
22 simultaneously with the development of Release 4,
23 correct?

24 A. I'm not sure exactly what you mean.

25 Q. Do you have a view as to whether Solaris

1 contains any significant amount of SVR 4 technology?

2 A. My understanding has been that it does.

3 Q. Do you know whether previous versions of UNIX
4 contained source code included in UnixWare?

5 A. Previous to what?

6 Q. Previous to the latest release of System V that
7 UnixWare represents?

8 A. My general understanding is that you would
9 find, in the latest release of UnixWare, code that had
10 been in earlier versions of UnixWare SVRX.

11 Q. And code that had been in earlier versions of
12 System V might not have made its way into UnixWare,
13 correct?

14 A. Yeah. I'd -- yeah. I don't know that for a
15 fact, but you say "might," and that sounds very possible
16 to me.

17 Q. Do you have a view as to whether, if code from
18 older versions of System V has not made its way into
19 UnixWare, do you have a view as to whether that older
20 code has any commercial value?

21 A. Well, yes.

22 Q. What's your view?

23 A. Well, in terms of -- to me, there are at least
24 two types of commercial value. One commercial value is
25 that there is actual technical merit that is still placed

1 on the marketplace, and I can't opine one way or the
2 other. The other is that there are intellectual property
3 rights associated with the technology but that,
4 independent of that current technical merit of that code
5 base, could have some relevance in the marketplace.

6 Q. Do you have a view as to whether UNIX System V,
7 Release 2, for example, has any commercial value?

8 A. I just -- well, in that respect that I just set
9 out, I would say, with respect to whether it has
10 technical merit, I'm not in a position to say. As to
11 whether the intellectual property rights associated with
12 it potentially have value, potentially.

13 Q. But you don't have a view one way or the other?

14 A. I think I would have a bias towards -- well,
15 which release is it?

16 Q. Release 2.

17 A. UNIX System V? So it's SVR 2?

18 Q. Two.

19 A. Let me see. Well, you know, copyright lasts
20 for a long time, and so if that code is still available,
21 potentially it could have commercial value in the sense
22 that I stated, for the intellectual property.

23 Q. As someone with programming experience, do you
24 have any view as to whether there is any existing
25 hardware that you could run SVR 2 on?

1 A. I don't know. I don't know.

2 Q. Now, in Novell's view, if there are trade
3 secrets in UNIX System V, SCO owns them, correct?

4 A. I believe that's been Novell's position.

5 Q. And was that your position at deposition?

6 A. I think so.

7 Q. And, in Novell's view, SCO owns the software
8 know-how and methods and concepts in UNIX System V and
9 UnixWare, correct?

10 A. You're talking post-APA UnixWare, these
11 rights -- independent of copyright?

12 Q. I'm asking you whether, in your view --

13 A. And I'll answer it this way. Post-APA versions
14 of UnixWare, to the extent not implicating Novell's
15 pre-APA copyrights in SVRX, and to the extent they are
16 developed by SCO, as opposed to some partner of SCO or
17 something, Novell would not be asserting rights to those,
18 certainly.

19 MR. NORMAND: Your Honor, could I publish a
20 portion of Mr. Jones' deposition in this case?

21 THE COURT: Sure.

22 (A portion of the deposition was played.)

23 MR. NORMAND: That's from Mr. Jones' May 10,
24 2007 deposition, Rule 30(b)(6); at page 36, line 24, to
25 page 38, line 1.

1 Q. Mr. Jones, in Novell's view, it would not be
2 accurate to say that Novell had transferred its existing
3 ownership interest in the UNIX System V products to Santa
4 Cruz in 1995, correct?

5 A. Could you say that again?

6 Q. In Novell's view, it would not be accurate to
7 say that Novell had transferred its existing ownership
8 interests in UNIX System V to Santa Cruz in 1995,
9 correct?

10 A. Right.

11 THE COURT: SCO 411?

12 MR. NORMAND: Yes, Your Honor.

13 Q. Mr. Jones, this is a document dated May 23,
14 1996. Do you recognize the document?

15 A. Yes. I've seen it before.

16 Q. And the second full paragraph says:

17 As you may have heard, Novell has transferred
18 to Santa Cruz, Santa Cruz Operation, Inc., Novell's
19 existing ownership interest in the UNIX System-based
20 offerings and related products, collectively transferred
21 products.

22 Do you see that line?

23 A. Yes.

24 Q. And you think that that's an inaccurate
25 statement, correct?

1 A. Yes.

2 Q. Do you have any explanation for why Mr. DeFazio
3 would sign a document containing such a statement?

4 A. No.

5 Q. Have you spoken with Mr. Defazio about that
6 issue?

7 A. No.

8 Q. Mr. Jones, do you have a view as to whether a
9 UnixWare license gives the licensee the right to use all
10 prior releases of UNIX System V?

11 A. I take it a UnixWare license to be a license to
12 a stand-alone version of UnixWare, and then I would say
13 that that license includes rights to any code contained
14 in it, and if it so happens that some of that code was in
15 prior releases of UNIX, then the licensee is receiving
16 licenses to that code.

17 Q. Do you have any view as to whether, when Novell
18 owned the UNIX business, it granted rights to the
19 previous releases of System V when it did a license of
20 the most recent releases of System V?

21 A. I've had some exposure to that in this
22 litigation and seeing what's come forward in discovery.
23 It seems -- what I have seen is that that happens when
24 consideration has been given for the prior products that
25 are in the agreement.

1 But, as I have told you before, and as you were
2 inquiring today, you know, my career focus has not been
3 doing sales agreements and things of that nature, so --

4 Q. Did you watch your counsel's opening argument?

5 A. Yes.

6 Q. Did you see reference made to the NCR
7 supplements?

8 A. Yes.

9 Q. Do you recall what the number of that
10 supplement was?

11 A. 112.

12 Q. And it's your position, as you understand it --
13 when I say "you," I mean Novell. It's Novell's position
14 that the only reason the System V prior products were
15 listed for NCR was because it had previously obtained a
16 stand-alone license to every previous release of System
17 V?

18 A. Well, what I heard was that, in fact, the
19 licenses had been obtained for previous releases. I
20 don't necessarily recall having heard that's the only
21 reason. I just can't recall.

22 Q. I may have misunderstood your answer. I
23 thought you said that your understanding was that the
24 only reason System V prior products would be listed would
25 be if the licensee had already obtained a stand-alone

1 license to all those releases.

2 A. Did I say "only?"

3 Q. That's what I understood you to say.

4 A. Okay. I -- and I thought I prefaced it with
5 generally. But, I mean, what I have -- my impression
6 that I have formed after seeing the documents that I have
7 been able to see in this litigation is that consideration
8 has been given for prior products. And I, again, tell
9 you that I have not surveyed all these agreements. That
10 has not been my purview. That's is not what I am
11 about.

12 Q. Can you recall coming across any agreements
13 where that could not have been true?

14 A. No.

15 Q. Are you familiar with the language in the APA
16 providing that Novell would receive royalties from SCO's
17 sales of UnixWare if certain conditions were met?

18 A. Yes.

19 Q. You were here for Mr. McBride's testimony,
20 right?

21 A. Yes.

22 Q. So you heard questions and answers regarding
23 floors and thresholds regarding UnixWare sales?

24 A. Actually I think my mind drifted off at that
25 point, but I have seen those parts of the agreement.

1 Q. Are you familiar with language in the APA
2 providing that, after December 31, 2002, Novell would not
3 receive any royalties from SCO's sales of UnixWare, even
4 if the conditions were met?

5 A. Yeah, something to that effect. I know that
6 there was a cut-off date and so forth.

7 Q. So, in Novell's view, after December 31, 2002,
8 SCO had the right to retain all royalties it received for
9 licensing UnixWare, correct?

10 A. Clearly, from the language, at least,
11 stand-alone versions of UnixWare.

12 Q. And, in Novell's view, in fact, the entire
13 intent of the APA was for the UnixWare business to be
14 transitioned to Santa Cruz, correct?

15 A. Could you say that again?

16 Q. In your view and in Novell's view, the entire
17 intent of the APA was for the UnixWare business to be
18 transitioned to SCO, correct?

19 A. Well, I don't -- I guess the only thing I would
20 say is: You know, in terms of entire intent, certainly
21 it was a driving factor behind the agreement, was to
22 transition that technology into another company and have
23 it advanced. But there were a variety of other purposes
24 to that agreement, including protecting Novell's
25 interests in making sure that there were provisions that

1 would enable Novell to receive a portion of an ongoing
2 revenue stream to be compensated for the business.

3 And so I'm with you in terms of, you know, the
4 business motive that triggered the transition was
5 certainly to advance the UnixWare technology, but I can't
6 go as far as saying that that was the entire purpose of
7 that document, the agreement. The agreement also has a
8 fundamental purpose to protect the interests and rights
9 of Novell.

10 Q. Let me rephrase the question. With respect to
11 UnixWare, Novell's entire intent was to transfer the
12 UnixWare business to Santa Cruz, correct?

13 A. Yeah, to the extent consistent with Novell's
14 other interests that would be implicated by the
15 agreement, which I think is -- you know, manifests itself
16 in various places in the document.

17 MR. NORMAND: Your Honor, I would like to play
18 a brief excerpt from Mr. Jones' deposition.

19 THE COURT: Go ahead.

20 (A portion of the deposition was played.)

21 MR. MELAUGH: If I could ask Mr. Normand to
22 state the part in the deposition before your start the
23 clip.

24 MR. NORMAND: All right. Sorry

25 MR. MELAUGH: I don't think you have indicated

1 it yet, the date and the page number you're referencing.

2 THE COURT: The page number and the line.

3 MR. NORMAND: Yes, Your Honor. I'm sorry.

4 That's Mr. Jones' May 10, 2007, 30(b)(6) deposition, and
5 at page 60 lines 14 to 23.

6 Q. SCO 61 is a two e-mail chain dated December 4,
7 1995, the top e-mail is from David Johnson to, among
8 others, Larry Bouffard. Do you recognize any of those
9 names, Mr. Jones?

10 A. Yes.

11 Q. And do you see the name of Skip Jonas about a
12 third of the way down?

13 A. Yes.

14 Q. Who is Skip Jonas?

15 A. He had a position relating to -- he had a sales
16 position, and I know that at least at one time his
17 responsibilities related to our UNIX business. That's
18 about the extent of my knowledge of Skip Jonas.

19 Q. Do you see this language, Mr. Jones, where
20 Mr. Jonas says, quote:

21 Novell is out of the UNIX/UnixWare business
22 after the closing and does not have the right to sell
23 UnixWare, so if Novell has any inventory of UnixWare
24 after the closing, I believe that Novell has only two
25 choices. Sell it to SCO or destroy it.

1 Do you see that language?

2 A. Yes.

3 Q. Is that language consistent with your
4 understanding of what happened with the sale of UnixWare
5 under the APA?

6 A. I'm not familiar with this particular issue of
7 the preexisting UnixWare inventory and what was done with
8 it and so forth. At this moment in time, I can't recall
9 that issue.

10 Q. But it is your understanding that Novell was
11 out of the UnixWare business after the APA, correct?

12 A. Yeah. I think, generally-speaking, I would
13 have to say yes. I would like to ask a clarifying
14 question on your earlier question.

15 Q. Of course.

16 A. What do you mean by "UnixWare business?"

17 Q. What's the ambiguity as to what UnixWare
18 business is?

19 A. Well, for example, there were pre-APA versions
20 of SVRX that were UnixWare, and so Novell continued to
21 have a revenue stream associated with those. So, that's
22 why I asked the question, in terms of just: What do you
23 mean by "in the business," because there's still
24 interests there. And so, hence, my question.

25 Q. Is that your only caveat to your view that the

1 entire UnixWare business had been transferred, as you sit
2 here today?

3 A. Now, that's a different question, the entire
4 UnixWare business having been transferred. Generally, of
5 course, Novell's focus was not going to be UnixWare, and
6 Novell was counting on SCO on moving forward with that.
7 And Novell had some -- it retained rights in terms of
8 copyrights, in terms of royalties that corresponded to
9 UnixWare, you know, and I haven't thought through to
10 delineate every little interest, ongoing interest Novell
11 may have, but I'm with you in terms of: No doubt, the
12 general direction was that UnixWare was moving forward
13 with SCO, and Novell has some ongoing interest in that
14 area, but it's certainly not Novell's focus.

15 Q. You're not suggesting, then, that Santa Cruz
16 was Novell's agent for purposes of UnixWare licenses, are
17 you?

18 A. Well, what do you mean by "UnixWare?" And,
19 again, I just mean, there are -- there were some pre-APA
20 releases of SVRX that were UnixWare, so, with respect to
21 those releases -- and those are identified on the
22 schedule of SVRX licenses. So, only with respect to
23 those versions of UnixWare, I would say that that
24 fiduciary relationship, that collection role applies to
25 those.

1 Q. But the right that Novell retained was to
2 continue to receive royalties for certain UnixWare
3 licenses that were in existence?

4 A. Anything that would be an SVRX license that
5 would pertain to the pre-APA release of UnixWare.

6 Q. Your position is that the APA identifies, as a
7 basis for SVRX licenses, certain UnixWare licenses?

8 A. I believe, if we were to take out the Asset
9 Purchase Agreement and look at the schedule that we would
10 see that the last one or two SVRX releases were, in fact,
11 UnixWare. And that's all I'm talking about.

12 Q. And, apart from that retained royalty interest,
13 do you have a view as to whether Novell retained any
14 interest in the UnixWare business after the APA?

15 A. Again, I think I've mentioned that, you know,
16 we would have copyrights associated with anything that
17 was pre-APA. And you said "apart from the royalties,"
18 and so we're not talking about that, you know, and I --
19 so, in my mind, those are the primary things. But as
20 I've told you, this is the last place in the world I
21 would want to sit and attempt to delineate every single
22 aspect of the APA and every possible ongoing interest.

23 And I'm with you in terms of the UnixWare
24 business, in general, is going to SCO, and that's SCO's
25 focus, and it's not Novell's from that point going

1 forward.

2 Q. It's not Novell's view that, when SCO was
3 licensing UnixWare with SVRX copyrights therein, it's not
4 Novell's view that SCO had to try to value those
5 copyrights and remit money to Novell, is it?

6 A. So, if you're talking about versions of
7 UnixWare created post-APA and what's being licensed is
8 that version of UnixWare, yes, that is not Novell's
9 position that SCO would have to attempt to, you know,
10 value all the SVRX component parts that make up a part of
11 that UnixWare release.

12 Q. Even though that UnixWare release, in your
13 view, does contain all manner of SVRX code, correct?

14 A. That's right.

15 Q. Now, you're familiar with this language in
16 amendment number 1 to the APA?

17 THE COURT: What is the exhibit?

18 MR. NORMAND: This is SCO 71, Your Honor. I'm
19 sorry.

20 Q. You have seen this language before?

21 A. Yes.

22 Q. Now, I may have misunderstood your testimony,
23 but SCO had the right to enter into new SVRX licenses if
24 it was doing so incidentally through its rights to sell
25 and license UnixWare software, correct?

1 A. Right.

2 Q. Now, when you were testifying earlier, I
3 thought you were saying that, in your review of the
4 Microsoft and Sun agreements, that an important fact to
5 you was that it was a new license. Did I mishear you?

6 A. Well, that was an important fact, but it was
7 taken in combination with my belief that the UnixWare
8 activity in the agreement was not -- excuse me -- that
9 the SVRX rights being granted were not merely incidental
10 to the UnixWare portion.

11 So I wasn't -- that was not the only factor. I
12 did highlight that.

13 Q. It doesn't really matter whether the SVRX
14 component of the Sun and Microsoft agreements is a new
15 component for purposes of determining this incidental
16 exception, does it?

17 A. I think it does.

18 Q. How so?

19 A. Well, so, for example, if you go to that
20 licensee and they already have a fully paid-up license
21 for a certain release of SVRX, and then that licensee
22 approaches SCO and licenses UnixWare, and from the
23 license -- that wouldn't be surprising -- licenses
24 UnixWare from SCO and enters an agreement in which
25 UnixWare is identified and then that version of SVRX, for

1 which the licensee had fully paid up its license, in that
2 scenario, the fact that -- and, to me, in that scenario,
3 the licensing of UnixWare very likely is incidental to
4 the -- excuse me -- the licensing of the SVRX showing
5 up on the schedule of the new UnixWare agreement, it's,
6 for all purposes, incidental because no new rights are
7 being granted. It's significance there is it's almost
8 meaningless.

9 However, if I took that same version of SVRX
10 and SCO approaches a customer, and SCO enters an
11 agreement with the customer and identifies that same
12 version of UnixWare on the product schedule and then
13 separately that version of SVRX, and that customer has
14 never paid for SVRX before and charges that customer the
15 very same amount for UnixWare, you know, then, to me, I
16 say: Well, now this customer has received substantial
17 additional rights that it did not previously have.

18 Q. It sounds like you've thought about the issue
19 of incidental licensing a bit?

20 A. I've thought about it.

21 Q. But you don't have any view as to whether this
22 language, this incidental language, encompasses a prior
23 practice of licensing older versions of System V with the
24 most recent release, do you?

25 A. Well, my view is, to the extent I have been

1 exposed to prior practices, that the theme that I see in
2 them is consistent with the rationale that I just set
3 out.

4 Q. You don't have a view as to whether, in
5 amendment number 1, the parties intended, through the use
6 of that language, to encompass the practice of licensing
7 the prior releases of System V with the most recent
8 release, do you?

9 A. I don't have any knowledge of the people who
10 drafted that language, having -- having spoken and saying
11 that this is why we are putting that language in the
12 agreement. I do not have that type of knowledge.

13 Q. Well, if you have no view on that issue, you
14 can't make a fully-informed assessment of whether
15 incidental licensing has occurred, can you?

16 A. To the contrary. This is an agreement. I
17 think there is an integration clause that says this
18 merges prior discussions and understandings. This
19 agreement, you know, I look at it, and I think that that
20 language has meaning independent of whatever prior
21 discussions took place.

22 Q. Would you acknowledge that it could also be
23 meant to encompass this prior practice, correct?

24 A. What prior practice?

25 Q. The prior practice of licensing older versions

1 of System V with the most recent release?

2 A. Well, the prior practice that I described is
3 one in which, for each of those prior releases,
4 consideration had been given. So I don't know if you're
5 talking about the same prior practice, but if that's the
6 prior practice you're alluding to, I could easily see
7 that this would support that type of practice.

8 Q. You don't have a view as to whether it
9 encompasses a practice of licensing releases even to
10 those people who had not previously acquired a
11 stand-alone license to the earlier releases?

12 A. I don't have any knowledge of it being applied
13 to such people.

14 Q. And if this provision was intended to encompass
15 this practice, it would change your analysis, wouldn't
16 it?

17 A. I don't know that it would.

18 Q. So you think the intent of the parties is
19 irrelevant?

20 A. No. But, again, there is -- this is an
21 agreement. I think there is an integration clause.
22 "Incidentally" is a word that appears in the dictionary.
23 It has a meaning.

24 Q. It's ambiguous, isn't it?

25 A. I don't know. I think it calls for application

1 to circumstances, but I have been asked about this
2 before, I know, and I said, you know, I'd look at the
3 dictionary, so --

4 THE COURT: Pick a good stopping point.

5 MR. NORMAND: This is fine, Your Honor.

6 THE COURT: Are you sure?

7 MR. NORMAND: Yes.

8 THE COURT: All right. We'll take our second
9 break and be in recess for 15 minutes.

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(Short recess.)

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REPORTER'S CERTIFICATE

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

I, REBECCA JANKE, 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 April 30, 2008, 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 numbered 281
through 354 constitute a full, true and correct record of
the proceedings transcribed.

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

And hereby set my hand and seal this 30th day
of April, 2008.

REBECCA JANKE, CSR, RPR, RMR

1 THE COURT: You may proceed, Mr. Normand.

2 MR. NORMAND: Thank you, Your Honor.

3 May I approach, Your Honor?

4 THE COURT: You may.

5 MR. NORMAND: This is a copy of the bulk of the
6 exhibits that we'll be using.

7 THE COURT: Are these all in? Have they all been
8 admitted?

9 MR. NORMAND: With one exception, Your Honor. And
10 when we get to that, I'll offer it.

11 Q. BY MR. NORMAND: Mr. Jones, do you recognize
12 Schedule 1.1(A) to the APA?

13 A. I'm familiar with it. It's not up there right now.
14 I don't have the exhibit to myself.

15 Q. And you referenced the schedule of assets that is
16 in 1.1(A) earlier; correct?

17 A. Correct.

18 Q. And that's in Item 6 of the APA; right?

19 A. Right.

20 Q. And there's no UnixWare release identified in
21 Item 6; correct?

22 A. I'm not certain in that -- my only uncertainty is
23 that I knew the early release of UnixWare was based on
24 Release 4.2. And so I just -- I'm not certain whether that
25 version of 4.2 corresponds to what was in UnixWare release or

1 not. That's my only uncertainty.

2 Q. Your view is UNIX System 5 Release 4.2 MP is the
3 same or virtually the same as the first release of UnixWare;
4 correct?

5 A. That's a lot more than I said. I just -- I think
6 that the early version of UnixWare corresponds to 4.2. But
7 sitting here today, I'm just not certain. So if it is the
8 case, then there's UnixWare in the schedule. If it's not the
9 case, then UnixWare is not there.

10 Q. So looking at Item 6 now, you don't think Novell
11 retained any interest in any UnixWare royalties after the APA;
12 correct?

13 A. If none of those identified as SVRX releases are
14 UnixWare, then the SVRX licenses and the corresponding
15 royalties would relate to UnixWare. So it's just a factual
16 question that I have. And that was -- when I was -- earlier
17 when you were asking me about UNIX everything I said was based
18 on whether or not any of these releases are, in fact, a
19 version of UnixWare.

20 Q. But in your view, the place to look to determine
21 what royalties arose is Item 6; correct?

22 A. Yeah, that's right. Item 6 is where there's a
23 reference to that in Section 4.16.

24 Q. You said earlier in your understanding that
25 System V prior products are only licensed when consideration

1 was given for the prior products; right?

2 A. I think I said generally. To the extent that I had
3 an opportunity to see examples that that's what I've seen. So
4 that's what I said.

5 Q. You're aware of examples of UNIX licensees who were
6 not charged any price for getting prior products; correct?

7 A. I don't believe I am. I'm not saying that that has
8 never happened. But I don't think I'm aware of any examples.

9 MR. NORMAND: This is SCO Exhibit 369. It may not
10 be in the book, Your Honor, as it turns out.

11 Blow up the top half.

12 Q. BY MR. NORMAND: Do you recognize this document,
13 Mr. Jones? Software agreement for Nihon SCO, Limited;
14 correct?

15 A. I just need to actually read the document here.

16 Yes.

17 Q. Page 10?

18 MR. MELAUGH: Can I ask Mr. Normand to give a copy
19 to the witness? Do you have a copy?

20 THE COURT: Do you have a copy that you can give to
21 him?

22 MR. NORMAND: Somewhere, Your Honor.

23 THE WITNESS: Thank you.

24 MR. NORMAND: Blow up the top half.

25 MR. ERIC WHEELER: Yes, sir.

1 Q. BY MR. NORMAND: Mr. Jones, Exhibit A to this
2 document at Page 10 reflects an initial designated CPU price
3 of \$375,000; correct?

4 A. Just a second. I'm trying to find it here.

5 Q. It's at Page 10. Do you see Item A, 1A?

6 A. I want to make sure it's the same page. It's kind
7 of clipped at the top.

8 Okay. Right.

9 Q. And if you turn to Page 32, Mr. Jones. There are
10 no prior products listed; correct?

11 A. Page 32?

12 Q. Correct.

13 A. I'm really thrown by the numbering.

14 Q. Do you not see this on the screen? Do you want me
15 to blow it up?

16 A. Well, I'd like to be able to see it in context.
17 And you're referring to page 32. I'm simply not tracking on
18 the pages.

19 Q. Bates number is 1042612.

20 A. Okay.

21 Q. So for this supplement, the initial CPU price is
22 \$375,000, and there are no prior products listed; correct?

23 A. There are no prior products in this exhibit. I've
24 never seen this agreement before. I'm not familiar with the
25 way it's organized. So all I can really say is I know this

1 exhibit says that, but I'm not familiar with the agreement.

2 Q. Okay.

3 May I approach, Your Honor?

4 THE COURT: You may. What exhibit are you talking
5 about?

6 MR. NORMAND: SCO 370.

7 Q. BY MR. NORMAND: SCO 370 is a UNIX agreement
8 concerning UNISYS; correct?

9 A. Yes.

10 Q. Do you see at Page 4 which is --

11 A. I think the Bate stamp number would help.

12 Q. It's easier?

13 A. Yeah.

14 Q. Bates 1039897.

15 A. Okay.

16 Q. In Section 1A, the initial designated CPU price is
17 \$375,000; correct?

18 A. Correct.

19 Q. If you turn to Bates 1039921. A lengthy list of
20 prior products; correct?

21 A. Right. There is a list, right.

22 Q. So these two documents reflect the same initial per
23 CPU price for UnixWare licenses whether or not the prior
24 products are listed; correct?

25 A. Again, I'm not familiar with the documents. I can

1 simply say that that information appears on the two pages that
2 we saw in each agreement. I have never studied this document.
3 I'm not familiar with the way it's organized and how it works.

4 Q. Well, having seen what I've shown you, it's clear
5 that --

6 MR. MALAUGH: Mr. Normand, is this a demonstrative
7 that you intend to use?

8 We have a stipulation such that demonstratives that
9 are going to be used with witnesses must be disclosed 24 hours
10 in advance.

11 MR. NORMAND: This is from the opening.

12 THE COURT: It's from what?

13 MR. NORMAND: The opening argument that Mr. Singer
14 did, Your Honor.

15 MR. SINGER: I used those two in my opening.

16 THE COURT: I thought he did.

17 MR. MALAUGH: I think our understanding of the
18 agreement was that if someone was going to use something with
19 the witness, we would be told it was going to be used with the
20 witness.

21 MR. NORMAND: I don't need to use it, Your Honor.
22 But I do have a different understanding of the meaning of the
23 stipulation.

24 THE COURT: Well, I don't have any understanding of
25 the meaning of that yet. So apparently you two have a

1 different ones. But now it's not relevant; right.

2 MR. NORMAND: I'll ask Mr. Jones a question without
3 using the exhibits.

4 THE COURT: All right.

5 Q. BY MR. NORMAND: Based on what I've shown you on
6 these two licenses, the same per CPU price per unit where a
7 license was charged whether or not the system prior products
8 was listed; correct?

9 A. The same price was listed on the page whether or
10 not the exhibit identified a product or not. And that's all I
11 can say, is those words appear. And I haven't studied the
12 agreements, so I don't know how they work.

13 Q. You are a lawyer; right?

14 A. I think lawyers actually need to read documents to
15 understand them, nonetheless.

16 Q. I understand.

17 Now, in your view, one needs the details in the
18 transaction at issue to determine whether there is an
19 incidental licensing that's SVRX with UnixWare; correct?

20 A. I'm sorry. Could you say that again?

21 Q. In your view, one needs to understand the details
22 of the transaction at issue to determine whether there has
23 been incidental licensing of any SVRX with UnixWare; correct?

24 A. Once you understand the circumstances of the
25 transaction.

1 Q. Now, on the issue of whether any SVRX source code
2 was licensed incidentally to UnixWare in Microsoft agreement,
3 you think Microsoft views are irrelevant?

4 A. As to SVRX agreement, yes.

5 Q. And as to whether there's been any incidental
6 licensing; correct?

7 A. Yes.

8 Q. And the same is true as to Sun's view in its
9 agreement as to whether there's been incidental licensing;
10 correct?

11 A. Yes.

12 Q. But you do think the overall facts and
13 circumstances surrounding the transaction are relevant;
14 correct?

15 A. Well, the circumstances of the transaction -- yeah,
16 to some extent that needs to be understood.

17 Q. To a significant extent; correct?

18 A. Yes.

19 Q. And primarily, you think the actual terms of the
20 agreements are the most important to determining whether there
21 has been incidental licensing; correct?

22 A. Not necessarily. I mean, the terms -- the terms of
23 an agreement might not fully reflect the circumstances behind
24 the transaction.

25 MR. NORMAND: Your Honor, may I play a clip from

1 Mr. Jones' deposition?

2 THE COURT: Yes. Tell us.

3 MR. NORMAND: May 10, 2007; Page 246 Line 16 to
4 Page 247 Line 1.

5 THE COURT: Thank you.

6 MR. MALAUGH: It was May 10th? Thanks.

7 MR. NORMAND: If that's not going to work, I can
8 read it, Your Honor.

9 THE COURT: Is it not going to work? All we're
10 getting so far is it a sounds like someone backing up.

11 MR. ERIC WHEELER: That is the audio, Your Honor.

12 THE COURT: If you can read it if you can't get it
13 to work.

14 Q. BY MR. NORMAND: Mr. Jones, I asked the following
15 question, and you gave the following answer:

16 Question. So in Novell's view --

17 MR. MELAUGH: Can I ask -- I'm sorry I'm having
18 difficulties, but could you give him a copy of the transcript
19 to Mr. Jones so he can follow along with you?

20 MR. NORMAND: May I approach, Your Honor?

21 THE COURT: Oh, yes. Yes.

22 Q. BY MR. NORMAND: This is at Page 246 Line 16:

23 Question. So in Novell's view whether the
24 UnixWare had been licensed or whether the SVRX had
25 been licensed incidentally with UnixWare is

1 something to be determined from the terms of the
2 agreements; is that right?

3 Answer. Well, as I said, I think terms of
4 the agreement would be the most important
5 consideration. And my response is I think I
6 suggested the overall facts and circumstances, and
7 those facts and circumstances I think are probably
8 the most important thing in the terms.

9 Do you recall being asked that question and giving
10 that answer?

11 A. Vaguely. But here it is, so....

12 Q. Now, beginning in October of 2002, you had several
13 communications with SCO; right?

14 A. Yes.

15 Q. And there were in your best estimate four to six
16 conversations between Novell and SCO during that time?

17 A. Something like that. I don't know.

18 Q. And to your recollection, in October of 2002,
19 Mr. McBride told that you SCO was starting to look into the
20 possibility of Linux end users using UNIX code; correct?

21 A. Yes.

22 MR. NORMAND: Will you pull up SCO 398?

23 MR. ERIC WHEELER: Yes, sir.

24 Q. BY MR. NORMAND: And in this e-mail, in the fall of
25 2002, you refer to that earlier conversation with Mr. McBride;

1 correct?

2 THE COURT: This is SCO 390?

3 MR. NORMAND: Yes, Your Honor -- 398.

4 THE COURT: Pardon me?

5 MR. NORMAND: 398.

6 MR. MELAUGH: And again, Your Honor, if I could ask
7 counsel to follow the general practice and give the witness a
8 copy of the exhibit that he's referring to so that the witness
9 can see the context of what you're blowing up.

10 Q. BY MR. NORMAND: Mr. Jones, do you need a copy of
11 this exhibit to understand this question?

12 A. Not this one. But in general I really appreciate
13 having the exhibits.

14 Q. Of course.

15 And you recall in this document that a few weeks
16 earlier on November 15th --

17 A. I actually didn't answer your question. But you
18 had asked me the question about --

19 Q. Do you think this e-mail reflects your discussions
20 with Mr. McBride?

21 A. Yes.

22 Q. This is an e-mail from November 15th, 2002;
23 correct?

24 A. Right.

25 Q. And you recall that a few weeks earlier on that

1 date, Mr. McBride, quote:
2 Expressed interest in pursuing Linux users
3 who may be using misappropriated UNIX code. End quote.
4 Right?
5 A. Right.
6 Q. This is SCO 397, e-mail dated November 20th, 2002,
7 from yourself. And in this e-mail you described a
8 conversation with Mr. McBride that you and Dave Wright had
9 that same day; correct?
10 A. Just a second.
11 (Time lapse.)
12 THE WITNESS: Yes.
13 Q. BY MR. NORMAND: You recount the possible efforts
14 by SCO to assert claims relating to infringing uses of SCO's
15 UNIX libraries by end users of Linux; correct?
16 A. Right.
17 MR. NORMAND: 399.
18 Q. BY MR. NORMAND: To some extent you may be able to
19 find it. It's tabbed.
20 A. Okay. Thanks.
21 Q. We're on 399 now.
22 I'm told we may need some time technically to be
23 able to use the documents this way, which I think is faster.
24 But I defer to how Your Honor wants to proceed. It may take
25 us three to four minutes.

1 THE COURT: To get this up and running?

2 MR. NORMAND: Yes, sir.

3 THE COURT: Well, we better wait. I think it
4 ultimately would be quicker.

5 MR. NORMAND: I agree, Your Honor.

6 (Time lapse).

7 THE COURT: There are no -- there are no interlude
8 non-exhibit questions you could ask? If there aren't, there
9 aren't.

10 MR. NORMAND: I'm sort of in the middle of this
11 topic.

12 (Time lapse.)

13 Q. BY MR. NORMAND: There is a discrete area that we
14 can turn to, Mr. Jones, if you're comfortable with that. We
15 can go back to this.

16 A. Yes.

17 Q. You spoke about the Solaris files with counsel in
18 your direct examination. Do you remember that?

19 A. Yes.

20 Q. Exhibits 439 to 59?

21 A. It sounds right.

22 Q. Do you know what functions these files perform in
23 Solaris?

24 A. I didn't. No. I didn't attempt to understand what
25 their functionality was.

1 Q. Do you know what function these files performed,
2 SVR4-389?
3 A. No. In neither case did I look at them to what
4 their functionality was.
5 Q. Do you know if the files originated in SVR4-386?
6 A. Meaning that the first version in which they
7 appeared?
8 Q. Yes.
9 A. I don't know.
10 Q. You said that Novell had a hard copy of SVR4-386;
11 correct?
12 A. A hard copy?
13 Q. A hard copy of the source code?
14 A. If I said that I'm mistaken. We have SVRX source
15 code. But if you understood me to say that we have hard
16 copies of it, I didn't intend to say that. That would be a
17 huge printout.
18 Q. I didn't mean to say you printed it out. I mean
19 you have access to the actual source code?
20 A. Okay. I understood you to mean by hard copy we had
21 a printout of the system.
22 Q. No. Why did Novell have the source code of the
23 SVR4-386?
24 A. I don't know why we wouldn't.
25 Q. Novell transferred all copies of its source code

1 for UNIX and UnixWare to Santa Cruz in 1995; correct?

2 A. There is a license of technology back to Novell.
3 The technology license agreement. It was contemporaneous with
4 the asset purchase agreement. So -- there are certain bounds
5 on the license, but we're perfectly entitled to have copies of
6 the pre APA SVRX according to the terms of that license
7 agreement.

8 Q. Now you identified 21 OpenSolaris filings that you
9 found; correct?

10 A. Yeah. There were 21 that we talked about today.

11 Q. And all of those files are in UnixWare 1; correct?

12 A. I don't know whether they're in UnixWare 1.

13 Q. You did not look at that, did you?

14 A. I did not look at that.

15 Q. Now, you testified, Mr. Jones, your views as to
16 what money Novell is entitled to under the Sun agreement in
17 2003. Do you recall that?

18 A. Yes.

19 Q. And you said you didn't think that the 2003 Sun
20 agreement was a customarily license agreement. Do you recall
21 that?

22 A. I think I said -- I can't recall -- that may have
23 been the question. I think what I said it was extraordinary.
24 I can't recall if I said, used the words, it's not customary.
25 But I do recall using the word extraordinary.

1 Q. The 1994 Sun agreement was extraordinary, as well,
2 wasn't it?

3 A. Yeah. I'd say it's not a typical agreement. It's
4 a buyout of source code rights. Buyout, excuse me, of source
5 code royalty obligations.

6 Q. Now, Novell seeks all 10 million that was paid for
7 the 2003 Sun agreement?

8 A. Yes.

9 Q. The 2003 Sun agreement does provide some broad
10 rights with respect to UnixWare; correct?

11 A. Yes.

12 Q. And you asses no value to that UnixWare license;
13 correct?

14 A. No. As I stated, there has been no value specific
15 to the UnixWare portion suggested by SCO. And given the
16 relationship between Novell and SCO in this regard and SCO
17 being the fiduciary and no value being, having been assigned
18 by SCO, I conclude that we're entitled to all of it.

19 Q. So your view is the only reason that Novell is
20 entitled to all of it is because SCO hasn't suggested an
21 apportionment?

22 A. Well, I don't think that -- you know, there would
23 have to be some legitimate apportionment established, and one
24 has not even been suggested.

25 Q. But your view is the most important thing to look

1 at to determine whether there's been incidental licensing is
2 in terms of the agreement; correct?

3 A. Well, let me see here. I mean, obviously what
4 we've talked about is the facts and circumstances and the
5 terms and conditions both mattering, having to look at all of
6 it. And so in my deposition you asked me the question, I said
7 one was more important than the other, and today I said the
8 other is more important. They're both important. They're all
9 important in understanding the agreement. I don't truly know
10 that gets us anywhere by trying to say one is more important
11 than the other. But the circumstances, the facts and
12 circumstances, the terms, all of those need to be considered.

13 Q. One can't reasonably review the 2003 Sun agreement
14 and conclude that no money was paid for the broad UnixWare
15 license; correct?

16 A. I don't think one can conclude that the monies paid
17 were not to some extent in consideration with the UnixWare
18 related rights. But I have no way of knowing how much of it
19 was for that.

20 Q. Your view is SCO should forfeit whatever money it
21 might be entitled to because it hasn't suggested a specific
22 apportionment; right?

23 A. In light of the fiduciary relationship that exists
24 between the parties and the fact that SCO executed this
25 without Novell's approval and involvement and SCO has not been

1 forthcoming with some suggestion as to what the value should
2 be for the UnixWare portion, yes.

3 Q. You think SCO should forfeit the money?

4 A. Well --

5 Q. You just said yes.

6 A. Well, then --

7 Q. So that's your answer.

8 A. Well, I guess forfeit the money is a
9 characterization.

10 Q. You're an attorney. I've asked you a question.
11 What's your view? Is it forfeiture?

12 A. What my view is is that there's no reason Novell
13 should forfeit any of the monies itself given the position
14 that Novell is in, given that Novell was excluded.

15 Q. That begs the question, doesn't it? We were here
16 to determine who gets what, what the relative value is of this
17 license.

18 A. Absolutely. And, of course, as I've expressed and
19 you certainly are going to disagree with me, that from my
20 perspective, given the fiduciary relationship and all the
21 factors that I've described, that if there's a party that's at
22 risk of forfeiting or foregoing some consideration as between
23 Novell and SCO, it should be SCO.

24 Q. Section 3 of the Microsoft agreement is the
25 UnixWare license; correct?

1 A. Yes.

2 Q. It was \$7 million worth of the UnixWare license;
3 correct?

4 A. You know, I just know there's money there. I have
5 not memorized the payment amounts for each section of that
6 agreement.

7 Q. The Sun UnixWare license is broader than the
8 Microsoft UnixWare license, isn't it?

9 A. I haven't looked at the two in those terms.

10 Q. Well, you testified at some length in your direct
11 examination about how much thought you've put into this. The
12 Section 3 Microsoft license is narrower than -- Section 3
13 license of Microsoft UnixWare is narrower than Sun's UnixWare
14 license; correct?

15 A. Is the question whether I said that before or
16 whether that's a fact?

17 Q. No. I'm asking you a yes or no question right now.

18 A. Right now. Well, the elements of a license in its
19 breath I think are the technology that are licensed and the
20 rights that are conferred. And the rights that are conferred
21 in the Sun agreement I can't imagine more expansive rights
22 than those. I haven't looked at the Sun agreement and the
23 Microsoft agreement side by side to see if there's any
24 meaningful distinction in the technologies that are
25 identified. So I simply haven't looked at the agreement from

1 that perspective. I haven't thought of it that way.

2 Q. You're not able as you sit here to compare the
3 scopes of the UnixWare license of Microsoft 2003 to the scope
4 of the UnixWare of Sun in 2003; that's your testimony?

5 A. Are you asking me to do that now?

6 Q. I'm asking you --

7 A. I have not done it before.

8 Q. How could you not have done that and apportion any
9 value to the Sun license?

10 A. For the reasons that I've stated before.

11 Q. The UnixWare license in the Sun agreement is worth
12 at least \$7 million, isn't it? Wouldn't it follow from the
13 act of the Section 3 UnixWare license in Microsoft was for
14 \$7 million?

15 A. I have not, you know, come here today having
16 attempted to made any specific valuations, just as SCO has not
17 offered any specific valuations. And my position as between
18 Novell and SCO is it's incumbent on SCO to do that. And if
19 they haven't done it, then they're the ones that should bear
20 the risk of foregoing consideration.

21 Q. But you concede that if you're wrong about that
22 point, if you're wrong about that burden that you think
23 applies to SCO, then there is value to the UnixWare components
24 in the Sun agreement. That is your view, isn't it?

25 A. Can you say that again?

1 Q. If you're wrong about your argument that SCO should
2 forfeit the value of any UnixWare license in the Sun
3 agreement, if you're wrong about that, there is value to the
4 UnixWare Sun agreement, isn't there?

5 A. I don't understand what you're saying. There's
6 value to the UnixWare --

7 Q. Are you suggesting that Sun take no money, no
8 consideration for the broad UnixWare license it received in
9 2003?

10 A. I'm just confused because the whole agreement
11 characterizes the UnixWare agreement. And you're specifying
12 the UnixWare portions?

13 Q. I understand Novell's position to be that there's
14 at least a broad UnixWare license in the Sun agreement. I
15 understand that Novell takes the position, that there's more
16 than that as well. And SVRX components. Are we on the same
17 page?

18 A. No. Where I got disconnected from you is that you
19 said that the Sun UnixWare license. And what I've heard SCO
20 do is it characterize the entire agreement as a UnixWare
21 license. And you just asked me if there's value associated
22 with it. And I think, well, yeah, Sun paid for it. So I
23 wasn't sure if you were asking about the entire agreement.

24 Q. I'm asking just about what you regard as the
25 UnixWare portion.

1 A. The UnixWare portion? Yeah. I've never said --
2 I'm drawing some conclusion that there's no value in the
3 UnixWare related rights that are conferred. But the question
4 is, how do you establish some valuation for apportionment
5 purposes? And SCO has not provided anything on that. And
6 again, under those circumstances, I feel Novell's entitled to
7 conclude that that money should be Novell's, and Novell should
8 not be required to forfeit something here.

9 Q. Your view that Novell gets all the money, the
10 10 million, is based on a legal argument; correct?

11 A. Well, it's based on -- legal arguments don't exist
12 in a vacuum. It's based on the factual circumstances and the
13 legal arguments arising out of the fiduciary relationship that
14 exists between the two parties.

15 Q. Your view that Novell gets everything is not based
16 on an objective assessment of what was paid for the rights in
17 the 2003 Sun agreement, is it?

18 A. It's not -- it does not reflect any type of
19 economic valuation or analysis or anything of that nature.

20 Q. I want to turn back to your discussions with SCO in
21 the fall of 2002.

22 A. Okay.

23 Q. I won't be much longer.

24 Exhibit 400, Mr. Jones. It should be in that book.

25 THE COURT: This is SCO 400?

1 MR. NORMAND: Yes, Your Honor.

2 THE WITNESS: Yes. I've got it.

3 Q. BY MR. NORMAND: Now, at the time of these
4 discussions with Mr. McBride, Novell had no interest
5 whatsoever in supporting any UNIX infringement claims against
6 end users of Linux; correct?

7 A. Yes. I think that's correct. And that's what our
8 executives advised me.

9 Q. Novell's efforts were prioritized in other places;
10 correct?

11 A. Well -- I guess I just say yes, just by virtue of
12 the fact that this didn't have priority. So....

13 Q. Now, at the time of these discussions Novell was
14 fully moving in the direction of being involved in Linux;
15 correct?

16 A. That's correct.

17 Q. And you didn't say that to SCO in these
18 discussions; correct?

19 A. No. I mean, to me I think we had acquired Zimeon
20 at that point, which is the Linux desktop company. So that
21 was public knowledge. And any other information that I had
22 about Novell's investigations would have been confidential, so
23 no.

24 Q. You didn't raise any objections with respect to the
25 perspective licenses that Darl had mentioned; correct?

1 A. I did not understand the licenses that would be
2 granted.

3 Q. You understood --

4 A. Darl, he came to me requesting help with due
5 diligence and assessing what SCO's rights would be. I
6 confided that once they understood what their rights would be,
7 they would act accordingly. So not having known the terms
8 that would have been offered to people in any such program or
9 any agreement and also just understanding that SCO seemed to
10 be investigating intellectual property rights to understand
11 the bounds what they might properly do, I don't think there
12 was any need for me -- I don't know what I would have objected
13 to.

14 Q. He specifically told you that they were concerned
15 about the use of UNIX code and use of UNIX code by Linux end
16 users; correct?

17 A. That's right.

18 Q. What did you understand UNIX code to be?

19 A. At that point I wouldn't know.

20 Q. Didn't think about it?

21 A. There wouldn't be -- as has been discussed, there
22 is a wide variety of UNIX code that's been developed over the
23 years. So how would I know what specific code he would be
24 discussing? He did mention -- the one specific thing that
25 Darl mentioned was the library. But I couldn't understand,

1 you know, in the vast scheme of things, you know, where that
2 would factor in or under what terms it would be offered or --
3 you know, my information was very scant.

4 Q. But you knew it concerned Linux and UNIX; correct?

5 A. That I knew.

6 Q. And Novell's position is that it retained
7 substantial rights in the UNIX business; correct?

8 A. We have substantial rights in pre-APA SVRX. UNIX
9 would be a pre-APA SVRX as a subset of UNIX. So when someone
10 says they're going to do something with UNIX, I cannot know if
11 they're taking about something that would implicate Novell's
12 interest or not.

13 Q. And you understood SCO to be contemplating a
14 program on its own; correct?

15 A. Yes. On its own -- well, what do you mean by, on
16 its own?

17 Q. You understood that SCO was interested in pursuing
18 its own efforts against Linux end users; correct?

19 A. Yeah. I guess I just need not to jump to a
20 conclusion here. They were asking for Novell's cooperation
21 and assistance to the extent of helping them identify
22 documents or due diligence purpose and things of that nature.
23 And, of course, they had questions about the terms of the
24 earlier agreements. And whether or not they had any
25 involvement with third parties was something I had no

1 knowledge of. So I was hasty to say they were going alone.
2 That was what I just described was the extent of the knowledge
3 that I had.

4 Q. You're not suggesting that Mr. McBride had asked
5 you to be a business partner in pursuing these Linux end
6 users, are you?

7 A. What do you mean by business partner?

8 Q. It was SCO's effort and they were asking for due
9 diligence support from Novell; right?

10 A. Yeah. The nature of the cooperation, and, you
11 know, partnering covers a wide variety of activities. So
12 Mr. McBride suggested, as he explained earlier here today, you
13 know, hey, Novell, if you help support us in some way, what we
14 intend to do that could have some business benefit to you.
15 And so, Novell, what we want of you is to help us do due
16 diligence. We think that will help support our efforts.

17 So is that partnering? I think that's some form of
18 partnering. But that's the extent of what Mr. McBride
19 explained to me. He didn't explain something beyond that to
20 me or suggest something beyond that.

21 Q. This is Exhibit SCO 87, Your Honor.

22 THE COURT: Okay.

23 Q. BY MR. NORMAND: Mr. Jones, I want to go back to a
24 couple of letters that we discussed. In 1996, you were
25 employed by Novell; correct?

1 A. Yes.

2 Q. Now, in 1996, Novell informed its customers and
3 business partners that Novell had transferred its existing
4 ownership interest in all releases of UNIX and UnixWare to
5 Santa Cruz; correct?

6 A. Could you say that again? I was looking at the
7 document, and you were speaking.

8 Q. I said in 1996 Novell represented to its customers
9 and business partners that it had transferred its existing
10 ownership interest in all releases of UNIX and UnixWare to
11 Santa Cruz; correct?

12 This paragraph that is Attachment A. You can go to
13 Attachment A.

14 A. I guess the only liberty -- I mean, this letter was
15 sent. I simply don't have the personal knowledge of how
16 extensively it was sent, but I think you said its customers.
17 So I don't know how many -- I just don't know how many
18 customers received it. But this letter does reference in this
19 exhibit all releases of UNIX System V and prior releases of
20 the UNIX system. And the letter would be inconsistent, of
21 course, with the asset purchase agreement.

22 Q. But Novell did make these representations to
23 Prentice-Hall; correct?

24 A. It's sent -- well, you know, again, I assume
25 Prentice-Hall received it, Novell wrote this in a letter to

1 Prentice-Hall by an Novell employee.

2 Q. Novell said that it was assigning its right under
3 its agreements that concerned those releases; correct?

4 A. If this letter says that, it's inconsistent with
5 the asset purchase agreement.

6 Q. Let's go to Exhibit 411.

7 THE COURT: SCO 411?

8 MR. NORMAND: Yes, Your Honor.

9 Q. BY MR. NORMAND: This is a letter from Mike DeFazio
10 to SunSoft. Do you know what SunSoft is?

11 A. I thought it was a software division of Sun.

12 Q. You're correct.

13 A. Okay.

14 Q. And Novell specifically told Sun that Novell had
15 transferred its existing ownership interest and all releases
16 of UNIX and UnixWare; correct?

17 A. This letter says that, and it's inconsistent with
18 the APA.

19 Q. Who signed this letter?

20 A. Michael J. DeFazio.

21 Q. What was his position?

22 A. I don't know his precise title, but he was -- I
23 know he had significant responsibilities for Novell's UNIX
24 business. You know, I regard him as having headed it up,
25 really, at certain points in time.

1 Q. Was he head of the organization within AT&T and USL
2 and later Novell responsible for product management, marketing
3 and licensing terms and conditions for UNIX from 1984 to 1995?
4 A. I don't know what you're reading. It sounds
5 plausible. It's obvious I don't come in here with that
6 specific knowledge in my mind. But that sounds plausible.
7 Q. But you think he was wrong about what he said?
8 A. Yes.
9 MR. NORMAND: SCO 136.
10 Q. BY MR. NORMAND: There is a SCO -- what number is
11 this?
12 MR. ERIC WHEELER: 136.
13 MR. NORMAND: 136, Your Honor.
14 Q. BY MR. NORMAND: This is a similar letter to
15 Microsoft; correct?
16 A. Just a second.
17 MR. NORMAND:
18 Your Honor, I don't think there's a stipulation as
19 to this document, so I move for its admission.
20 THE COURT: 136.
21 MR. MELAUGH: No objection.
22 THE COURT: Well, it's on the list, isn't it?
23 THE CLERK: It is not on the list.
24 THE COURT: 136. It's on my list.
25 SCO Exhibit 136.

1 THE CLERK: I don't have a 136 on mine, on my list.

2 THE COURT: Well, I'll admit it. It's on my list.

3 (Whereupon, SCO 136 was received.)

4 MR. NORMAND: Thank you, Your Honor. We'll cure
5 the confusion.

6 Q. BY MR. NORMAND: Now, in these letters, Mr. Jones,
7 Novell was telling people to deal directly with Santa Cruz;
8 correct?

9 A. I've been reading the other part of the letter. So
10 just a second.

11 (Time lapse.)

12 Q. BY MR. NORMAND: Have you had a chance to review
13 the document?

14 A. Yes. Yes. It's consistent with what you said.
15 These are -- it's informing the parties that the contracts
16 have been assigned to SCO. So in effect that they should, you
17 know, they should be dealing with SCO then.

18 Q. And Novell told Sun and Microsoft that; is that
19 correct?

20 A. SunSoft and Microsoft.

21 Q. My colleagues remind me that when we went down with
22 the system, I was on one of your e-mails.

23 A. Okay.

24 Q. Your infamous e-mails.

25 A. Infamous.

1 MR. NORMAND: This is still 399, Your Honor.

2 Q. BY MR. NORMAND: Do you have that e-mail in front
3 of you, Mr. Jones?

4 A. Hang on just a second. Tab -- this is Exhibit --
5 yeah, I've got this.

6 THE COURT: SCO 399.

7 THE WITNESS: Right. Thanks.

8 Q. BY MR. NORMAND: Let me know when you've had a
9 chance to review it.

10 A. Okay.

11 (Time lapse.)

12 THE WITNESS: Okay.

13 Q. BY MR. NORMAND: Thank you, Mr. Jones.
14 You said on December 4th, 2002, that you and Mr.
15 Wright had returned a phone call from Mr. McBride; correct?

16 A. Yes.

17 Q. And you said that Darl reiterated his request from
18 Novell's assistance, and then he informed us that next week
19 SCO will announce a Linux licensing program; correct?

20 A. Correct.

21 Q. That's an accurate statement; correct?

22 A. I believe so.

23 Q. In your review of this document, have you had seen
24 any statements that you made that you think are inaccurate?

25 A. That I made that are inaccurate?

1 Q. Correct.

2 A. I think the only thing I might take issue with is
3 my poor writing in the second sentence of the fourth paragraph
4 where I talk about potential increase of the declining
5 \$8 million revenue stream.

6 Q. But the rest of your statements in the e-mail you
7 believe are accurate?

8 A. Yeah. And I think, as Mr. McBride was saying, I
9 think he was just suggesting that the decline would slow, not
10 that there would be some substantial increase or something of
11 that nature.

12 MR. NORMAND: May I approach, Your Honor?

13 THE COURT: Yes.

14 Q. BY MR. NORMAND: I hand you two last documents,
15 Mr. Jones.

16 A. Okay.

17 Q. These are Novell 468 and 469. This is a Novell
18 letter to Microsoft from September of 2007; correct?

19 A. Well, there are two letters. I'm sorry. We were
20 on --

21 Q. I'm sorry. I'm on 468.

22 A. Okay.

23 Q. And 469 is a letter to Sun.

24 A. Yeah.

25 Q. And the content of the letter is the same; correct?

1 A. I don't know.

2 Q. Let's do 468.

3 A. Okay.

4 Q. Have you seen this letter before?

5 A. I think I have. I've seen so many documents. But

6 I believe I've seen it.

7 Q. In this letter, Mr. LaSala, who was general counsel

8 at the time; correct?

9 A. Yes.

10 Q. Tells Microsoft, quote:

11 We believe that the 2003 agreement is

12 unenforceable, void or invalid, and hence that

13 there may be copyright issues arising out of

14 Microsoft's use of UNIX or UnixWare code in which

15 Novell retains copyright ownership.

16 Do you see that line?

17 A. Yes.

18 Q. Does that statement reflect Novell's position

19 today, as well?

20 A. Yes.

21 Q. Exhibit 469 is a letter to Sun. And it contains in

22 bottom third of the letter the same statement; correct?

23 A. I think they're not quite identical. But you're

24 asking if that still reflects Novell's position? That's the

25 question?

1 Q. Right.

2 A. I believe so.

3 MR. NORMAND: Nothing further, Your Honor.

4 THE COURT: Pardon me?

5 MR. NORMAND: Nothing further.

6 THE COURT: Thank you, Mr. Normand.

7 Anything else, Mr. Melaugh?

8 MR. MELAUGH: Your Honor, we have no further
9 questions of this witness.

10 THE COURT: Thank you, Mr. Jones. You may call
11 your next witness.

12 MR. JACOBS: Your Honor, we have no further
13 witnesses. We have a couple of exhibits to move into
14 evidence. And we would request the opportunity to just check
15 this evening against the exhibits that we looked at to make
16 sure that they were either part of the stipulation or we moved
17 them into evidence.

18 THE COURT: What exhibits are you talking about?

19 MR. JACOBS: So 430, Novell Exhibit 430 is the
20 letter to the Arbitral Tribunal in which SCO stated that it
21 had no further claims after this Court's copyright decision.

22 THE COURT: This is Novell 430.

23 MR. JACOBS: Correct.

24 THE COURT: Any objection?

25 MR. SINGER: No objection.

1 THE COURT: 430 is received.

2 (Whereupon, Novell Exhibit 430 was received.)

3 MR. JACOBS: And Novell Exhibits 468 and 469 are
4 the two exhibits that you just saw in the examination of
5 Mr. Jones. The letters from last September to Microsoft and
6 Sun.

7 THE COURT: You want them in twice?

8 MR. JACOBS: No. He did not move them into
9 evidence.

10 THE COURT: Didn't he? I thought he did.

11 MR. NORMAND: I missed the reference to the
12 exhibits number. I'm sorry.

13 THE COURT: It's SCO.

14 MR. JACOBS: No. I believe it's Novell.

15 THE COURT: Novell 468 and 469.

16 MR. NORMAND: I would like to move them into
17 evidence. Thank you.

18 THE COURT: I thought you would. 468 and 469 are
19 received.

20 (Whereupon, Novell Exhibits 468 and 469 were received.)

21 MR. JACOBS: And then if we may, Your Honor, just
22 check, we don't know of anything we left out. But we would
23 like to check this evening on whether there were any further
24 exhibits.

25 THE COURT: We'll check at the end of the trial, as

1 well, for both of you. All right.

2 MR. JACOBS: Otherwise we rest, Your Honor.

3 THE COURT: Thank you.

4 MR. SINGER: Your Honor, we would like to move at
5 this time for an involuntary dismissal of these claims. I'm
6 not going to ask to argue at this time, but argument on a
7 certain basis later today. But we simply would like to do so
8 on the basis of all the papers that have been submitted
9 including arguments in our trial brief and proposed findings.

10 THE COURT: All right. And I'll take those motions
11 under advisement.

12 And you may call your first witness.

13 MR. SINGER: That is John Maciaszek.

14 THE COURT: You want this on the record? Because
15 we can't hear you if you do.

16 MR. SINGER: We would like to put on the record
17 reserving the right to using these blowups used in the
18 openings with any witnesses that will be called tomorrow. We
19 won't use them with Mr. Maciaszek today.

20 THE COURT: You will not today?

21 MR. SINGER: I don't think we'll need them with
22 Mr. Maciaszek.

23 THE COURT: All right. Well, that almost gives you
24 your 24-hour notice.

25 Come forward and be sworn, please. Right here in

1 front of the clerk of court. Right there. That will be good.
2 Thanks.

3 THE CLERK: Please raise your right hand.
4 JOHN MACIASZEK,
5 called as a witness at the request of SCO Group,
6 having been first duly sworn, was examined
7 and testified as follows:

8 THE WITNESS: I do.

9 THE CLERK: Thank you. Please take the witness
10 stand right there.

11 Please state your name and spell it for the record.

12 THE WITNESS: John Maciaszek, M-A-C-I-A-S-Z-E-K.

13 THE CLERK: Thank you.

14 DIRECT EXAMINATION

15 BY MR. SINGER:

16 Q. Good afternoon, Mr. Maciaszek.

17 A. Good afternoon.

18 Q. When were you first employed by AT&T or any company
19 involved in the UNIX business?

20 A. Well, I started in AT&T back in 1966. The UNIX
21 business portion was when I moved into USL in December of
22 1991.

23 Q. So that's when you would date back your beginning
24 of involvement with UNIX?

25 A. Centrally, yes. Before that I had peripheral

1 interactions relative to it on other product lines.

2 Q. When you started with USL, UNIX System Labs, in
3 1991, what were your responsibilities?

4 A. I had product management responsibility for some
5 components of the operating system business, as well as
6 ultimately responsibility for the interaction between USL,
7 Novell and the joint venture Univell.

8 Q. Did there come a time when your employment changed
9 either to a new company or your responsibilities changed?

10 A. Fundamentally I've been a product manager ever
11 since joining USL, all the way through the changes through
12 Novell and through Caldera and back to SCO again.

13 Q. Has products for which you have managed include the
14 UNIX System V products?

15 A. Yes.

16 Q. And do they include UnixWare?

17 A. Yes.

18 Q. What is your current employment?

19 A. I'm currently employed by SCO on a part-time basis.
20 I'm sort of semiretired at the moment.

21 Q. Where do you live?

22 A. I live in Marlboro, New Jersey.

23 Q. And have you worked consistently in New Jersey on
24 AT&T and UNIX System Labs and so forth?

25 A. Yes. Yes. I was born in New Jersey, and except

1 for my time in the Army, I lived there all my life.

2 Q. Mr. Maciaszek, was there a time when you worked for
3 Novell?

4 A. Yes.

5 Q. What was that time period?

6 A. It was a time period when Novell acquired USL from
7 AT&T. And during -- I was there during that entire duration
8 before the sale to Santa Cruz.

9 Q. Were your responsibilities the same?

10 A. Essentially the same, yes. I was product manager.

11 Q. And when the sale occurred to Santa Cruz, did you
12 go over to Santa Cruz?

13 A. Yes, I did.

14 Q. And did you continue with those responsibilities?

15 A. Yes.

16 Q. And similarly forwarded to SCO?

17 A. Yes.

18 Q. Was there a licensing group that was at Novell at
19 the time that the asset purchase agreement was entered into?

20 A. Yes, there was.

21 Q. And what happened to that licensing group or most
22 of the members of the group after the agreement was executed?

23 A. They basically moved over to SCO. I believe
24 everybody with possibly one or two exceptions moved to
25 Novell -- I mean to SCO.

1 Q. They moved from Novell to SCO?

2 A. That's right.

3 Q. Did they continue with the licensing of UNIX for
4 Santa Cruz?

5 A. Yes, they did.

6 Q. And you remained part of that group?

7 A. Well, I was not in the licensing group. But in
8 product management. And obviously I had responsibilities to
9 interact with the licensing group to put together the
10 schedules.

11 Q. Can you explain what the Santa Cruz UNIX licensing
12 group did?

13 A. They were responsible for the legal aspects of new
14 schedules that got put together for new product offerings.
15 I'm talking in this case about source code products. Plus
16 they were responsible for all the contracts that were
17 negotiated with customers for both binary and source and
18 interacted with all the sales organizations worldwide.

19 Q. What is UnixWare?

20 A. What is UNIX or UnixWare is the latest, depending
21 on the number you want, it's -- what is UnixWare. The next
22 release of UNIX System V that we offer in both binary package
23 format today as well as potentially source licenses for it.

24 Q. Are you familiar with SVR4.2 MP?

25 A. Yes.

1 Q. What does that stand for?

2 A. That's System V Release 4.2 multiprocessing
3 version.

4 Q. How did that relate to UnixWare?

5 A. Well, that was the predecessor to UnixWare 2.
6 UnixWare 2 essentially contains the bulk of SVR4.2 MP, plus
7 some additional user interface code that was built on top of
8 that.

9 Q. What does the MP mean?

10 A. Multiprocessor. That's today's technology.
11 Typically all the computers you see today have more than a
12 single processor in it.

13 Q. Is that important?

14 A. That contains the code that enables the operating
15 system to support those multiprocessors.

16 Q. Is that an important development?

17 A. Absolutely. I mean, there were very few today even
18 at the desktop level that you buy with -- having only a single
19 processor.

20 Q. You mentioned after SVR4.2 MP you had UnixWare 2?

21 A. Yes.

22 Q. Was there a UnixWare 1?

23 A. Yes. UnixWare 1 was actually based on SVR4.2, no
24 MP, which was a single processor version of the operating
25 system. And UnixWare 1 was produced as part of the joint

1 venture of Univell and USL. Univell did some work on the user
2 interfaces. Novell added some code with respect to the
3 NetWare, and then the product was sold, was initially sold as
4 a packaged product. The initial units were packaged products
5 by Univell.

6 Q. Was UnixWare 2.0 the first multiprocessing version
7 of UnixWare?

8 A. That's correct.

9 Q. Now, did the versions of UnixWare build on the
10 earlier System V UNIX code?

11 A. Yes, of course.

12 Q. And after -- at the time of the APA, did you have a
13 transfer of the UnixWare business to Santa Cruz?

14 A. Yes.

15 Q. And did Santa Cruz continue in development and
16 release of its own versions of UnixWare?

17 A. Yes, it did.

18 Q. Did it make any modifications to the UnixWare
19 operating system?

20 A. Every new version contains modifications to support
21 new hardware, support new features that were needed by the
22 more modern applications that were coming to the market.

23 Q. And you also were employed at the time in 2001 when
24 Santa Cruz sold its business to Caldera?

25 A. Yes, I was.

1 Q. And what happened to the UNIX licensing group at
2 that time?

3 A. That crew moved, as far as I can recall, lock,
4 stock and barrel to Caldera.

5 Q. And your involvement continued throughout?

6 A. Yes, that's correct.

7 Q. Okay. Now, at Novell, with respect to UnixWare,
8 did you have any involvement in the negotiation or oversight
9 of UnixWare licenses?

10 A. Yes.

11 Q. Can you explain what your responsibility was?

12 A. As a product manager, my recollection is that I was
13 involved in putting together the UnixWare 2 license, to model
14 it so that it paralleled our package product introducing what
15 the discount structure would be.

16 Q. Can you describe generally what a UnixWare license
17 provided at that time?

18 A. The UnixWare license provided access to the source
19 code of the corresponding package product and would enable an
20 OEM or other licensee to construct an identical product to
21 what we were shipping as packaged product or to use the source
22 code to produce a version of UnixWare that would run under
23 alternate architecture. The products that we were selling
24 then and continue to sell now are targeted at the Intel
25 market. But at that time, there clearly were other chipsets

1 that were in the marketplace. And a licensee of that source
2 code could produce a version that would run on those alternate
3 architectures.

4 Q. Let me go over that a little bit and make sure I
5 understand the set.

6 There were some SCO UnixWare products that were
7 just sold out to the market; is that correct?

8 A. The packaged product, yeah.

9 Q. And that would be --

10 A. Excuse me. We're almost out of water here.

11 THE COURT: Just enough for you.

12 THE WITNESS: Right. It looks that way.

13 Q. BY MR. SINGER: Are you ready now?

14 A. Yes.

15 Q. The end user -- the packaged products go to end
16 users; is that correct?

17 A. Ultimately to the end users, yes. We sold through
18 a multi-tier distribution and still do.

19 Q. Now, you mentioned you also licensed source code to
20 OEMs, original equipment manufacturers; is that right?

21 A. Right. Those are computer manufacturers.

22 Q. And your point was they could use that to develop
23 their own type of operating system based on that source code
24 and sell those products?

25 A. Right. They would either modify it because they

1 had a different central processing architecture or they would
2 need to make improvement so that it would perform best on
3 their hardware over and above, you know, other hardware.

4 Q. When you gave one of those OEMs a license to do
5 that with the UnixWare source code, could they use any part of
6 the UnixWare source code for developing their own product?

7 A. Yes, of course.

8 Q. And that would include the System V source code
9 that may have originated back in 1969 or later times?

10 A. Well, whatever was in UnixWare was UnixWare.

11 Q. There was no distinction in terms of what the
12 customer could use?

13 A. No, absolutely not.

14 Q. Now, when you licensed UnixWare and at the time
15 that you were Novell, did Novell grant the customer any
16 license to any older versions of the System V products?

17 A. Well, the standard practice going back to AT&T days
18 was to grant the right to use prior products as part of the
19 new products.

20 Q. And you said that goes back to AT&T days?

21 A. Oh, yeah. Started well before I joined the
22 organization. Go back and look at the SVR1.1 prior, and there
23 were always prior products listed there.

24 Q. Did you obtain --

25 A. Is it okay if I have a cough drop?

1 THE COURT: Sure.

2 THE WITNESS: Thank you.

3 Q. BY MR. SINGER: And if you need more water --

4 A. No. I still got the water. When I talk a lot I
5 tend to cough.

6 Okay. Let's go.

7 Q. Okay. Did you have personal knowledge of that
8 licensing of prior products at the time that you joined UNIX
9 Systems Labs?

10 A. Oh, yes. I mean, I was involved in creating the
11 4.2 license, so I understand very well what the situation was.

12 Q. Were the customers who were given those prior
13 products asked to pay anything extra for the prior products?

14 A. Absolutely not.

15 Q. And is that a consistent practice throughout the
16 time that you have been at Novell and both its predecessor and
17 successor companies?

18 A. Absolutely. I can't remember or recall any
19 occasion where there would be any even thought given to charge
20 them for that.

21 Q. Was there any requirement imposed that you would
22 only give the prior -- the access or right to use prior
23 products to those licensees who had bought for value that
24 earlier version?

25 A. No.

1 Q. That's not something you looked into?

2 A. No. Absolutely not. That was part of the standard
3 license in general. We use the same license for all licensed
4 users.

5 Q. Now, when the original equipment manufacturer
6 entered into a license, what types of fees did they pay?

7 A. Well, there would be a fee for the software
8 agreement, a fee for the sublicensing agreement and a fee for
9 the individual schedules or the individual licensees with
10 particular releases of the product.

11 Q. Was the fee for the actual source code, was that a
12 one-time fee or something that would recur?

13 A. It was a one-time fee.

14 Q. And then you mentioned there would also be a fee
15 for distribution?

16 A. That's right. The sublicensing fee.

17 Q. Was that also a one-time fee?

18 A. It in effect became a one-time fee. It was listed
19 each time. But if somebody already had one, we typically
20 didn't charge them again.

21 Q. Was there a third source of fees or royalties
22 involved?

23 A. Well, the most obvious fee and the most generic was
24 the one when you distributed the products there would be a
25 royalty or per copy fee that was paid for each copy of the

1 product, the derivative work that was distributed.

2 Q. Is that sometimes referred to as a binary fee?

3 A. Binary per copy fee, right.

4 Q. And what does the binary refer to?

5 A. Well, it is non-source. In essence, it's a running
6 pro product that has been created when compiling, linking
7 source code into a binary. In essence, think about the CD
8 that you put in when you install Windows. That's a binary
9 product. You don't get the source code to Windows.

10 Q. And that fee, of course, would vary depending on
11 how many products were sold?

12 A. There was a discount schedule, and also it would
13 depend on what release you were shipping. Over the historical
14 time the fees tended to go up as time marched on.

15 Q. Now, I'd like to show you Exhibit 141. This is
16 SCO 141.

17 May I approach the witness, Your Honor?

18 THE COURT: Yes.

19 Q. BY MR. SINGER: Mr. Maciaszek, do you recognize
20 this exhibit?

21 A. Yeah. This looks to me like a 2.1 schedule for the
22 UnixWare 2.1.

23 Q. You see a customer name on the second page?

24 A. Right. NCR.

25 Q. Okay. And was this a license for UnixWare 2.1

1 source code?

2 A. That is correct.

3 Q. Now, if you turn to Exhibit I, prior products on
4 Page 24 --

5 A. Okay. I'm there.

6 Q. Okay. Is this a list of prior products which NCR
7 was given rights to use in connection with this license?

8 A. Yes, that is correct.

9 Q. Was any additional fee charged to NCR to make use
10 of any of these products?

11 A. No.

12 Q. Was there anything special about this treatment of
13 NCR from what you treated other customers at this time?

14 A. Absolutely not. This is a standard schedule, as
15 best I can tell from looking at it.

16 Q. Did there come a later point in time after this
17 when you stopped listing particular prior products on a
18 schedule?

19 A. Yes. With UnixWare 7.

20 Q. Why was that done?

21 A. Well, the plain thrust there, if you go look at the
22 history, at that time we were primarily in the packaged
23 product business. The majority of OEMs had already downsized
24 and eliminated their engineering organization. So our goal
25 with UnixWare 7 was a standard binary product that would go

1 into the marketplace. Consequently, we didn't add the
2 additional prior products because we wanted to maximize the
3 similarity of all releases of UnixWare.

4 Q. If a customer wanted to use, make some use of a
5 prior product they had had, was that a problem?

6 A. No.

7 Q. Did you charge anything extra for that?

8 A. No. To my knowledge, I don't think anybody -- we
9 actually did -- I don't think we actually modified anybody for
10 that purpose. But had they asked, we would have added the
11 additional prior products without any issue.

12 Q. Do you recall in the period of time that was the
13 way you approached the license whether anyone even asked to
14 use the prior products?

15 A. I don't believe anyone ever did. I'm not -- I
16 certainly can't recall anyone who did.

17 Q. Can you turn to Page 6 of the license, which has
18 Paragraph 10. Can you see the section, perhaps we can blow it
19 up, called the Novell NetWare software?

20 A. Yes, I do.

21 Q. What does that paragraph mean to you?

22 A. Well, NetWare was a component of UnixWare 2. There
23 was some components of NetWare. At that time, Novell had the
24 strategy, not unlike the one I referred to earlier about
25 UnixWare 7, of wanting to make NetWare ubiquitous across all

1 operating systems. So UnixWare 2 contained NetWare
2 components. And in essence, what this is saying is that you
3 had to include -- wait a minute. Let me read this one -- oh,
4 you could only use the source code for NetWare should you
5 choose to license it; in essence, to fix bugs, but not to make
6 derivative work. That was to keep NetWare standards.

7 Q. So this was a limitation on the use of NetWare,
8 which was a Novell product, which was being sold along with
9 the UnixWare?

10 A. Yes, that's correct. If you were a licensee of
11 UnixWare 2.1, we would have delivered to you the complete
12 source code to build that product coupled with some binary
13 components that you couldn't change. NetWare was one of them.
14 There were some other third-party components. NetWare source
15 was licensable as an add-on to the 2.1. I believe if you look
16 at the first page of the schedule there is a separate price
17 for it. This paragraph is constraining what you could do with
18 that source should you choose to optionally license it.

19 Q. Was there any restriction, Mr. Maciaszek, in the
20 license agreement on earlier versions of UNIX software, not
21 talking about NetWare now, but UNIX software that may have
22 been developed by Novell or its predecessors?

23 A. No.

24 Q. So this was specific for NetWare?

25 A. That's correct. NetWare was considered to be the

1 crown jewels of Novell at the time. And I would assume it
2 still is today.

3 Q. Now, when -- you've discussed the fact there was no
4 separate source code licensing fee for including prior
5 products; is that correct?

6 A. That's correct.

7 Q. Now, let's say you have a binary product that one
8 of these companies developed using that source code. Was
9 there a method that was used to determine what royalty scale
10 you would use; in other words, whether the royalty would be
11 calculated by the most recent UnixWare version or an earlier
12 version of the System V code?

13 A. The royalty was always based on the latest source
14 code that was incorporated and used to build the derivative
15 work. So if you were shipping 2.1, you would read this
16 schedule, and it would tell you exactly what you would have to
17 pay.

18 Q. What if you have a derivative work that has some
19 old System V code in it and some more recent versions in
20 UnixWare, how would you determine the royalty in that
21 situation?

22 A. The royalty was the same.

23 Q. What would it be based on?

24 A. Pardon me? It would be based according to this
25 schedule, what we said it was for UnixWare 2.1. That was the

1 whole purpose of the prior products.

2 Q. How much code of UnixWare would there need be to
3 trigger the UnixWare royalty as opposed to one of the older
4 royalties?

5 A. Well, that's the concept. The one-line-of-code
6 concept said if you licensed UnixWare 2.1 and it was the
7 latest release, if you took a single line of code from
8 UnixWare and included it in a derivative work, your derivative
9 work as you distribute it would be subject to the terms,
10 conditions and obviously royalties which were part thereof of
11 the UnixWare 2.1 schedule. So you'd pay based on UnixWare if
12 you took one line of code from UnixWare sources and put it in
13 derivative work.

14 Q. That's why it's called one line of code?

15 A. That's correct.

16 Q. So even if 99 percent of the code in that
17 derivative product was an older System V version, if it was
18 one line of UnixWare, it would trigger UnixWare royalty?

19 A. That is correct.

20 Q. And under the APA, are you aware whether any
21 UnixWare royalties had to be remitted to Novell?

22 A. No UnixWare royalties remitted to Novell. There
23 would have been possibly royalties paid on UnixWare based upon
24 the business model that was part of the APA. But that was
25 never achieved, so we never did pay.

1 Q. You're referring now to the part of the APA which
2 had a special UnixWare royalty?

3 A. That is correct.

4 Q. And that was never achieved, you said?

5 A. As far as I know it was never achieved. And as the
6 product manager I would have been aware if we were paying
7 those royalties.

8 Q. And by achieved, the sales never reached the level
9 that that would be kicked in by?

10 A. That's correct. It was a business plan that was
11 stipulated as part of the APA. And if we achieved certain
12 targets, then some royalties potentially would have gone back
13 to Novell. But that was never achieved.

14 Q. Okay.

15 I have nothing further. Thank you.

16 THE COURT: Thank you.

17 You may cross-examine, Mr. Jacobs.

18 MR. JACOBS: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. JACOBS:

21 Q. Mr. Maciaszek, good afternoon.

22 A. Good afternoon.

23 Q. Could you take a look again at SCO 141, please.

24 A. Is that what I'm looking at now?

25 Q. Yes. That's that NCR license.

1 A. Okay.

2 Q. And if you look at the second line, you see it? It
3 says, supplement Number 112?

4 A. Yes.

5 Q. Can you explain, please, what that means?

6 A. Well, that says to me that there would have been
7 111 prior agreements or supplements that NCR had executed
8 prior to this one.

9 Q. And in each of those 111 prior agreements or
10 supplements, NCR would have paid fees for that supplement?

11 A. I would have assumed -- I would assume so. I can't
12 testify if that's correct since I'm not aware of them.

13 Q. That was -- based on the ordinary license practice,
14 which you testified that you're familiar with, that would be
15 your assumption?

16 A. Yes.

17 Q. So at least in this particular case, this was not a
18 fresh out-of-the-box license of March 31, 1997, of
19 UnixWare 2.1 to NCR with no history to it, was it?

20 A. It was a fresh 2.1. There was clearly interaction
21 and history for NCR's relationship going back all the way to
22 AT&T, obviously.

23 THE COURT: Excuse me. All the way back to what?

24 THE WITNESS: To AT&T when they first licensed
25 their first substantiation of UNIX from AT&T. And I can't

1 tell you what that was.

2 THE COURT: Okay.

3 THE WITNESS: It was before my time.

4 THE COURT: Excuse me, go ahead.

5 Q. BY MR. JACOBS: Take a look, please, sir, at the
6 prior products section of this agreement. I believe you told
7 us it was Exhibit I. This would be Page 77766 on this
8 exhibit.

9 A. Okay.

10 Q. And I believe you testified -- I think you might
11 have just been mistaken about the meaning of Mr. Singer's
12 question. He asked you whether there were any restrictions on
13 the use of the prior products, and you said no. That's not
14 quite right; correct?

15 A. Well, in this particular case, there was a
16 restriction with respect to the corporation of NetWare in the
17 application server and personal edition, if that's what I'm
18 reading.

19 Q. Well, there were restrictions on, for example, the
20 use of SCO UnixWare 2.0 under this license agreement, are
21 there not, sir?

22 A. I think I just said what it was. I said that if,
23 in fact, you deleted NetWare from your derivative work, then
24 you were only able to use 2.0 and 1.1.

25 Q. Let me ask you -- perhaps I could ask it this way,

1 sir. Take a look at prior products, and you see that it says,
2 SCO UnixWare Release 2.0. Do you see that?

3 A. Yes.

4 Q. Was it your understanding under this agreement that
5 the customer was free to publish the source code of SCO
6 UnixWare 2.0 on its website?

7 A. No, absolutely not.

8 Q. Why not? What restricted him?

9 A. I would assume it would have been -- the place that
10 you would find that restriction would be in the software
11 agreement.

12 Q. In the --

13 A. Software agreement.

14 Q. In the software agreement which governs all the
15 software licenses --

16 A. Unless it's superceded, yes.

17 Q. You would be pretty shocked if a customer said, you
18 got the rights to release 2.0. Under a 2.1 agreement, we can
19 do whatever we want with it including publishing it on our
20 website?

21 A. That was not -- that certainly would not be
22 authorized under the software agreement.

23 Q. And publishing the software code on the website
24 would be a big deal in your capacity as a product manager?

25 A. Yes.

1 Q. Why?

2 A. Well, it depends on what you were publishing, what
3 purpose you were publishing it for.

4 Q. You're publishing the entire source code for
5 SCO UnixWare 2.0.

6 A. That would have been a violation of your
7 contractual rights.

8 Q. And substantial injury to the owner of SCO
9 Release -- UnixWare 2.0?

10 A. Yes.

11 Q. And the same with, say, let's pick one,
12 UNIX System V Release 4.2 Intel386 Implementation. Everything
13 you said about SCO UnixWare 2.0 applies to that release, as
14 well; correct?

15 A. Well, it's a matter of greed. The bulk of that
16 stuff was obsolete at the time.

17 Q. If a customer under your tenure as product manager,
18 say when you were at Novell --

19 A. Yes.

20 Q. -- and let's go back a little bit, had published on
21 its website, Internet is just coming into being, and they
22 publish on their website UNIX System V Release 4.0 Intel386
23 the Version 3 implementation, that would have been a big
24 surprise, wouldn't it?

25 A. Yes, it would have been.

1 Q. And it would have been a substantial potential
2 injury to the business you were responsible for?

3 A. Absolutely.

4 Q. Now, you talked about the development practices of
5 the UNIX operating system. You testified that modifications
6 were added over time with each successive release. Do you
7 recall that testimony?

8 A. Yes.

9 Q. And isn't it a fact, sir, that modifications also
10 include deletions of code over time?

11 A. That is correct. Substitutions, as well.

12 Q. And I think in answer to a question from Mr. Singer
13 that was driving at a somewhat similar point, you said,
14 whatever is in UnixWare is in UnixWare. Do you recall that
15 answer?

16 A. Yes.

17 Q. And in order to know whether any particular code
18 from a prior release has been carried forward all the way to
19 the present day, you would actually have to look at the code
20 and compare it, wouldn't you?

21 A. To be definitive, yes.

22 Q. And it's quite possible that code from, say, UNIX
23 System 4.0, pick your release, has been deleted over time and
24 is not in the current version of UnixWare?

25 A. That's correct. It could have been deleted or it

1 could have been substituted or enhanced.

2 Q. And the same is true for, say, UNIX System IV, pick
3 your release, and, say, SCO UnixWare 2.1?

4 A. That's correct.

5 Q. Under the OEM agreements, an OEM licensee could
6 create its own version of UNIX and put its name on it, say,
7 Sun Solaris; correct?

8 A. That's correct.

9 Q. And it is, indeed, your understanding that Sun
10 Solaris is based upon a UNIX System V release; correct?

11 A. That is correct.

12 Q. Do you happen to know which release, sir?

13 A. To be perfectly frank, no, I don't. I have not
14 looked at the Solaris code recently, so I do not know.

15 Q. It is true that Solaris was developed before the
16 1995 asset purchase agreement; correct?

17 A. Yes.

18 Q. And it would not surprise you if you found
19 substantial code predating the asset purchase agreement in Sun
20 Solaris?

21 A. No. It wouldn't surprise me if there were code
22 from the prior release, no.

23 Q. And at any particular point in time, an OEM
24 licensee could stop taking additional releases of UNIX or
25 UnixWare and develop it on its own path; correct?

1 A. That's correct.

2 Q. And, in fact, some OEMs did that; correct?

3 A. Yes.

4 Q. For example, Sun Solaris; correct?

5 A. Yes.

6 Q. They -- in so far as their code refresh, if you

7 will, from any of the UNIX businesses was concerned, it was

8 frozen in time as of the last schedule attached to their

9 software agreement; correct?

10 A. I would have assumed, yes. I think it was 4.0, but

11 I'm not positive.

12 Q. And that code as to Sun, that older code, that is

13 the UNIX code on which then as of that date and going forward,

14 unless they were to sign a new license, they were building

15 their variance on; correct?

16 A. Yes.

17 Q. And --

18 A. I would assume there would be code from other

19 sources, as well. But, yes.

20 Q. You're right. I didn't actually ask that quite

21 precisely enough.

22 In so far as the UNIX code is concerned, once

23 they're frozen in time as of their latest schedule, that is

24 the UNIX code on which they were relying; correct?

25 A. Correct.

1 Q. And as to Sun in that case, that UNIX code has
2 substantial value, doesn't it?

3 A. Well, you'd have to ask Sun that. I mean, I can't
4 answer that question.

5 Q. Well, if you went to them and say, after the asset
6 purchase agreement went to them in 1996 and said, you know
7 what, we want you to strip out all of that UNIX System V
8 Release 4 code from Sun Solaris, what do you think their
9 reaction would have been?

10 A. It wouldn't have been favorable.

11 Q. Because it would have been a substantial injury to
12 their business, would it not, sir?

13 A. Yes.

14 Q. Have you in preparing for your testimony studied
15 any other examples of UnixWare licensing other than the NCR
16 Corporation?

17 A. Studied?

18 Q. Yes.

19 A. No, not to my knowledge. I don't recall studying
20 anything.

21 Q. Have you surveyed the UNIX licenses that SCO and
22 its predecessors have entered into to try and form an
23 understanding whether your testimony today about the practices
24 is, in fact, supported by the actual underlining documents?

25 A. I did not study all licenses, no.

1 Q. Did you study any of the licenses?

2 A. I'm aware of a good number of them.

3 Q. But did you go back and check before you testified
4 today to see whether the documents relating to UNIX licensing
5 practices support your testimony today?

6 A. Probably casually, yes. I don't recall any detail
7 going back over all of those licenses.

8 Q. Thank you.

9 Thank you, Your Honor. No further questions.

10 THE COURT: Thank you.

11 Mr. Singer?

12 MR. SINGER: Just a couple of questions.

13 REDIRECT EXAMINATION

14 BY MR. SINGER:

15 Q. Mr. Maciaszek, if Sun, once they get a UnixWare
16 source code license incorporates one line of that UnixWare
17 program into their new Solaris products, do they have to pay
18 royalties on the binary products based on the UnixWare
19 schedule?

20 A. Yes.

21 Q. Is that an application to what you discussed as the
22 one-line-code rule?

23 A. That is correct.

24 Q. Can you think of any reason why Sun would buy a
25 license from UnixWare if they weren't interested in making use

1 of new technology?

2 A. It doesn't make any sense to me.

3 Q. Now, with respect to the NCR agreement,
4 Exhibit 141, you were asked about the fact that there were a
5 lot of earlier supplements as being 112. Are prior
6 supplements also done whenever there are additional CPUs which
7 are being added to the license to make use of the software?

8 A. Yes, that is correct.

9 Q. Are they done for additional distributions of the
10 software?

11 A. Yes, that is correct.

12 Q. So it doesn't necessarily mean a new release of the
13 operating system?

14 A. Oh, absolutely not. There are all kinds of
15 ancillary products that would end up being on one of these
16 supplement licensing forms.

17 Q. So did NCR's rights to make use of prior software
18 products as set forth in this UnixWare license depend in any
19 way on the fact there were 112 prior supplements?

20 A. Absolutely not.

21 Q. Your answer?

22 A. Absolutely not.

23 MR. SINGER: Nothing further.

24 THE COURT: Thank you.

25 Anything else, Mr. Jacobs?

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MR. JACOBS: No, Your Honor.

THE COURT: I assume this witness may be excused?

MR. SINGER: He may.

THE COURT: You may be excused.

We'll be in recess now until 3 o'clock when you'll
be back to argue the motions.

MR. JACOBS: Great.

MR. SINGER: Can we leave everything as it is, Your
Honor?

THE COURT: Sure.

(Whereupon, the trial proceedings were concluded.)

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

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

6 That as such reporter, I attended the hearing of
7 the foregoing matter on April 30, 2008, and thereat reported
8 in Stenotype all of the testimony and proceedings had, and
9 caused said notes to be transcribed into typewriting; and the
10 foregoing pages number from 207 through 280 and 355 through
11 constitute a full, true and correct report of the same.

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

14 And hereby set my hand and seal, this ____ day of
15 _____ 2008.

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KELLY BROWN HICKEN, CSR, RPR, RMR