

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

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4 _____)
5 THE SCO GROUP, INC., a Delaware)
6 corporation,)
7)
8 Plaintiff and Counterclaim-)
9 Defendant,)
10)
11 vs.)
12)
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14)
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21)
22)
23)
24)
25)
_____)
NOVELL, INC., a Delaware)
corporation,)
Defendant and Counterclaim-)
Plaintiff.)

)Case No. 2:04-CV-139 dak

16 BEFORE THE HONORABLE DALE A. KIMBALL
17 DATE: MAY 1, 2008
18 REPORTER'S TRANSCRIPT OF PROCEEDINGS
19 TRIAL TRANSCRIPT
20 VOLUME III

24 Reporter: REBECCA JANKE, CSR, RMR
25 KELLY BROWN HICKEN, CSR, 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, ESQ.
EIRC M. ACKER, ESQ.
DAVID E. MELAUGH, ESQ.
3625 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105

FOR SCO: BOIES, SCHILLER & FLEXNER LLP
BY: STUART H. SINGER, ESQ.
EDWARD J. NORMAND, ESQ.
JASON CYRULNIK, ESQ.
401 EAST LAS OLAS BLVD, SUITE 1200
FORT LAUDERDALE, FLORIDA 33301

HATCH, JAMES & DODGE, P.C.
BY: BRENT O. HATCH, ESQ.
10 WEST BROADWAY, SUITE 400
SALT LAKE CITY, UTAH 84101

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1 MAY 1, 2008

SALT LAKE CITY, UTAH

2 P R O C E E D I N G S

3 * * *

4 THE COURT: Good morning.

5 ALL ATTORNEYS: Good morning.

6 THE COURT: You may call your next witness.

7 MR. NORMAND: Yes, Your Honor. William

8 Broderick

9 MR. NORMAND: May I approach, Your Honor?

10 THE COURT: Yes.

11 Come forward and be sworn, please, right here
12 in front of the clerk of the Court.

13 WILLIAM BRODERICK,

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 CLERK: Please state your name and spell it
19 for the record.

20 THE WITNESS: William Broderick.

21 B-r-o-d-e-r-i-c-k .

22 DIRECT EXAMINATION

23 BY MR. NORMAND:

24 Q. Good morning, Mr. Broderick.

25 A. Good morning.

1 Q. What is your current position with the SCO
2 Group?

3 A. I'm the Director of Software Licensing.

4 Q. And how long have you held that position?

5 A. Since -- with SCO, since Caldera bought the
6 business from the Santa Cruz Operation.

7 Q. And could you briefly describe your
8 responsibilities in that position?

9 A. I'm responsible for all contract and licensing
10 activities.

11 Q. And how long have you had those
12 responsibilities at SCO?

13 A. Since I moved over to SCO from the Santa Cruz
14 Operation.

15 Q. What did you do at Santa Cruz?

16 A. I did contracts and licensing.

17 Q. How did your responsibilities there compare to
18 your responsibilities at SCO?

19 A. They are exactly the same. I just continued to
20 do the same work with the same people.

21 Q. And what did you do before you were at Santa
22 Cruz?

23 A. I was at Novell.

24 Q. And what were your responsibilities at Novell?

25 A. At Novell, when Novell first merged or bought

1 the UNIX business from USL, I was Manager of Sales
2 Operations, but it was a month or two after Novell bought
3 us, I moved to the contracts group, and then I was the
4 contracts manager.

5 Q. And what were your responsibilities at
6 Novell?

7 A. Contracts and licensing of the UNIX business.

8 Q. What did you do before you went to Novell?

9 A. I was at the UNIX Systems Labs.

10 Q. What did you do there?

11 A. I was Manager of Sales Operations.

12 Q. And what were your responsibilities there?

13 A. I reported to the Vice President of Sales, and
14 I handled the sales compensation plan forecasting; sales
15 compensation plan, forecasting. If issues came up with
16 the sales force, a lot of times I was directed to try and
17 solve those.

18 Q. How have your responsibilities in all those
19 positions pertained to UNIX?

20 A. It was all UNIX.

21 Q. Why is that?

22 A. Well UNIX System Laboratory owned the UNIX
23 technology and the business, and when they merged with
24 Novell, Novell bought that business from Santa Cruz, and
25 we worked in Novell's -- I'm not sure of the exact title.

1 It was the Novell UNIX Group. And then when Novell sold
2 the business to Santa Cruz, we moved into Santa Cruz's
3 legal department and worked contracting UNIX.

4 Q. You were part of the UNIX Group --

5 A. Yes.

6 Q. -- at Novell? What happened to the UNIX Group
7 after the transfer of assets from Novell to Santa Cruz in
8 1995?

9 A. What happened to the UNIX Group?

10 Q. What happened to the UNIX Group?

11 A. The UNIX Group, I think in its entirety, went
12 to Santa Cruz.

13 Q. How did your responsibilities change, if at
14 all, when you went from Novell to Santa Cruz?

15 A. Santa Cruz was doing -- at that time, we were
16 doing more of the packaged product, the binary business,
17 so we were working with not only OEMs that were licensing
18 source code, but we were dealing with distributors, a lot
19 of resellers of the packaged products, and we were doing
20 agreements for those also.

21 Q. What are OEMs?

22 A. OEMs are original equipment manufacturers.
23 They are the computer manufacturers, Hewlett-Packard,
24 IBM, Compac. The people that build the computers are
25 OEMs.

1 Q. How did your responsibilities change, if at
2 all, when the assets went from Santa Cruz to Caldera in
3 2001?

4 A. Well, at Santa Cruz, there were a number of
5 people that did contracts related to the UNIX business,
6 and when I went to Caldera, I won it all.

7 Q. And, at some point, Caldera changed its name to
8 The SCO Group, Inc.; is that right?

9 A. Yes.

10 Q. How did your responsibilities change, if at
11 all, upon that name change?

12 A. Not at all. But there was a period from
13 August, 2002, until April of 2003 where I wasn't an
14 employee of Santa Cruz, I went to another company, but I
15 continued to do consulting with SCL on the contracts, but
16 essentially my responsibilities changed not at all.

17 Q. You mentioned OEMs earlier. What kind of fees
18 or payments did OEMs make for the UNIX products that you
19 have been describing?

20 A. The source code products?

21 Q. Yes.

22 A. There was a one-time fee, right to use fee that
23 paid for the source code, and that gave them the right to
24 put it on an initial designated CPU. And a designated
25 CPU, that's a computer. So they could put the source

1 code on one computer, and then they would -- there were
2 extra fees related to if they wanted additional
3 designated CPU's, if they wanted to put the source code
4 on more copies. Generally, if they wanted the source
5 code on more computers in their development lab, they
6 would pay an additional fee for those.

7 Q. Was the one-time fee a recurring fee?

8 A. No. It was a one-time fee.

9 Q. What kind of recurring payments were made under
10 these contracts the OEMs executed?

11 A. Once they created -- they had rights to modify
12 the source code, and it was generally so the source code
13 would run on their computers. They would -- the source
14 code is human-readable code. It doesn't run a computer.
15 You can see every line of code. You load the source code
16 on to a computer, and you can see every line of code and
17 interact with it and modify it.

18 Once you have got the source code where you
19 want it, you run it through what's called a compiler, and
20 that gives you a binary. And the binary is what will
21 reside on the computer and run it. And that binary is
22 just like if you were to go to an Office Max and buy a
23 copy of Windows, that's a binary. You can't see the
24 code. You can't modify it. You just use it.

25 And every time an OEM sold a copy of that

1 binary, they paid a royalty.

2 Q. And if you want some water, by the way, there's
3 water there right there.

4 We have stopped bringing our own water, Your
5 Honor. We used to do that.

6 THE COURT: I kidded you about that. I didn't
7 mean to necessarily persuade you from doing that.

8 MR. NORMAND: I'm sensitive about that.

9 THE COURT: A sensitive lawyer.

10 Q. Now, in the course of your work at all these
11 jobs, what was the general nature of the product that you
12 were licensing?

13 A. It was UNIX.

14 Q. And any particular version or releases of UNIX?

15 A. When I started with Novell in the contracts, we
16 were still licensing a source code product. I believe we
17 were still licensing UNIX System V, 4.0, Release 4.1 ES,
18 Release 4.2, 4.2 MP, and we started our UnixWare source
19 code. And then, when we moved to Santa Cruz, we started
20 licensing UnixWare in a binary format.

21 Q. What does that mean?

22 A. That's the -- Santa Cruz -- prior to that, we
23 were licensing source code in the OEMs, and the OEMs
24 would create the binary and distribute it. Santa Cruz,
25 prior to buying the UNIX Group, had a UNIX license, and

1 they created their own binary of UNIX for the Intel
2 platform.

3 Q. So, stop there. Santa Cruz had licensed from
4 AT&T some UNIX source code previously?

5 A. Yes.

6 Q. And what had they done with that source code?

7 A. They created their flavor of UNIX, their
8 binary, for an Intel computer.

9 Q. And then Santa Cruz, itself, subsequently came
10 to own the UNIX business?

11 A. Yes.

12 Q. Go on. Sorry.

13 A. Where was I?

14 Q. You were talking about the nature of the
15 products.

16 A. Oh, that's true. Novell was licensing some
17 binaries of UnixWare towards the end of the time that we
18 worked at Novell, and I wasn't involved in that binary
19 side of the business. I got involved in the binary side
20 of the business when we were sold to Santa Cruz. And
21 then I continued to license the binaries to distributors
22 and then the source code to the OEMs.

23 Q. And this SCO Exhibit 390, can you see that on
24 your Monitor, Mr. Broderick?

25 A. Yes, I can.

1 Q. Do you recognize this document?

2 A. Yes.

3 Q. Can you describe what it is?

4 A. This is a -- with the OEMs, they would execute
5 a software agreement which covered the general terms and
6 conditions of their rights to use and protections of the
7 source code product in general. And then, under that
8 software agreement, they would execute supplements, which
9 were the actual licenses to the source code product. And
10 this is an example of Unisys licensing the source code
11 product for UNIX System V For Multiprocessor, Version
12 1.

13 Q. And what is the number on the middle of the
14 page toward the right under "fee?" What does that number
15 represent?

16 A. That's the one-time source right-to-use fee
17 that Unisys paid for the licensing.

18 Q. And the date of this document is 1991; is that
19 right?

20 A. I don't see it. I don't see a date on mine.

21 Q. Turn to the next page.

22 A. October 31, 1999 -- 1991.

23 Q. So this is UNIX System Labs. This is before
24 Novell even owned the UNIX business; is that right?

25 A. Yes.

1 Q. Now, I think you said earlier that Novell,
2 itself, licensed UNIX in the same manner; is that right?

3 A. Yes.

4 Q. SCO Exhibit 27. Do you recognize this
5 document, Mr. Broderick?

6 A. Yes, I do.

7 Q. Can you describe what it is?

8 A. It's a supplement and licensing order form.
9 It's when -- it's for AT&T GIS. And they're licensing
10 source code for UnixWare, Release 1.1

11 Q. And what is the date of this document on the
12 lower Right?

13 A. July 13, 1995.

14 Q. And if we turn to page 27, do you recognize
15 what these are, Mr. Broderick?

16 A. This is a listing of the prior products. It's
17 the lineage of -- this would be the lineage of UnixWare
18 1.1. And when anyone licensed a current release of a
19 source code product, they were given rights to access
20 prior products. And the prior products is really, from
21 this here, it starts off with all prior releases and
22 versions of System V, Release 2.0, so it's all the UNIX
23 releases, starting with AT&T, that went into the growth
24 and development of each new release. So, every time
25 there was a new release, we gave licensees rights to

1 access all the prior releases.

2 Q. Now, how did Santa Cruz's licensing practices
3 compare to Novell's licensing practices?

4 A. Exactly the same.

5 Q. This is SCO Exhibit 371. Do you recognize this
6 document, Mr. Broderick?

7 A. Yes.

8 Q. Would you describe what it is.

9 A. It's a supplement licensing order form where
10 Unisys licensed rights to the source code for UnixWare
11 2.1.

12 Q. And what is the date of the document?

13 A. May 28, 1996.

14 Q. And at this point, Santa Cruz is the owner of
15 the UNIX technology; is that right?

16 A. Yes.

17 Q. And do you recognize what is on page 24,
18 Mr. Broderick?

19 A. Yes. This is the listing of the prior products
20 that we were granting the licensee rights to.

21 Q. And did you say the license is for Unisys?

22 A. This license is for Unisys, and, again, it's
23 the legacy of the UNIX products. In fact, this is
24 UnixWare 2.1. So, from the previous document we looked
25 at, you can see we added UnixWare 1.1 and UnixWare 2.0.

1 Q. And you said this date is 1996?

2 A. Yes.

3 Q. Do you recognize this document, Mr. Broderick,
4 SCO 370?

5 A. Yes. Again, it's a supplement licensing order
6 form where Novell licensed Unisys, the source code for
7 UnixWare 2.01.

8 Q. And what's the date of this document on the
9 lower left?

10 A. November 3, 1995.

11 Q. This is before the Unisys supplement that we
12 just looked at?

13 A. Yes.

14 Q. And do you recognize what's reflected on page
15 26, Mr. Broderick?

16 A. Yes. This is another example of prior products
17 that we granted rights to the legacy products in UNIX.

18 Q. So, why, in the 1996 supplement, did you list
19 these same prior products?

20 A. It was the practice in all current releases to
21 list the prior products because we didn't tailor make the
22 schedules for everybody. And it's a possibility that
23 somebody would take UnixWare 2.0 without having any prior
24 products -- I mean prior licenses for a source code. And
25 for each current release, we wanted to show what the

1 legacy products were that they were getting rights to.

2 Q. When you and the UNIX Group went to Santa Cruz
3 in 1996, why did you use the same licensing approach that
4 Novell had used?

5 A. We were directed to.

6 Q. Who directed you to?

7 A. When we went from Novell to Santa Cruz, we had
8 transition meetings, and we had statements of works
9 because from the time the APA, Asset Purchase Agreement,
10 was signed in December of '95, it didn't close until, I
11 believe it was, February 1, '96. Well, we were still
12 Novell employees at that time, so we had transition team
13 meetings, and they talked about how business was going to
14 go forward and then what we were going to do after we
15 left, when we became Santa Cruz.

16 And part of those transition meetings, there
17 was a statement of works for the contracts people, and
18 our direction was that the only thing we changed on any
19 of the agreements or anything was the change of the name
20 from Novell to Santa Cruz.

21 Q. This is SCO Exhibit 84. Do you recognize this
22 document, Mr. Broderick, at least the first page of it?

23 A. Yes, I do.

24 Q. And is the reference to the SOW in the first
25 sentence of that letter the statement of work you were

1 referring to?

2 A. Yes.

3 MR. NORMAND: Could we go to Bates number
4 1299956.

5 Have you seen that document before,
6 Mr. Broderick?

7 A. Yes.

8 Q. It's a memo, attention to Steve Sabbath. Who
9 was Steve Sabbath, as of November 22, 1995, what was his
10 position?

11 A. Steve Sabbath was General Counsel for Santa
12 Cruz Operation.

13 Q. And who was Kelly Hicks?

14 A. Kelly Hicks was the controller for Santa Cruz
15 Operation.

16 Q. Would you go to the next page. Signed by Lou
17 Ackerman. Who was Lou Ackerman?

18 A. Lou Ackerman was my manager when I was at
19 Novell as a contract manager. He was Manager of the
20 Contracts Group.

21 Q. Do you see this language at the bottom of the
22 first page in the memo from Mr. Ackerman:

23 Would you also please confirm that SCO intends
24 to use the standard software agreement and sublicensing
25 agreement currently used by Novell, with exception to the

1 necessary name and address changes for any new customers.

2 Q. Do you see that language?

3 A. Yes.

4 Q. How does that language compare to your
5 understanding of what Santa Cruz was going to be doing in
6 the transition?

7 A. Well, in the transition, all documents went
8 from Novell to Santa Cruz. We kept all of our computers.
9 We had all of the agreements in word processing on our
10 computers, and all we did was go in and do a global
11 change, Novell to Santa Cruz.

12 Q. I won't read those out loud, Mr. Broderick.
13 You can see them. How do those directives from
14 Mr. Ackerman compare to your understanding of what was to
15 be done on the transition?

16 A. Again, it was the same idea. We had a UnixWare
17 2.0 schedule with Novell, with Novell's name in it, and
18 we did a global change with the name from Novell to Santa
19 Cruz and changed nothing else.

20 Q. Do you recognize this document, Mr. Broderick,
21 SCO Exhibit 71?

22 A. Yes.

23 Q. What is the document?

24 A. It's amendment number 1 to the Asset Purchase
25 Agreement.

1 Q. If we could go to page 6. This is the
2 language, Mr. Broderick, in which the parties state that
3 buyer shall have the right to enter into amendments of
4 the SVRX licenses as may be incidentally involved to its
5 rights to sell and license UnixWare software.

6 Do you see this language?

7 A. Yes.

8 Q. This provision goes on to state that buyer
9 shall not -- shall have no right to enter into new SVRX
10 licenses, except in the situation specified in little "i"
11 of the preceding sentence or as otherwise approved.

12 Do you see that language?

13 A. Yes.

14 Q. Do you recall discussing this language during
15 the transition period from Novell to Santa Cruz?

16 A. Yes.

17 Q. And what do you recall about that?

18 A. Well, in the transition team, we were told that
19 Novell was selling the business, but, as part of the
20 purchase price, they were going to get the ongoing stream
21 of royalties for what was defined as the SVRX products
22 that were transferred from Santa Cruz to Novell. We
23 couldn't do anything that jeopardized that revenue
24 stream. It was essentially money in the bank for Novell.

25 And we couldn't enter into new licenses for the

1 SVRX products. And what that meant was -- what they
2 didn't want Santa Cruz to do was -- you had a licensee
3 who had an SVRX product from Novell. What we couldn't do
4 is go to that licensee and say: You know, you're paying
5 a hundred-dollar-royalty-per-copy fee. If you execute a
6 new license with us, Santa Cruz, we'll charge you a
7 \$50-per-copy fee.

8 We couldn't do anything that took away that
9 royalty stream that Novell was to get. What they said is
10 but we could license the SVRX incidentally. And we said:
11 Well, what's "incidentally?"

12 And they said: Well, the major part of this,
13 if you take a look, if you license the source code, the
14 source code license fees, from when they first started
15 being used, always included prior products of the legacy
16 products. You will continue to use those same types of
17 licenses. You'll continue to include that legacy prior
18 products. And that's an example of an incidental right

19 Q. And did, in fact, Santa Cruz continue to
20 license prior products with its UnixWare licenses?

21 A. Yes, we did, because what we did is we changed
22 the name from Novell to Santa Cruz. The rest of the
23 license was to remain the same, and the licenses had
24 prior products, and it's the way source code was licensed
25 from the early '80's.

1 Q. When was this transition period completed?

2 A. I believe we became Santa Cruz employees on
3 February 1, '96.

4 Q. Do you recognize this document, SCO Exhibit
5 141, Mr. Broderick?

6 A. Yes.

7 Q. And could you describe what the document is.

8 A. It's -- again, it's a supplement licensing
9 order form, NCR Corporation, licensed UnixWare 2.1 source
10 code from SEL, Santa Cruz.

11 Q. And if we go to page 24. And do you recognize
12 this part of the document, Mr. Broderick?

13 A. Yes.

14 Q. And what is it?

15 A. It's the listing of the prior products where we
16 granted rights to access the legacy products that
17 UnixWare was ultimately built on.

18 Q. What supplement number is this, Mr. Broderick?

19 A. 112.

20 Q. And have you had occasion to go back and
21 consider some of the other types of supplements that
22 predated this supplement?

23 A. In my 15 years of doing licensing, I'm aware of
24 how the supplements are numbered, how they worked.

25 Q. Specifically to NCR, have you had occasion to

1 go back and look at some of the other supplements they
2 executed?

3 A. Yes.

4 Q. And can you describe what you found?

5 A. Well, the lion's share of the supplements for
6 NCR and most other OEMs are for additional designated
7 CPU's or CPU changes. AT&T -- well -- and all the
8 subsequent owners were very protective of the source
9 code. They didn't license the source code to an OEM and
10 let them put unlimited copies of source code throughout
11 their company where they could possibly lose control of
12 the source code.

13 So, what they did is license it on a CPU basis,
14 so when somebody licensed the source code, they paid the
15 source code right-to-use fee, and they got it on one
16 computer.

17 There were a lot of OEMs that wanted the source
18 code on multiple computers, and you look at some of the
19 supplements where they licensed source code, and they
20 would list -- sometimes they would list 50 designated
21 CPU's that we gave the rights to. So, if you take a look
22 at NCR supplement 112, and you go in and take a look at
23 their records, the lion's share of those supplements are
24 either licensing additional designated CPU's, and even
25 when they changed a computer they were putting it on,

1 like a computer got old and they wanted a computer with
2 more power and they put the source code on that computer,
3 they executed a supplement acknowledging a change from
4 one computer to another computer.

5 So, if you look at a customer's records, 112
6 supplements of -- my guess is better than half of them
7 are related to designated CPU's.

8 Q. Did your decision on whether to list the System
9 V prior products in this supplement turn, in any way, on
10 how many stand-alone licenses for a UNIX release NCR had
11 previously entered into?

12 A. Absolutely not.

13 Q. Do you want a sip of water?

14 A. You are watching out for me.

15 Q. Is there any way for you to estimate how many
16 UNIX licenses you have been a part of during your tenure
17 in these companies?

18 A. That I have personally been involved in?

19 Q. Not in negotiating but that you've overseen in
20 your roles?

21 A. By "UNIX licenses," you're talking about where
22 they actually license a source code product?

23 Q. Yes.

24 A. Well, in one way or another, a few thousand.

25 Q. And, to the best of your estimate and your

1 experience of those number of licenses, how many include
2 the list of System V prior products?

3 A. Virtually all of them.

4 Q. Now, with respect to UnixWare, in particular,
5 to the best of your estimate, how many UnixWare licenses
6 have you overseen or been responsible for in your tenure?

7 A. Forty-three.

8 Q. And of those, how many of those 43 licenses
9 identify the System V prior products?

10 A. All but eight.

11 Q. And how come there are eight that don't list
12 the System V prior products?

13 A. Well, one was a UnixWare 2.0 source code
14 license that Novell did with a company called ALPS. And
15 they intentionally omitted the prior products. The other
16 seven were UnixWare 7 that we included as prior products
17 just the UnixWare prior releases.

18 Q. And why was that?

19 A. When we were doing the UnixWare 7 license, I
20 was directed by Steve Sabbath to make it simple, cut it
21 down.

22 Q. And who is Steve Sabbath?

23 A. Steve Sabbath is the general counsel at Santa
24 Cruz. He said -- I think the 2.1 license was 20-some, 28
25 pages, something like that. And he said: The sales

1 force complains that a customer is saying that it's too
2 much to read. See what you can do to cut the thing down.
3 And also, talking to John Maciaszek, who was the product
4 manager, they wanted the focus to be on UnixWare.

5 So we went through the 2.1 license and started
6 going through it, what needed to be changed to make it a
7 UnixWare 7 license, and we substantially cut it down.
8 And when when we got to the prior products, John said:
9 You know, I want -- when we do a -- we have had UnixWare
10 out there for awhile. When we go to a licensee, I want
11 them to only see the word "UnixWare." I want them to
12 focus on UnixWare.

13 If somebody is licensing the source code, we
14 already have a binary that we distribute ourselves on
15 Intel, so for somebody that has another computer that's
16 not Intel -- they have different types of computers so,
17 if that person licenses the UnixWare and puts it on their
18 computer, we want them to focus on UnixWare, and we want
19 that UnixWare to look and feel just like the UnixWare
20 that we have. We don't want somebody to get a UnixWare
21 license, put it on another computer, and not have the
22 applications that run on our units that are run on that.

23 It's not good for the company. It wouldn't be
24 good for UnixWare. It would give it a bad name if
25 everything wasn't working. If people license UnixWare,

1 they want it to look the same.

2 So, we cut it down and we limited the prior
3 products to UnixWare.

4 Q. And when did the UnixWare 7 licenses begin?

5 A. When we were in Santa Cruz. I don't know the
6 exact date.

7 Q. Sometime in the late '90's?

8 A. Late '90's.

9 Q. If a UnixWare licensee had called you in 2000
10 and asked: Do I have any rights to use the System V
11 prior releases?

12 What would you have said?

13 A. Well, I would have talked to John Maciaszek
14 and, in all likelihood, we would have said: Sure, you
15 can have them.

16 Q. And would you have charged them any fee for
17 acquiring a copy of the source code for the prior
18 product?

19 A. No. We never did.

20 Q. Did customers pay any additional fee, on top of
21 the one-time fee we have talked about, for listing the
22 System V prior products in their supplements?

23 A. No.

24 Q. Do you recognize SCO Exhibit 369,
25 Mr. Broderick?

1 A. Yes.

2 Q. And could you describe what it is.

3 A. It's a software agreement. What I talked about
4 earlier, the software agreement covers the general terms
5 and conditions for licensing source code. And this is a
6 software agreement executed between our Japanese
7 subsidiary Nihon SCO, and a company called ALPS
8 Electric.

9 Q. Mr. Broderick, what does this Exhibit A
10 represent?

11 A. Exhibit A is the -- lists the source code
12 right-to-use fees for the UnixWare 2.0.

13 Q. What does the number 375,000 in Section 1.A
14 represent?

15 A. That's our standard licensing fee to license
16 UnixWare 2.0.

17 Q. And is this a number that has something to do
18 with CPU's you mentioned earlier?

19 A. Yes. It's the fee to get the source code right
20 to use it on the initial designated CPU.

21 Q. And what does this part of the supplement
22 represent, Mr. Broderick ?

23 A. This is part of the ALPS license for UnixWare
24 2.0. It's the prior products section.

25 Q. And there's nothing listed?

1 A. It says: This exhibit is intentionally left
2 blank.

3 They did not include any prior products.

4 Q. ALPS is the licensee you mentioned earlier that
5 I think you said had no interest in the prior products?

6 A. I contacted -- when I saw this, when I was
7 reviewing the UnixWare licenses, I saw this and I
8 contacted our Japanese office, and they said they didn't
9 remember why, but they said ALPS said: Take it out. We
10 don't care about it.

11 Q. We looked at this document earlier,
12 Mr. Broderick. Do you recognize this document?

13 A. Yes.

14 Q. What is it?

15 A. It's providing to Unisys the license for
16 UnixWare 2.0.

17 Q. And what is this part of the document,
18 Mr. Broderick?

19 A. Again, this is the listing of the source code
20 right-to-use fees.

21 Q. And what does Section 1.A, the \$375,000 number
22 represent?

23 A. That's the right-to-use fee for the initial
24 designated CPU for UnixWare 2.0.

25 Q. And what does this part of the document

1 represent, Mr. Broderick?

2 A. That's a listing of the prior products, and it
3 includes all of the legacy products for UnixWare 2.0.

4 Q. So, not to belabor the point, but let's compare
5 the two documents we just reviewed. For the ALPS
6 license, there's a \$375,000 charge for what?

7 A. The initial designated CPU for the source code
8 product for UnixWare 2.0.

9 Q. And are any prior products listed?

10 A. No. In fact, they are intentionally left
11 out.

12 Q. And for the UnixWare license we just looked at,
13 what does this price represent?

14 A. That's the licensing -- the source code
15 licensing fee for the additional designated CPU.

16 Q. And how does this price compare to the ALPS
17 price?

18 A. Exactly the same.

19 Q. And were there any prior products listed?

20 A. Yes, all the legacy products for UnixWare 2.0.

21 Q. We looked at the NCR license earlier with the
22 supplement number?

23 A. Yes.

24 Q. Can you recall any instances in which you
25 entered into contracts with licensees whose first

1 supplement listed System V prior products?

2 A. Sure.

3 Q. Could you describe any of those examples that
4 you can recall?

5 A. Off the top of my head, there were two UnixWare
6 licenses; one with a Company called Super Computer
7 International, and one with a company called Lexus
8 Software Corporation. They licensed, I believe it was,
9 UnixWare 2.0, and that was the standard schedule that
10 listed all of the legacy products for UnixWare 2.0 as
11 prior products with rights to them.

12 Q. Did you charge either of those companies
13 anything extra above the one CPU source code right-to-use
14 fee for the listing of the prior products?

15 A. No.

16 Q. Why not?

17 A. Because we didn't charge for prior products.
18 It was a right we granted to our licensees for the legacy
19 products to the current release that they were
20 licensing.

21 Q. Now, during your tenure at Santa Cruz and SCO,
22 was it ever your view that you were obligated to remit to
23 Novell any royalties for UnixWare licenses?

24 A. No.

25 Q. Why did you have that understanding?

1 A. SCO owned UnixWare, and the APA stated that
2 UnixWare gets all the fees -- SCO gets all the fees for
3 UnixWare.

4 Q. Were you ever part of any audits that Novell
5 conducted of Santa Cruz or SCO?

6 A. I wasn't part of it. I knew they were going
7 on, but I wasn't part of it.

8 Q. And to what extent were you aware that they
9 were going? How did you know that?

10 A. I work on a daily basis with Jean Acheson in
11 the finance group, and she would tell me that Novell is
12 coming in to audit.

13 Q. Who is Jean Acheson?

14 A. Jean Acheson is currently our controller. When
15 the audits went on, she was either the manager of revenue
16 or the director of revenue.

17 Q. What did Jean Acheson have to do with audits?

18 A. She was responsible for overseeing or preparing
19 the royalty payments to Novell for the SVRX products
20 under the Asset Purchase Agreement.

21 Q. During these audits, did anyone ever ask you to
22 produce any UnixWare licenses to Novell or the evidence
23 of any payments for UnixWare licenses to Novell?

24 A. No. And if Novell had asked for it, I would
25 have been told they were asking for it.

1 Q. Why is that?

2 A. Because they weren't supposed to get them.

3 Q. Why do you have that view?

4 A. Because Santa Cruz Operation, and then SCO, had
5 full rights to UnixWare and the UnixWare royalties, so if
6 Novell was asking for it, trust me, it would have gone
7 through me and all the way upstairs.

8 Q. Now, you had some understanding that SCO was
9 obligated to remit to Novell SVRX royalties; is that
10 right?

11 A. Yes.

12 Q. What was your understanding on that front?

13 A. Again, it was -- the way -- the reason they
14 told us when we were in the transition meetings was that
15 Santa Cruz didn't have enough money to pay the asking
16 price that Novell wanted, so what they negotiated was:
17 Look, we've got these System V products. We'll identify
18 them in the Asset Purchase Agreement, and for any of
19 those System V products, if there's a licensee that has a
20 current agreement with us that we transfer to Santa Cruz,
21 we'll get those royalties on those SVRX-defined
22 products.

23 Q. Now, during your tenure at Santa Cruz and SCO,
24 did you or, to the best of your knowledge, anyone else
25 ever try to distinguish between the UnixWare license

1 payments and any payments for these System V prior
2 products?

3 A. There were no payments for the System V prior
4 products to distinguish.

5 Q. In your view, was the licensing of the rights
6 to use the System V prior products a source of any
7 royalties that would go to Novell?

8 A. No.

9 Q. Why not?

10 A. Because it was part of our licensing UnixWare
11 and SVRX as an incidental component of licensing that
12 UnixWare.

13 Q. Now, briefly describe, again, why it was that
14 OEMs would license the UnixWare source code?

15 A. They wanted to -- they wanted to be able to get
16 the source code so they could make some modifications to
17 it. And a lot of the OEMs started out way back in the
18 '80's with licensing UNIX, and they were building their
19 UNIX offering on their computers. And the later -- and
20 they licensed System V, every new release that came out.
21 Virtually all the OEMs, major OEMs, every new release of
22 UNIX System V that came out they grabbed because they
23 wanted the new functionality.

24 If you stay on the old functionality and you
25 don't do anything with it, you're not going to be in the

1 business long. So, every new release that came out, they
2 would license. And when we released -- when Novell
3 released the first UnixWare release, which was their
4 branded name for UNIX System V, OEMs licensed that, so
5 they would continue to build their product.

6 A lot of the OEMs also entered into packaged
7 product distributions with us. It saved them money on
8 development. If they had an Intel box, they could take
9 our packaged product and just ship it with their
10 computers, and it was a substantial cost savings to
11 them. But they still had their operating systems where
12 they were running their version of UNIX, and they would
13 continue to license the source code so they could keep
14 that up to date.

15 Q. What if the product the OEM created included
16 massive amounts of System V source code and only a few
17 lines of UnixWare source code? What kind of royalties
18 did they pay in that instance?

19 A. UnixWare.

20 Q. Why?

21 A. Because we've also operated on the -- it was
22 generally referred to as the one-line-of-code rule. If
23 you have a derivative that you're paying royalties on and
24 it's on a certain release of UNIX, say, UNIX System V,
25 Release 4.2 MP, and you're paying royalties on it, if you

1 license UnixWare, and you take one line of code from
2 UnixWare and put it in your 4.2 MP product, that 4.2 MP
3 product is required to be reported as UnixWare and report
4 the royalties based on that.

5 And the reasoning for that is: We didn't want
6 to get into -- it was just -- there is no way to get into
7 an argument with an OEM of how much of UnixWare is in the
8 product. Are you going to be paying -- like, well, I'm
9 only using 5 percent of UnixWare, so I want to pay a 4.2
10 MP royalty on this and only a little bit --

11 That discussion was ended by AT&T years ago.
12 If you take any of the later release, put it in your
13 current derivative, that current derivative becomes the
14 later release.

15 Q. Do you have an understanding as to whether
16 Novell, before the APA was executed, used that same
17 one-line-of-code rule?

18 A. Yes, because I was the licensing manager at
19 Novell.

20 Q. And the answer is: They did, or they didn't
21 use it?

22 A. They did. Absolutely.

23 Q. Now, we reviewed the Unisys licenses earlier
24 today. Do you recall that?

25 A. Yes.

1 Q. You reviewed one from 1991. Do you recall
2 that?

3 A. Yes.

4 Q. And one from 1995. Do you recall that?

5 A. Yes.

6 Q. And one from 1996. Do you recall that?

7 A. Yes.

8 Q. Did there come a time when you contacted Novell
9 with respect to issues that had arisen regarding
10 Unisys?

11 A. Yes, there was.

12 Q. And could you describe those circumstances?

13 A. Yes. Unisys had -- Unisys came to us and said
14 they have a product they call ClearPath, a computer they
15 call ClearPath.

16 Q. ClearPath?

17 A. ClearPath.

18 Q. This was a computer?

19 A. Yes -- well, it was essentially more than a
20 computer. It was really three computers in one package,
21 so they had a box and then they had three computers in
22 that box. And what they were doing was: One of the
23 computers ran a Unisys proprietary operating system.

24 Q. What does that mean "proprietary?"

25 A. It was a -- before UNIX came out, all of the

1 computer manufacturers developed their own operating
2 system for their computers. The operating system worked
3 with the applications, and that's how you get work done.
4 So, they had their own proprietary operating system.
5 When UNIX came out, the market demanded UNIX, so they
6 also offered a UNIX solution. So, what the ClearPath
7 product had was one computer running Unisys proprietary
8 operating system. It had one separate -- and doing
9 certain functions -- one separate computer running System
10 V, Release 4 MP performing certain functions, and they
11 had one computer running UnixWare performing certain
12 functions.

13 And they wanted to know how they had to pay on
14 it because they had a list price for that computer with
15 the three -- for that box with the three computers in it.

16 Q. Now, what interest did you have in the price
17 that Unisys was charging for this ClearPath product?

18 A. Their royalty is based on a percent-of-system
19 list. So the OEMs would provide us their system list so
20 we could track what royalty they were supposed to be
21 paying.

22 Q. System list is, in layman's terms, the price
23 for the computer?

24 A. It's their price book, you know, ClearPath, "X"
25 dollars.

1 Q. And to what end did you contact Novell?

2 A. Well, it involved System V, Release 4 MP and
3 UnixWare. So --

4 Q. Now, was Unisys an existing SVRX licensee at
5 the time of the APA?

6 A. Yeah. That's why I contacted Novell. And I
7 contacted Cindy LaMont. I worked with her as a contract
8 administrator at Novell. She had stayed with Novell and
9 went to the finance group and was handling the royalties.

10 I sent her a letter and I said, essentially:
11 Unisys is one of the -- I don't know if I exactly said
12 this in the letter, but -- here is the deal. Unisys was
13 one of the licensees that transferred to Santa Cruz from
14 Novell. They've got a situation where they've got three
15 operating systems on three separate computers in a box.

16 Here is how we propose to handle the royalties,
17 so let's talk.

18 Q. And what was Ms. LaMont's response, to the best
19 of your recollection?

20 A. What's your proposal?

21 And we said: The UnixWare 7 is on what Unisys
22 called an SMP computer. I don't know the exact name, but
23 it's SMP something. They had a list price --

24 Q. SMP is symmetrical multi-processing; is that
25 right?

1 A. You've got me.

2 Q. Okay.

3 A. I'm a contracts guy.

4 Q. I finally know something you don't.

5 A. You win. So they had a list price for that SMP

6 computer of a hundred-thousand dollars. So we would say,

7 like, okay. Irrespective of whether it's in this box

8 with these other two things, if they are running UnixWare

9 on this SMP computer, it's got a list price of a

10 hundred-thousand dollars. You'll pay a royalty off your

11 UnixWare license related to the list price of a

12 hundred-thousand dollars.

13 What we told Novell was: Here's our proposal.

14 The UnixWare, out of the ClearPath list price, we take a

15 hundred-thousand dollars off that list price. Unisys

16 pays the royalty based on the UnixWare license for that.

17 We keep it. The 4. -- that leaves two processors left

18 and part of the ClearPath list price.

19 I don't know what the total ClearPath list

20 price was, but what we said was: You've got this bucket

21 left after the hundred thousand is taken off the list

22 price. What we're proposing and what Unisys has agreed

23 to is that we cut that number in half, so half of that

24 remaining list price, we will apply the royalties

25 schedule under the 4.0 MP license, which was licensed

1 under a specific supplement, and those royalties would go
2 to Novell

3 Q. And what was Novell's response?

4 A. Fine.

5 Q. So, let me make sure I understand it. For the
6 UnixWare 2.0 operating system --

7 A. Uh-huh.

8 Q. -- that Unisys was running its ClearPath
9 computer, did you attribute any value or royalties to
10 Novell for the System V prior products?

11 A. No. It was based on their supplement where
12 they licensed 4.0 MP. It was a separate license for the
13 UnixWare license.

14 Q. And at the time you wrote the letter to
15 Ms. LaMont and had these discussions, had Unisys been
16 paying SVRX royalties that were being remitted to Novell?

17 A. Yes.

18 Q. This is SCO Exhibit 409. Do you recognize
19 that, Mr. Broderick?

20 A. It's my letter to Cindy.

21 Q. This is SCO Exhibit 386. Do you recognize this
22 document, Mr. Broderick?

23 A. Yes, it is. This is where we agreed with
24 Unisys on how the royalties would be treated.

25 Q. You say in the opening sentence of this letter:

1 The agreement between Santa Cruz and Novell requires
2 prior written approval from Novell for all the new
3 agreements or changes to current agreements related to
4 UNIX System V.

5 Q. Do you see that language?

6 A. Yes.

7 Q. Do you recall why you wrote that?

8 A. It was a flag of Cindy's, related to Unisys,
9 that, Cindy, we've got a deal coming up. It includes the
10 SVRX product, so let's get together and talk about it.

11 Q. And why did you feel compelled to contact her
12 with respect to that SVRX product?

13 A. Because that was Novell's -- Novell's right was
14 to the royalty under the 4.0 MP license.

15 Q. And why did you have the view that that was
16 Novell's right to have that money?

17 A. Because it was a license transferred to Santa
18 Cruz under the Asset Purchase Agreement.

19 Q. Mr. Broderick, you've heard of the 2003
20 Microsoft agreement, I take it?

21 A. Okay.

22 Q. Have you?

23 A. I have reviewed it.

24 Q. You've heard of it?

25 A. Oh, I've heard of it.

1 Q. Have you had occasion to review it?

2 A. I have read it.

3 Q. At the time of this 2003 license, was Microsoft
4 an existing UNIX licensee?

5 A. No.

6 Q. Do you have any understanding, Mr. Broderick,
7 as to whether, in Section 4 of this agreement, Microsoft
8 obtained a license to the OpenServer source code?

9 A. Yes. My understanding in Section 4 is it
10 loosened up some of the limitations or restrictions on
11 what Microsoft could do with the UnixWare and also added
12 OpenServer and some additional UnixWare releases,
13 OpenServer releases and the prior legacy UNIX products.
14 That's my understanding.

15 Q. Now, as of the time of this agreement in 2003,
16 had Santa Cruz or SCO ever licensed the OpenServer source
17 code for commercial use?

18 A. Absolute -- no.

19 Q. Why not?

20 A. OpenServer was their flagship product. It was
21 the binary that ran on the Intel box. It had a huge
22 installed base. I believe it's where most of the revenue
23 came from, from the packaged product, and they just
24 weren't going to release the source code and,
25 essentially, create a competitor for them. It was -- if

1 you want -- if you want a packaged product with UNIX on
2 Intel, come to us.

3 Q. Did you have a view as to whether Santa Cruz or
4 SCO was obligated to pay Novell anything's with respect
5 to OpenServer licenses?

6 A. No. In fact, the APA is very specific that
7 Santa Cruz doesn't owe any royalties to Novell for
8 distributions under their software agreement,
9 sublicensing agreement schedules they had prior to, you
10 know, Santa Cruz buying the business.

11 Q. So -- I won't lead you. How was OpenServer
12 created?

13 A. OpenServer was created under Santa Cruz's
14 license for UNIX System V, Release 3.2.

15 Q. That was the license Santa Cruz had before it
16 became the owner of the UNIX business; is that right?

17 A. Yes.

18 THE COURT: I'll probably let you lead him if
19 you want to because you tried to led him about SMP, and
20 he wouldn't be lead.

21 MR. NORMAND: Thank you, Your Honor.

22 THE WITNESS: I missed -- being what?

23 THE COURT: It's legal stuff. Don't worry
24 about it. It was a compliment.

25 THE WITNESS: Well, thank you.

1 Q. Have you heard the phrase "installed base" used
2 with respect to OpenServer?

3 A. Yes.

4 Q. And, to you, what does that mean?

5 A. Installed base is the number of end users that
6 are using the software product.

7 Q. And why is it relevant to talk about installed
8 base?

9 A. Because it's adding up everybody that's using
10 your product. In fact, if you take a look at a lot of
11 marketing literature or industry reports on UNIX or any
12 other product, they always refer to installed base as how
13 successful a product is doing.

14 Q. What was OpenServer's installed base like?

15 A. My understanding, it was very large. In fact,
16 I have seen reports which said OpenServer had the largest
17 installed base of UNIX products.

18 Q. How did SCO's OpenServer business compare to
19 its UnixWare business in the last few years?

20 A. OpenServer was doing more revenue.

21 Q. And would the same be true as of the time of
22 the 2003 Microsoft agreement?

23 A. That's my understanding, yes.

24 Q. In your view, how would the value of a full
25 OpenServer source code license compare to the value of a

1 full UnixWare source code license?

2 A. I would say it's a lot more.

3 Q. Why would you say that?

4 A. Because UnixWare was licensed in source code
5 format since it first came out. We were perfectly
6 willing to have OEMs license the UnixWare source code to
7 create their derivative. OpenServer, we guarded very
8 close to the vest and never licensed the source code.
9 So, if we had a point in time when we decided to license
10 the source code, we would want a lot of money for it.

11 Q. You've also heard of the 2003 Sun agreement, I
12 take it?

13 A. I have heard of it.

14 Q. Was Sun paying any royalties as of the time of
15 that agreement?

16 A. No.

17 Q. This is Novell Exhibit 5, Mr. Broderick. Do
18 you recognize this document, dated January 1, 1994?

19 A. Yes, I do.

20 Q. This is attachment 2, titled Deliberately
21 Omitted Software, and the first two entries are System V
22 4.1 ES 3B2 and System V 4.1 C2 3B2. Do you see those?

23 A. Yes, I do.

24 Q. Now, at the time of this 1994 agreement, did
25 Sun already have a license for those products?

1 A. Yes.

2 MR. NORMAND: This is a document, Your Honor,

3 that has not been agreed to be admitted.

4 THE COURT: What number is it?

5 MR. NORMAND: SCO 414.

6 THE COURT: Okay.

7 MR. NORMAND: It's not listed in our 26(a)(3).

8 It's a document we believe rebuts a point that Novell has

9 made in this case.

10 THE COURT: Mr. Melaugh?

11 MR. MELAUGH: I think this is fine. I'm

12 generally reluctant to agree to exhibits I have never

13 seen before, but I won't object to this.

14 THE COURT: It's admitted. SCO Exhibit 414?

15 MR. NORMAND: Yes.

16 THE COURT: It's admitted.

17 (Sco Exhibit 414 received in evidence.)

18 Go ahead.

19 MR. NORMAND: Thank you, Your, Honor.

20 Q. Mr. Broderick, what is SCO Exhibit 414?

21 MR. MELAUGH: Your Honor, could I at least get

22 a copy of this, please?

23 THE COURT: Do you have it?

24 MR. MELAUGH: I do.

25 MR. NORMAND: He does.

1 MR. MELAUGH: Thank you.

2 Q. What is SCO Exhibit 414?

3 A. It's a UNIX System Laboratories license with
4 Sun Microsystems, where Sun Microsystems licensed the
5 UNIX System V, Release 4.1 Enhanced Security Platform and
6 the C2 Auditing.

7 Q. Do you have any understanding as to why, in the
8 1994 Sun agreement, these releases were identified as
9 deliberately omitted software?

10 A. My understanding is they had a license for the
11 4.1 ES, but that code was not included in their Solaris
12 product, so when they did the royalty buyout, when they
13 did the agreement in 1994, it was specific to their
14 Solaris product based on UNIX System V, Release 4.0. So
15 they specifically excluded the 4.1 ES

16 Q. And, to the best of your understanding, was
17 this 4.1 ES license in place as of the 2003 Sun
18 agreement?

19 A. Yes. I can't find any record of it having been
20 terminated. The licenses were perpetual unless you
21 violated the agreement.

22 Q. Did their come a time, Mr. Broderick -- we're
23 getting close to the end -- did there come a time during
24 this litigation when you undertook to survey all of the
25 UNIX licenses that you have been overseeing for all these

1 years?

2 A. Yes.

3 Q. And, as painful as it may be, can you describe
4 what you did.

5 A. I -- all the licenses were on an imaging
6 system. They were -- when Novell bought us, all the
7 licensing was done in Greensboro, North Carolina. They
8 were all on hard copy. So, what Novell did to control
9 this, what Steven Baker did, was he brought in a company,
10 and what they did was they scanned all the documents.
11 And it went into what we call the image system. And it
12 was indexed by customer number and product and date.

13 So, instead of going through a file room and
14 trying to find something, on your computer you could just
15 take a look and see what a customer's number is, put that
16 customer number in, and it would bring up all of their
17 documents, and you could just go through on your screen
18 and look at any documents they had.

19 I was the only one that had this computer. It
20 was on an old Windows 95 computer. And I thought about:
21 If I get hit by a truck for this, and this Windows 95
22 computer, in 2003, decides to give up the ghost, nobody,
23 really has a record of the history of the licensing.

24 So I started going through the imaging system
25 and, if what I've been told is true, there's 30,000

1 records in the image system. And I probably agree with
2 that because this project took me the better part of a
3 year.

4 And what I did was I just brought up the
5 customers and I started going through each customer and
6 taking a look at what they had licensed, and I built a
7 Word -- Microsoft Word table. I didn't know it was going
8 to end up 400 pages. If I did, I would probably have
9 gone to the our IP department and said: Can you give me
10 a database or something?

11 But there was no way to scan this information
12 in, so I had to type it all in. So I would just go by
13 customer and take a look at what they licensed, and it
14 took time because if I was looking at a licensee who had
15 licensed UNIX System V, Release 3.0, there could be 25
16 different supplements. I had to look at the earliest
17 supplement, bring it up, and if it was when they
18 initially licensed the 3.0, I would print the page or the
19 first couple of pages and move on looking for the next
20 product that customer licensed.

21 I did this for all 30,000 records, and what I
22 did is I would just print them out during the day, and I
23 would take them home at night, sit down at the computer
24 and type them in on this 400-page thing.

25 When I completed that -- we stopped using the

1 imaging system in the late '90's, sometime in the
2 late '90's. The scanner broke, and Steven Sabbath
3 wouldn't buy us another one. So, after that, the
4 documents were in hard copy. And when Caldera bought us,
5 a short time after that all the documents were sent out
6 to a central filing in Lindon, so on one of my business
7 trips to Lindon, I went through the files out there,
8 started with A, and looked at all of them. And if it
9 came up with a source license or a non-disclosure or
10 something related to UNIX, I checked my list. If I
11 didn't have it on my list, I added it.

12 Then, when I was done with that, I sent the
13 list off to our Japanese subsidiary and said: This is
14 what I have so far. Do you know of anything that we
15 should add to it or if there's any errors that you can
16 see?

17 And Mikado Aso sent me back a huge spreadsheet,
18 essentially from their financial -- I think it was from
19 their financial -- that listed the licensees and what
20 they had licensed and when they had licensed it. I also
21 went through that, checking it against my list. And the
22 long and the short of it is, after about a year, I had
23 420-some pages that is a listing of everybody who had
24 licensed UNIX and when and under what agreement.

25 Q. This is --

1 THE COURT: 367, Right?

2 Q. SCO Exhibit 367. Is this what you're talking
3 about?

4 May I approach, Your Honor?

5 THE COURT: You may.

6 MR. NORMAND: May I have approached?

7 THE WITNESS: It is, yes.

8 Q. Now, you've had occasion to review that
9 document, I take it, in the last few years?

10 A. Yes. I've used it on a number of occasions,
11 and I passed it out to some people to use because I put a
12 lot of work into this, and I wanted people to use it.

13 Q. Are you aware of any material inaccuracies in
14 the document?

15 A. No. I found a couple. I recently went through
16 this to find some information, and I found a few examples
17 of, like, a UNIX System V, Release 4.2 MP that I had
18 licensed in 1983, and I knew that was wrong, so I went to
19 the image system and pulled it up, and it was 1993. And
20 I just attributed that to the eight's next to the nine,
21 and I'm human. But, I don't know. I put lot of work
22 into this, and I didn't do it slipshod, so I think it's
23 fairly -- I think it's pretty accurate.

24 Q. Now, you have seen this demonstrative before,
25 Mr. Broderick?

1 A. Yes.

2 Q. We worked on it together, correct?

3 A. Absolutely.

4 Q. In sum, what does this demonstrative represent?

5 A. This is taken from information I provided on
6 the number of UNIX licenses for different System V
7 groupings and when they were licensed. So, what it shows
8 is the higher -- for each group, where it shows the
9 higher graph, it's the higher number of licenses during
10 that period that were granted.

11 Q. This is based on Exhibit 467?

12 A. Yes.

13 Q. Or 367. I'm sorry. So, describe to me what
14 these SVR 1 columns represent.

15 A. Well, it shows -- it starts off with when the
16 product was first introduced. There is a certain amount
17 of interest and licensing. It shows the number of
18 licensees that took licenses. And then it jumped up
19 when, you know, more people started. During that time
20 period, more people just started licensing the product.

21 And then, in time -- and it generally relates
22 to our releasing of a subsequent release of the product,
23 and it stands to reason, we have an operating system that
24 people are licensing, and a lot of people are getting on
25 board, and then, when we license a later release with

1 more functionality, they jump on that. And you can see
2 the older release starts to go down at the time the new
3 release is going up.

4 Q. You're comparing these two columns?

5 A. Yes.

6 Q. What is this new functionality you're referring
7 to?

8 A. Well, in the software industry, if you don't
9 keep on improving you're product, you're going to go out
10 of business. That's why you've got, you know, Microsoft
11 Windows, Microsoft Windows 95, Windows 98, XP. You have
12 to continually improve your software product to add more
13 functionality so it can do more things; also to take
14 advantage of improvements in the computers they are going
15 to be running on.

16 So, as they come out with new computers and
17 people are demanding more functionality, you have to
18 upgrade your software.

19 Q. What does this demarcation represent between
20 these two colors, the System 4 era and the UnixWare era?

21 A. What's that? The starting of the yellow?

22 Q. Yes.

23 A. Can you give me a hint?

24 Q. March 10, 1995, what does that date represent?

25 A. Oh. That's the last date that we licensed the

1 UNIX System V 4.0 product.

2 Q. Now, do you recall when the APA was executed?

3 A. The APA was executed in December of 1995. It
4 closed February 1, '96, I believe.

5 Q. And that's what you described earlier as the
6 transition period?

7 A. Yes.

8 Q. I wanted to show you one other document about
9 that period. This is SCO 50. This is an e-mail from
10 Larry Bouffard. Do you know who Larry Bouffard is?

11 A. Yes.

12 Q. Do you recall what his responsibilities were at
13 this point?

14 A. Well, I worked with him when I was at USL, and
15 Manager of Sales Operations. And then, at Novell, I
16 believe he was director of some sales area, I think the
17 UNIX sales area of Novell.

18 Q. This is October 10 -- October 19, 1995.

19 Mr. Bouffard says:

20 We are obligated to give SCO all information,
21 contracts, assets, etc., pertaining to the UnixWare
22 business and the old UNIX source code business. They
23 have bought it lock, stock and barrel. Once the
24 transition is closed, November or December, we will have
25 no more involvement in this business. Therefore, if a

1 contract is for UnixWare or UNIX, it will be SCO's.

2 Do you see that language?

3 A. Yes.

4 Q. And it says: If a contract is for UnixWare,
5 and let's say Netware, the UnixWare part is theirs.

6 Do you see that lin.

7 A. Yes.

8 Q. How did Mr. Bouffard's statement compare to
9 your understanding of what was happening during that
10 transition period?

11 A. If not word-for-word, this is what we were told
12 during the transition meetings when we were -- you know,
13 from Novell to Santa Cruz.

14 Q. So, the APA was executed after the last license
15 of SVR 4; is that right?

16 A. According to the records, yes.

17 Q. And I know you've alluded to this before, but
18 let's just have you explain one more time, in your view,
19 why did these sales erode over time in this way?

20 A. It's older technology. It's comparable to
21 somebody coming out with a new PC and announcing to the
22 world, you know: Hey, buy my new PC. It runs DOS.

23 These are old products. In fact, if you look
24 at the System V, Release 2.0 products, there was a UNIX
25 System V 2.0 VAX.

1 Q. What is as VAX?

2 A. It was a -- Digital Equipment Corporation had a
3 model number for their computer. The computer that that
4 VAX ran on I was told was the size of a refrigerator and
5 didn't have the functionality of your cell phone. So,
6 computers increase in power. You used to have a room
7 full of computers and now a laptop handles it.

8 So, as these computers got bigger, you had to
9 improve the software to run on those computers, and the
10 old software just goes by the wayside.

11 Q. So, are these SVR licenses that were in place
12 as of the time of the APA, did SCO pay Novell royalties
13 on those products?

14 A. The ones that were in place, if they were
15 royalty bearing, and they were transferred to Santa Cruz
16 from Novell, SCO gave Novell those royalties for the
17 system -- for the SVRX-defined products.

18 Q. And did SCO pay Novell royalties on any of the
19 UnixWare products?

20 A. No.

21 Q. I wanted to go to one other point with you,
22 Mr. Broderick. We spoke earlier about the 1 CPU source
23 code right-to-use fees. Do you recall that?

24 A. Yes.

25 Q. From your experience, do you have some

1 familiarity with the actual prices charged for these
2 releases over time?

3 A. Yes.

4 Q. What were the price -- what was the price
5 charged for SVR 2? Do you recall?

6 A. SVR 2 -- the different releases of SVR 2; 2.0,
7 2.1, the different versions, they were \$43,000 for the
8 initial designated CPU license.

9 Q. How about SVR 3?

10 A. SVR 3, there were different versions. 3.0
11 started out at 65,000. 3.1 brought it up to 71,000. 3.2
12 brought it up to 77,000. Then there was a 3.0386 that
13 was 50,000. It was 50,000 because you had to have one of
14 the other licenses

15 So, if you took all those releases and
16 averaged it together, you would get about \$55,000 for the
17 3.X.

18 Q. Why don't we do it on paper and quickly create
19 a record of this. Can you see that, Mr. Broderick?

20 A. Yes.

21 Q. The first entry on this piece of paper, which
22 is from an attachment to the 2003 Sun agreement --

23 A. Okay.

24 Q. -- is 4.1 ES 3B2, right?

25 A. Uh-huh.

1 Q. Do you know what the 1 CPU right-to-use fee is
2 for that product?

3 A. A hundred-thousand dollars.

4 Q. Let me give you a copy of this, Mr. Broderick,
5 and you can track of it with me. How about the next
6 release, Mr. Broderick, 4.1 C2 3B2?

7 A. That was a security feature. That was
8 \$50,000.

9 Q. And the next?

10 A. That's a hundred-thousand dollars. I'm
11 assuming that's the platform.

12 Q. 4.1 ES is a hundred?

13 A. Yes.

14 Q. And these were the prices paid at the time of
15 the releases; is that right?

16 A. It's the additional -- that would be the CPU
17 source right-to-use fee that is in the license.

18 Q. How about System V, Release 4.2?

19 A. 200,000.

20 Q. 4.2 MP?

21 A. 250.

22 Q. And the next releases are UnixWare releases,
23 correct?

24 A. Yes.

25 Q. Now, you and I did this addition last night.

1 Do you have a record of what that comes out to? Is it
2 700?

3 A. If you're talking about the -- all the
4 UnixWare --

5 Q. Not the UnixWare releases. I mean the numbers
6 I've written down I believe adds up to \$700,000?

7 A. Yes, 250, 500. Yes, 700,000.

8 Q. I'll take that back from you now that it's
9 coming up on the screen. It just confuses things.

10 Let's do the same thing, Mr. Broderick, with
11 respect to Exhibit C for the 2003 Microsoft agreement. I
12 take it you have seen this page before?

13 A. Yes.

14 Q. This one is a little more challenging.

15 A. Is there a focusing of it?

16 Q. It didn't work. Why don't we do this. We'll
17 do it half and half.

18 A. That's good. I can see it.

19 Q. Yeah. Now, some of these documents are in
20 italics. Do you see that?

21 A. Yes.

22 Q. Do you have an understanding of why they are in
23 italics?

24 A. They were source code releases that we did not
25 have copies to provide.

1 Q. Now, let's start with the paragraph that says
2 sCO OpenServer, Release 5.X. Do you see that?

3 A. Yes.

4 Q. What is the first System V release identified
5 in that list?

6 A. System V, Release 4.2 MP.

7 Q. How much was that?

8 A. 250,000.

9 Q. What is the next release?

10 A. 4.2.

11 Q. There's a release for 4.2 MP international
12 edition; is that right?

13 A. It's the same thing. The source code for 4. --
14 for all the source code products is you've got 4.2 MP and
15 4.2 MP international. It was the same fee. It was just
16 whether it went international or not, and my
17 understanding is that the only difference is that if it
18 went internationally, there were some restrictions on
19 encryption coding.

20 Q. You didn't charge any extra fee for the
21 international edition?

22 A. No. Absolutely not. If a licensee licensed a
23 product, the license schedule was titled 4.2 MP and 4.2
24 MP International.

25 Q. And what is the next product you see? 4.2 MP,

1 you said?

2 A. Yes. This is V, Release 4.2.

3 Q. How much?

4 A. 200,000.

5 Q. What's the next you see?

6 A. 4.1 ES.

7 Q. How much?

8 A. 100.

9 Q. What's the next you see?

10 A. 4.0 MP.

11 Q. How much?

12 A. 150.

13 Q. What's the next you see?

14 A. Well, the italics is Release 4.0, Version 4.

15 Q. Let's hold off on the italics for now.

16 A. Okay.

17 Q. What's the next one down?

18 A. UNIX System V, Release 4.0.

19 Q. How much?

20 A. 100.

21 Q. What's the next?

22 A. 4.40, Version 2. That's also a hundred.

23 Q. What's the next, not in italics?

24 A. UNIX System V 386 3B2.

25 Q. Okay. And is the same true of its

1 international edition?

2 A. Yes.

3 Q. How much?

4 A. That's the one that was 50,000 because you had
5 to have another release with it that I talked about
6 earlier.

7 Q. Okay. Next?

8 A. You need to raise it up.

9 Q. What's that?

10 A. Slide it up.

11 Q. You can't see it?

12 A. I can't see the next.

13 Q. Sorry, Mr. Broderick.

14 A. That's okay. UNIX System V, Release 3.2.

15 Q. How much?

16 A. 77. 3.1 is 71. 3.0 is 65. All of the 2.0's
17 are 43.

18 Q. Now, you and I did this math last night.
19 excluding the Italics, we came up with 1.249. Do you
20 recall that?

21 A. Yes.

22 Q. Sounds good to you? And I think you did work
23 on your own, and you came up with a number if you were to
24 include the sum of the italicized releases, correct?

25 A. The sum of the italicized, yes. I believe that

1 was 700.

2 Q. That's correct. Thanks for your patience,
3 Mr. Broderick.

4 A. No problem.

5 Q. And, again, these are -- these prices represent
6 what?

7 A. The source code right-to-use fees for the
8 initial designated CPU.

9 Q. Paid at what time?

10 A. At the time of -- at the time of licensing.

11 Q. So, for example, using our number from 2.0, at
12 the time of a 2.0 license, what was the one-time source
13 code right-to-use fee for one CPU?

14 A. \$43,000.

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

16 THE COURT: Thank you, Mr. Normand.

17 Mr. Melaugh, you may cross examine.

18 MR. MELAUGH: Thank you, Your Honor. Your
19 Honor, may I approach?

20 THE COURT: You may.

21 MR. MELAUGH: There is a binder of some of the
22 exhibits we may be using during the cross examination.

23 CROSS EXAMINATION

24 BY MR. MELAUGH:

25 Q. Good morning, Mr. Broderick.

1 A. Good morning.

2 Q. Now, let's start with SCO Exhibit 141. Let's
3 go to the second page of that. You were asked a number
4 of questions about this exhibit during your examination.
5 You'll note here that it's supplement 112, correct?

6 A. Yes.

7 Q. Now, I believe it was your testimony that you
8 looked over the history of the supplements with NCR; is
9 that right?

10 A. Yes.

11 Q. And you found that something on the order of
12 half of those supplements were additional CPU fees; is
13 that right?

14 A. Not necessarily additional CPU fees. It could
15 be changes in designated CPUs, assignment of designated
16 CPUs. Roughly, that's the way it looked.

17 Q. So, it's fair to say, then, that during your --
18 during the course of your tenure as contracts manager,
19 the particular CPU upon which the source code could be
20 used is something you took very seriously?

21 A. Oh, yes. It was a control factor.

22 Q. And, in fact, to move it even from one CPU to
23 another required its own supplement?

24 A. At a point in time, we stopped that practice,
25 when we were at Novell. We started just tracking number

1 of designated CPUs.

2 Q. And if a licensee wanted to use it on more
3 CPU's than they had at the present, they needed to come
4 to you and execute another supplement?

5 A. Correct.

6 Q. And you charged them a fee for that?

7 A. Correct.

8 Q. So, it's fair to say that the right to use code
9 on a particular CPU is something that had commercial
10 value, both to AT&T, USL, Novell, Santa Cruz and
11 presumably the licensees themselves?

12 A. I'm not sure the -- I'm not sure the intent was
13 to get commercial value out of it. The way it was
14 explained to me when I started doing licensing, worked in
15 licensing, was they wanted the licensee to really think
16 about how many copies of the source code they wanted to
17 have internally in their lab, so they wanted -- so they
18 charged them a nominal fee.

19 I mean, if you're spending \$200,000 for your
20 source code license on an initial designated CPU and then
21 you have to pay \$3,000 for additional CPUs, that's not a
22 great deal of value. It's more of a: Think about this,
23 guys. You've got to write a check for three grand for
24 each CPU. How many do you really want?

25 Q. So it was something that everyone was all just

1 pretty careful about?

2 A. Yes.

3 Q. And if a company had come to you and said:
4 We'd like to use this source code on any CPU we want,
5 anywhere in the world.

6 It's not something that you would have have
7 allowed under, at least the terms of the license as we
8 see here under this supplement?

9 A. I'm sorry. What was that?

10 Q. If a licensee had come to you -- say NCR had
11 come to you and said: We would like to use this code not
12 just on the CPU we've designated in this supplement but
13 on a CPU anywhere; anywhere in the company, anywhere in
14 the world.

15 That's something they wouldn't have been able
16 to do under this licensing regime; isn't that right?

17 A. Actually, we changed. If you're talking about
18 they have got the designated CPU that's licensed, we
19 changed the policy from tracking all the CPU's. And the
20 reason we changed the policy is: When AT&T tracked all
21 this stuff, they had 25 people in Greensboro doing it.
22 With Novell it went down to three of us.

23 So we said: Look. You have a certain number
24 of CPU's. We're not tracking it anymore. So, say you've
25 got one CPU. You're licensed for one CPU. Taking into

1 consideration export rules, you can use that CPU anywhere
2 in the world. That was the policy.

3 Q. It's just one CPU, though?

4 A. Yes.

5 Q. And so if NCR had come to you and said: You
6 know, I recognize that our supplement says one CPU. We
7 want to use it on a hundred CPUs.

8 That's not something they could have done under
9 this supplement?

10 A. They would have had to give us a purchase order
11 for whatever the license said. Some licenses were
12 \$2,000, some were 3. But they would have to give us a
13 purchase order for the number of additional designated
14 CPUs they wanted to use.

15 Q. And under these supplements, the NCR
16 supplements as an example, NCR couldn't pass along the
17 source code to sublicensees, for example, could it?

18 A. No rights to distribute source code.

19 Q. Say again?

20 A. No rights to distribute source code.

21 Q. And you and I can agree, can't we, that the
22 right to distribute source code is something that has
23 commercial value?

24 A. Yes.

25 Q. And it's something that AT&T, USL, Novell Santa

1 Cruz were pretty careful about?

2 A. Correct.

3 Q. So, when we saw this list of prices that you
4 went through, the prices for all the 40 versions and 41
5 versions and 42 versions and 30 versions and 20 versions,
6 none of those prices reflected a license that allowed the
7 licensee to distribute source code; is that right?

8 A. Under those licenses that -- under the software
9 agreement that governed those licenses, that is
10 correct.

11 Q. And under the software agreement that governed
12 the 40 license the 42 license, all of those licenses,
13 none of those licenses gave the licensee the power to,
14 say, open source the source code?

15 A. That's correct.

16 Q. And for every one of those licenses, again, the
17 42 licenses, the 41 licenses, the 40 licenses that we
18 saw, if that licensee wanted to distribute binary code
19 for those versions, they would have to pay AT&T, USL,
20 Novell, Santa Cruz an extra fee for each copy; isn't that
21 right?

22 A. A binary royalty, yes.

23 Q. So that fee is not incorporated into the
24 figures that Mr. Normand was writing?

25 A. That's correct.

1 Q. Let's take a look at Exhibit 30. I think this
2 is something you have already been looking at. If you
3 don't have a copy, I'm happy to give you one. It's a
4 Novell exhibit. So you addressed this letter in your
5 testimony -- in your direct testimony; isn't that right?

6 A. Yes.

7 Q. This is a letter dated May 26, 1996?

8 A. Yes.

9 Q. It's to Cynthia LaMont, correct?

10 A. Yes.

11 Q. And you have signed it at the end, Bill
12 Broderick?

13 A. Yes, I did.

14 Q. And it lists your title as Manager of Law and
15 Corporate Affairs?

16 A. Yes.

17 Q. And the first paragraph of this letter reads:

18 The agreement between Santa Cruz Operation,
19 Incorporated, SCO, and Novell, Novell, requires prior
20 written approval from Novell for all new agreements or
21 changes to current agreements relating to UNIX System V.

22 Is that an accurate statement?

23 A. As it applies to Unisys here. This is a letter
24 that was directed at the Unisys issue.

25 Q. And in the third paragraph of this letter, you

1 talk through what Unisys is proposing to do essentially,
2 correct?

3 A. Yes.

4 Q. Unisys is talking about shipping a product that
5 combines, in some way, SVR 4.0, a Unisys proprietary
6 system, and UnixWare 2.1; is that right?

7 A. I want to be clear. It doesn't combine those.
8 They are talking about a box that has three separate and
9 distinct computers, and each one runs one over these.

10 Q. So they are talking about making a distribution
11 of each of those pieces of software?

12 A. On specific -- individually specific computers,
13 yes.

14 Q. And what you propose here is essentially an
15 apportionment of the value what Unisys is proposing to
16 pay SCO between monies that SCO gets to retain and monies
17 that Novell gets to retain?

18 A. Yes.

19 Q. And you are -- as your direct testimony
20 indicated, you reasoned it through. I think there's even
21 a spreadsheet attached to another copy of this exhibit.
22 And you make a proposal to Novell. We think this much
23 should be yours and this much should be ours.

24 That's a fair characterization?

25 A. Yes.

1 Q. And, in the end, you seek Novell's approval for
2 the arrangement?

3 A. Yeah.

4 Q. So, it's fair to say, from this letter, that
5 you regarded Unisys -- Unisys' proposal to distribute a
6 binary version of SVR 4.0 MP as something that SCO needed
7 to remit royalties to Novell for; isn't that Right?

8 A. Yes. Because it was under a supplement that
9 Unisys had executed, where they licensed the 4.0 MP, and
10 in that license it had how to calculate the royalties.
11 And it said that if you ship this product, you will pay
12 royalties. So, under that license, if they were using
13 the 4.0 MP on that specific computer, they had to pay the
14 royalties, and those royalties went to Novell.

15 Q. That's despite the fact that, at the time,
16 Unisys also had more frequent -- more recent supplements;
17 isn't that Right?

18 A. Yes.

19 Q. And those supplements listed prior products?

20 A. Yes.

21 Q. But, nevertheless -- and those prior products
22 included SVR 4.0 MP?

23 A. Yes.

24 Q. And, nevertheless, though, this was something
25 that SCO regarded it had to pay Novell for?

1 A. Because it was under a specific license that
2 Unisys had for the 4.0 MP.

3 Q. Is this the existing-vs.-new license
4 distinction?

5 A. I don't understand your question.

6 Q. I'm trying to see what you're getting at here.
7 I'm not sure I understand why it is your saying that the
8 SVR 4.0 MP fees are something that SCO had to remit to
9 Novell. I take it, it's because, at the time of the APA,
10 there was an SVRX license for 4.0 MP?

11 A. That was transferred from Novell to Santa
12 Cruz.

13 Q. But that's the reason that SCO had to pay
14 Novell for 4.0 MP?

15 A. Yes. Under that separately-licensed product,
16 yes.

17 Q. So, the basis of your testimony is that the
18 reason SCO had to pay for 4.0 MP is because this was an
19 existing SVRX license?

20 A. At the time of the Asset Purchase Agreement,
21 yes.

22 Q. All right. Let's take a look at SCO Exhibit
23 371. It's been pre-admitted. I think this is a license
24 that we also addressed -- that you also addressed in your
25 direct testimony; is that correct?

1 A. Yes.

2 Q. It's with Unisys Corporation?

3 A. Yes.

4 Q. It's supplement number 233?

5 A. Yes.

6 Q. It's dated May 28, 1996?

7 A. I don't have a date -- yes, it is.

8 Q. And, at the bottom, we see your signature on

9 behalf of Santa Cruz Operation?

10 A. Yes.

11 Q. And if we turn to Exhibit I of this document,

12 which is 140491, there's a listing of prior products that

13 you have addressed in your direct testimony?

14 A. Yes.

15 Q. Now, isn't it true that, at the time Unisys

16 entered into supplement 233, it already had the rights to

17 every product listed on this list by way of its previous

18 supplements?

19 A. I would have to check, but Unisys is a long

20 time OEM, and they always licensed the latest release

21 that was coming out, so if not all of them, a majority of

22 them.

23 Q. Well, we can look. Let's turn to Exhibit 370.

24 This is also an exhibit that you addressed in your direct

25 testimony. I'm happy to give you a copy, sir, if it's

1 helpful.

2 A. What is 370?

3 Q. This is Novell Exhibit 370 -- I'm sorry, SCO
4 Exhibit 370.

5 A. You have got to help me out here.

6 MR. MELAUGH: May I approach, Your Honor?

7 THE COURT: Yes.

8 THE WITNESS: Okay.

9 Q. And we see, from the second page of this, that
10 this is another supplement executed with Unisys?

11 A. Yes.

12 Q. It's supplement 230; is that right?

13 A. Correct.

14 Q. And it's something that Novell executed?

15 A. Correct.

16 Q. And if we turn to the list of prior products on
17 Exhibit J, for which the reference is 1039921 --

18 A. Okay.

19 Q. -- we see the prior products that are carried
20 over into the next supplement; isn't that right?

21 A. Yes.

22 Q. And if we were to put them up side-by-side,
23 which you can see on your monitor?

24 A. Uh-huh.

25 Q. Again, that indicates that in Exhibit 233 -- in

1 supplement 233, Unisys had already paid for all the
2 rights that are listed in the prior product rights; isn't
3 that right?

4 A. Unisys didn't pay for the products in the prior
5 products. They paid for the source right-to-use fees on
6 additional designated CPUs. The prior products came with
7 no fee.

8 Q. When looking at supplement 233, isn't it right
9 that, at the time Unisys executed this, they already had
10 the rights to all of the versions listed in Exhibit I by
11 way of their previous supplements?

12 A. More than likely.

13 Q. Let's turn to SCO Exhibit 141.

14 MR. MELAUGH: May I approach, Your Honor?

15 THE COURT: Yes.

16 Q. If you could turn to the second page of this
17 exhibit. This is a supplement with NCR Corporation?

18 A. Yes, it is.

19 Q. It's supplement number 112?

20 A. Yes.

21 Q. It's something that you executed on behalf of
22 Santa Cruz in March of 1997?

23 A. Yes.

24 Q. And, again, we see an example of a prior
25 products listing at Exhibit I, which is 977766. And

1 isn't it true, again, that, by way of previous
2 supplements, NCR had all of the rights that you see
3 listed here on Exhibit I?

4 A. The chances are, yes.

5 Q. Now let's turn to exhibit -- SCO Exhibit 392.

6 A. I'm sorry, could I take one second and stand?
7 My knees are getting old.

8 THE COURT. Sure.

9 THE WITNESS: Thanks.

10 THE COURT: You can even answer questions while
11 you stand if you speak up.

12 THE WITNESS: Okay. Let's go.

13 Q. Okay. Good for you. SCO Exhibit 392.

14 A. Okay.

15 Q. We're looking at the second page. This
16 indicates it's a supplement with Stratus; isn't that
17 right?

18 A. Yes.

19 Q. And it indicates it's supplement number 87?

20 A. Yes.

21 Q. And we see your signature at the bottom on
22 behalf of Santa Cruz, Bill Broderick?

23 A. Yes.

24 Q. And if we turn to the prior products listing,
25 we see another of these lists of prior products, UnixWare

1 20 and down to earlier versions UNIX; isn't that right?

2 A. Yes.

3 Q. And, again, if we turn to SCO Exhibit 405, this
4 is another of these supplements with Stratus?

5 A. Yes.

6 Q. And it's numbered 86?

7 A. Yes.

8 Q. So it comes just one before the one we just
9 looked at?

10 A. Yes.

11 Q. And it's something's you signed, Bill
12 Broderick, this time on behalf of Novell?

13 A. Yes.

14 Q. And, here again, when we look at the prior
15 products, we see that by the time Stratus enters into
16 supplement 87, the one we just looked at, they already
17 have the rights to all the prior products that are listed
18 in the prior products section?

19 A. Not necessarily. They didn't have rights to
20 access the prior products under the 2.1 license unless
21 they are listed in the 2.1 license. These are prior
22 products that they are allowed to access under the 2.0
23 license, and if they access them, they have to be treated
24 the same as a UnixWare 2.0.

25 When you go to the 2.1 license, we list prior

1 products which grants them rights to access them under
2 the UnixWare 2.1 license. Two separate and distinct
3 licenses. We're granting rights to access the prior
4 products under UnixWare 2.1 and then under UnixWare 2.0.
5 The fact that they have rights to the prior products
6 under 2.0 doesn't give them rights to 2.1 unless we add
7 them, unless we include them in the 2.1 license.

8 If you read this, it says they can access it as
9 if they were part of the UnixWare 2.0 license. That
10 means the access to the prior products on this 2.0
11 license are directly related to the 2.0 license. When we
12 go to the 2.1 license, it will say the same thing, but
13 they can access the prior products as though they were a
14 UnixWare 2.1 product. You need them in each license.

15 Q. Let's talk that through. So, if we're looking
16 at supplement 87 -- this is Exhibit 392 -- and if we look
17 at the prior products list, we see SCO UnixWare 1.1, for
18 example?

19 A. I'm sorry. Oh, here we go. Okay.

20 Q. So, this is supplement 87, which is the
21 UnixWare 2.1 supplement?

22 A. Yes.

23 Q. And we see UnixWare 1.1 release on the prior
24 products schedule?

25 A. Yes.

1 Q. And this prior products schedule gave them the
2 right to access that source code?

3 A. Correct.

4 Q. And it gave them the right to distribute binary
5 copies of the source code if they paid Santa Cruz an
6 extra fee?

7 A. It gave them rights to distribute -- which
8 product, the 1.1?

9 Q. 1.1.

10 A. If it was -- if they didn't have a license for
11 1.1, and through the prior products they were able to
12 access the 1.1, and they included some of that code into
13 the 2.1 product, they could distribute the binary, but
14 the binary would be a UnixWare 2.1 binary. The prior
15 products don't give any licensee the right to create a
16 derivative work of, say, UNIX System V, Release 3.2.
17 This is just a grant of access. Any access they have and
18 any use they would use of these prior products has to be
19 done under the current and, in this case, the UnixWare
20 2.1 license.

21 Q. Let me make sure I understand your testimony.
22 If I wanted to make a derivative work of UNIX System V,
23 Release 3.2, that is not something I could do under
24 supplement 87?

25 A. That's correct.

1 Q. And so, if I wanted to use --

2 A. Well, let me clarify that. If you wanted to
3 create a derivative work of UnixWare 2.1, that included
4 some of the prior product, you could do that. But if you
5 just looked at the prior products, the prior products
6 grant access to it. It is not the same as having a full
7 source license for that product, so there is no right, by
8 virtue of the prior products, that you can distribute a
9 stand-alone UnixWare 3.2 derivative work.

10 Is that clear?

11 Q. I think so.

12 A. Okay.

13 Q. Now, I believe it was your testimony that the
14 inclusion of prior products was not something that was
15 always done, either by AT&T or by USL or by Novell or by
16 Santa Cruz?

17 A. As a general practice, it was always done.

18 Q. But there were exceptions to that?

19 A. One on the UnixWare 2.0 license, where they
20 were specifically omitted, and then UnixWare 7, where a
21 business decision was made to hone in on the UnixWare
22 only as a prior product. But everything prior to
23 UnixWare 7, all the thousands of licenses that were
24 issued, I only found one that did not include prior
25 products.

1 Q. What was that one?

2 A. That was the ALPS one.

3 Q. If we could turn to SCO 8.

4 MR. MELAUGH: May I approach, Your Honor?

5 THE COURT: Yes. What is it? SCO what?

6 MR. MELAUGH: This is SCO Exhibit 8, Your
7 Honor.

8 Q. This is a supplement with Sequent Computer
9 Systems; isn't that right, Mr. Broderick?

10 A. Yes.

11 Q. And it's supplement number 4; is that right?

12 A. Yes.

13 Q. And it's something that USL entered into -- or
14 I'm sorry -- AT&T entered into?

15 A. Yes.

16 Q. Now, I don't see any prior products listing
17 here, Mr. Broderick, do you?

18 A. No, I don't.

19 Q. Take a look at SCO Exhibit 10. This is another
20 supplement with Sequent Computer Systems; isn't that
21 right?

22 A. Yes, it is.

23 Q. Supplement number 9?

24 A. Uh-huh.

25 Q. It's entered into by AT&T; isn't that right?

1 A. Yes.

2 Q. And, again, I don't see any prior products
3 listing in this supplement. Do you, Mr. Broderick?

4 A. No. But this is a 3.1 upgrade from 3.0. And
5 it says that the -- in addition to the terms and
6 conditions set forth in the attached upgrade schedule.
7 For upgrades from 3.0 to 3.1 from the UnixWare 3.0, the
8 terms and conditions of supplement 6 for 3.0 govern, and
9 I believe if you go look at supplement number 6 for 3.0,
10 you'll see prior products listed.

11 Q. We can agree, though, that this supplement does
12 not list prior products; isn't that right?

13 A. Yes, but it references a supplement -- it ties
14 to a supplement that does.

15 Q. Let's turn to SCO Exhibit 12. This is another
16 of these supplements. It's again with Sequent; isn't
17 that right?

18 A. Yes, it is.

19 Q. And it's supplement number 15?

20 A. Yes, it is.

21 Q. Entered into by AT&T?

22 A. Yes.

23 Q. And, again, we don't see any prior products
24 listed in terms of this supplement, do you?

25 A. No. And, again, this is an upgrade

1 supplement.

2 Q. So there's a class of supplements that you're
3 calling upgrade supplements that do not include prior
4 products rights?

5 A. Yeah -- well, no. When I reviewed the
6 licenses, especially in the 3.0, because in 3.0, you
7 license 3.0 and it was a main schedule that had a lot of
8 these licensing requirements. But when they upgraded to
9 3.1 or 3.2, in a lot of cases it was just a one or
10 two-page supplement that referenced back to the original
11 3.0. And in that original 3.0, I think you'll find that
12 there are prior products listed.

13 THE COURT: Pick a good breaking point,
14 Mr. Melaugh.

15 MR. MELAUGH: Your Honor, I think I have no
16 more questions. I think I can end now.

17 THE COURT: Are you done with this witness?

18 MR. MELAUGH: I'm done with this witness.

19 THE COURT: Then let's take a break. We'll be
20 in recess for about 15 minutes.

21 THE WITNESS: Is that it?

22 THE COURT: He might have some redirect.

23

24

25 (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 May 1, 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 420 through 499
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 May 1,
2008.

REBECCA JANKE, CSR, RPR, RMR

1 THE COURT: Do we have a witness? You can resume
2 the stand.

3 And you may proceed with redirect, Mr. Normand.

4 MR. NORMAND: Thank you, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. NORMAND:

7 Q. Mr. Broderick, you've been asked by both counsel
8 and myself about the Unisys ClearPath situation. Do you
9 recall those questions?

10 A. Yes, sir.

11 Q. If the ClearPath computer contained only the CPUs
12 that worked with UnixWare on the one hand and with the Unisys
13 proprietary product on the other hand, would you have remitted
14 any money to Novell?

15 A. No. I wouldn't have told them about it.

16 Q. Why not?

17 A. Because UnixWare was owned by SCO, and the APA was
18 very clear that UnixWare money went to SCO.

19 THE COURT: Put the mike up and speak right into
20 it.

21 THE WITNESS: I'm sorry.

22 Q. BY MR. NORMAND: You looked at the Supplement
23 Number for the NCR license, I think it was 112. Do you recall
24 that?

25 A. Yes.

1 Q. I take it that every licensee at some point had to
2 execute a Supplement 1; is that fair to say?

3 A. Correct.

4 Q. Now in those instances of UnixWare licensees who
5 executed a Supplement 1, was there a list of prior products in
6 that supplement?

7 A. Absolutely.

8 Q. And what were the two examples that we spoke about
9 earlier of that, that you can recall?

10 A. I had two examples. One was Super Computer
11 International, and one was Lexis Software Corporation. They
12 license UnixWare 2.0 licenses with Novell. And the UnixWare
13 license was Supplement Number 1. They had not licensed
14 anything previously.

15 Q. Mr. Broderick, this is the Unisys UnixWare 2.0
16 license represented on the right. Do you recall going through
17 this?

18 A. Yes.

19 Q. Now, to your understanding, was any of this
20 System V material included in the UnixWare source code at the
21 time of this license?

22 A. At the time we developed the UnixWare 2.0 source
23 code product?

24 Q. At the time the Unisys UnixWare 2.0 license was
25 executed, did you have an understanding as to whether this

1 UnixWare source code included source code from these prior
2 releases?

3 A. Source code from the prior releases, if it had any
4 commercial usability or value would have continued forward
5 into UnixWare. Each release is built on a previous release.
6 And what they do is, say you're at 4.2 MP, you add new
7 functionality to it. You may make some modifications, but
8 you're adding new functionality to support market needs. That
9 new functionality that was put in the 4.2 MP became
10 UnixWare 2.0. And 4.2 MP has functionality from 4.0
11 conceivably to 3.0. If there is any commercial usability to
12 it, it's carried forward.

13 Q. Now, at this point, the time of this license, did
14 Unisys have an existing UNIX license?

15 A. Yes.

16 Q. And do you know whether they had an existing
17 operating system that was derived from their previous UNIX
18 licenses?

19 A. If they had -- well, Unisys had a derivative work
20 that was based on UNIX System V Release 4 MP.

21 Q. Was that your understanding?

22 A. That's a fact.

23 Q. As to that operating system under this
24 UnixWare 2.0 license, was Unisys entitled to use any part of
25 these prior products in building that derivative work?

1 A. For --

2 THE COURT REPORTER: I'm sorry?

3 THE WITNESS: I'm clearing up the question.

4 Q. MR. NORMAND: For Unisys' existing UNIX derivative
5 operating system --

6 A. Yes.

7 Q. -- once Unisys acquired this UnixWare license, were
8 they entitled to use any material they wanted from this System
9 V releases in that existing operating system?

10 A. Yes. They just had to treat it as UnixWare 2.0 and
11 pay the royalties based on the 2.0 license.

12 Q. Was there any scenario in a case of a UnixWare
13 licensee like Unisys in which they would be paying royalties
14 based on the System V products?

15 A. Not solely based on the fact that they're listed as
16 a prior product and they have access to them. They would pay
17 royalties if they had executed a separate supplement for that
18 specific release of UNIX.

19 Q. If you had a licensee who had never before been a
20 UNIX licensee, brand-new, UnixWare licensee of the sort that
21 we discussed earlier, for simplicity, let's pick a name, Super
22 Computer, was that a UnixWare 2.0 licensee?

23 A. Yes.

24 Q. Is there any scenario in which Super Computer would
25 be paying System V royalties based on the list of System V

1 products with its UnixWare license?

2 A. Absolutely not. It's very clear in the prior
3 products section that says you can access these prior products
4 pending any code you might use has to be treated as though
5 it's UnixWare. So no. If you access prior products under
6 UNIX -- for 2.0 schedule, it's 2.0.

7 Q. In the case of Super Computer, first-time UnixWare
8 licensee --

9 A. Uh-huh (affirmative).

10 Q. -- to your understanding, was there System V
11 material in its UnixWare source code that it had a license?

12 A. Well, yes. UnixWare is a System V product. It's
13 just a brand naming. So -- and it's built on prior releases
14 of UNIX System V. So UnixWare clearly has System V coding.

15 Q. And under its license, it can use System V
16 technology consistent with its rights to use UnixWare; is that
17 fair to say?

18 A. Absolutely.

19 MR. NORMAND: Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Normand.

21 Any re-cross, Mr. Malaugh?

22 MR. MALAUGH: Yes, Your Honor.

23 RE-CROSS-EXAMINATION

24 BY MR. MALAUGH:

25 Q. When you and I were looking at that NCR supplement

1 and I asked you whether that supplemental loan, it was a 2.1
2 supplement, gave NCR the right to make derivative works from
3 the prior products listed, I think your answer was no; isn't
4 that right?

5 A. As a standalone derivative work, my answer is no.

6 Q. Is that answer also true -- and isn't that answer
7 also true if it had been Supplement 1?

8 A. That's correct. They can access the code, but it
9 has to be treated as though it would be a UnixWare 2.0
10 product.

11 Q. And they don't have the right to make derivative
12 works and distribute derivative works as standalone products
13 for products listed in the prior products list of that
14 Supplement 1?

15 A. Well, it's kind of hypothetical. If somebody took
16 a 2.0 license and they accessed the prior products, and they
17 built a derivative by accessing the prior products on a
18 UnixWare license, then they could distribute derivative work,
19 but they would pay off a UnixWare -- they would pay off of the
20 UnixWare license.

21 Q. I thought you had said that the prior products
22 license did not convey the right to make a derivative work of
23 those products.

24 A. That's true. But it's -- it doesn't grant rights
25 to create a derivative work, like UNIX -- you have UNIX

1 System V 3.2 listed as prior products.

2 Q. Uh-huh (affirmative).

3 A. You can't access that from a -- say you get from a
4 licensee that has a SCO license created derivative work on
5 that 3.2 and distribute that derivative work as a
6 3.2 license.

7 Q. And that's true regardless of whether it's
8 Supplement 112 or Supplement 1.

9 A. That's correct.

10 Q. You've answered my question. Thank you very much.

11 THE COURT: Thank you.

12 Anything else, Mr. Normand?

13 MR. NORMAND: No, Your Honor.

14 THE COURT: Thank you. You may stand down,
15 Mr. Broderick.

16 I assume this witness may be excused.

17 MR. NORMAND: Yes, sir.

18 THE COURT: And you may call your next witness.

19 MR. GONZALES: Your Honor, SCO calls Jean Acheson.

20 THE COURT: You are Mr. Cyrulnik; is that correct?

21 MR. GONZALES: No. I wish I were. I'm
22 Mr. Gonzalez. Mr. Cyrulnik is a few years younger than I am.

23 THE COURT: All right. Thank you.

24 MR. GONZALEZ: May I approach, Your Honor?

25 THE COURT: Yes. Thank you.

1 Come forward and be sworn, please, right here in
2 front of the clerk of court.

3 Do we need these posters up still?

4 MR. GONZALEZ: No. I'll take them down.

5 THE CLERK: Please raise your right hand.

6 JEAN ACHESON,

7 called as a witness at the request of SCO Group,

8 having been first duly sworn, was examined

9 and testified as follows:

10 THE WITNESS: I do.

11 THE CLERK: Thank you. Please take the witness
12 stand over there.

13 THE WITNESS: Thank you.

14 THE CLERK: Please state your name and spell it for
15 the record.

16 THE WITNESS: My name is Jean Acheson. That's
17 spelled J-E-A-N A-C-H-E-S-O-N.

18 THE CLERK: Thank you.

19 DIRECT EXAMINATION

20 BY MR. GONZALEZ:

21 Q. Good morning, Ms. Acheson.

22 A. Hello.

23 Q. What is your current occupation?

24 A. I'm the controller at SCO.

25 Q. And when did you began?

1 THE COURT: Excuse me. Pull the mike down a little
2 and speak right into it. Thank you.

3 THE WITNESS: Okay.

4 Q. BY MR. Gonzalez: When did your tenure as
5 controller begin?

6 A. Last September.

7 Q. And in that role, do you have responsibilities that
8 are related to UNIX revenues?

9 A. Well, all of the financial functions report into me
10 including the recording of the UNIX revenues.

11 Q. And have you had prior experience related to
12 UNIX -- the UNIX licensing business and its revenues?

13 A. Yes. I started back with AT&T UNIX Systems
14 Laboratories '90, '91. Basically at that point I started in
15 the accounts payable and moved over into the revenue as a
16 contract administrator working for Carolyn Kachinsky in UNIX
17 Systems Laboratories. And there I processed the OEM and other
18 company quarterly reports for the SVR binary royalties.

19 Q. And did you then leave USL?

20 A. Well, not really, because Novell purchased USL, and
21 I continued in the same function with Novell. And then later
22 when Santa Cruz Operations was purchasing the product line
23 from Novell, my boss at that time Carolyn Kachinsky moved into
24 another position at Novell, and I took over management for the
25 binary royalties. And then with Santa Cruz Operation, I

1 continued as the manager of the binary royalties taking on all
2 the binary royalties for the company, whether it was the SVRX,
3 UnixWare, OpenServer or other products. And later making the
4 worldwide revenue manager for Santa Cruz and then moved into
5 that that same position when Caldera later known as SCO
6 purchased the UNIX product line, as well.

7 Q. Thank you. Is it fair to say, therefore, that
8 since 1991 when you started at USL you have been continually
9 involved with tracking and reporting of UNIX revenue?

10 A. Yes.

11 Q. And within those functions, did you come to be
12 involved with the reporting and tracking of what are known as
13 SVRX royalties under the agreement between Novell and Santa
14 Cruz in '95?

15 A. Yes.

16 Q. And what function did you play with respect to
17 those royalties?

18 A. Well, either myself directly or my direct report
19 would review the quarterly royalty reports that were sent in
20 by the OEMs and the other customers. We would review them for
21 correctness under the various product schedules to make sure
22 they were calculating correctly, you know, just adding and
23 subtracting correctly. We would record these revenues, well,
24 not as revenue, to SCO or to Santa Cruz or to SCO, but we
25 would record the transactions. We would segregate the cash,

1 and then on a monthly basis prepare a report that we would
2 give to Novell for the cash from the preceding month.

3 Q. And did you continue performing those functions
4 once you moved over to Caldera SCO?

5 A. Yes.

6 Q. So again, it's fair to say that with respect to
7 SVRX royalties, you had been on the front line of tracking and
8 reporting and remitting those royalties?

9 A. Yes.

10 Q. And what exactly -- what is your understanding of
11 what these SVRX royalties are?

12 A. Basically as identified in the APA, you know, as
13 SVRX royalties it's various products where the revenue stream
14 was, you know, maintained administratively by Santa Cruz for
15 Novell.

16 Q. And that administration has continued with SCO?

17 A. Yes.

18 Q. And are you aware of any interest under the APA
19 that Novell had with respect to UnixWare royalties?

20 A. Novell didn't have any interest in UnixWare under
21 the APA.

22 Q. Was there a section of the APA that provided for
23 any interest that Novell would have in UnixWare royalties if
24 certain benchmarks were reached?

25 A. Yes, that's correct. The APA provided that if

1 Santa Cruz reached in their total UnixWare sales more than
2 40 percent of projections that were laid out in the APA, then
3 Santa Cruz would have had to have paid an additional fee,
4 royalty fee to Novell for the UnixWare product line. These
5 benchmarks were never reached, and that calculation ended in
6 2002.

7 Q. By that, do you mean that Novell's interest expired
8 in 2002?

9 A. Yes.

10 Q. And in your work with -- in your work in the UNIX
11 business that you were describing, did you become familiar
12 with the licenses that generated the UNIX revenues that you
13 tracked?

14 A. Yes. We had to review them from the financial
15 viewpoint.

16 Q. And please describe the licenses under which
17 licensees paid these SVRX royalties that you've been talking
18 about.

19 A. Well, basically it was a product schedule that
20 described, you know, from the technical view point it
21 described a lot about the product and the licensee's rights
22 for the product. And then it also -- the section I was more
23 interested and concerned with was how to calculate the
24 royalties and when royalties were due.

25 Q. Going back to your earlier testimony about the

1 interest that Novell had with respect to UnixWare royalties
2 that expired in 2002, did you have a shorthand name for that
3 interest?

4 A. Yeah. We called it the 40-percent calculation.

5 Q. So going back to the line of questioning on which
6 we were, were the licenses that you were describing that are
7 identified under the APA that generated SVRX royalties, were
8 those for a particular release of a System V product?

9 A. Well, each product schedule was for a release. So
10 you would have -- you know, a customer would purchase
11 licensing rights for SVRX or System V Release 3.2 or System V
12 Release 4.0, et cetera.

13 Q. Are you familiar -- having seen and worked with
14 these UNIX licenses, are you familiar with the concept of
15 prior products under these licenses?

16 A. Yes. I've seen that.

17 Q. And can you describe for us your understanding of
18 what prior products are?

19 A. Usually when licensee would sign up for the next --
20 for a release of a product, it would include, there was
21 usually a section in it, a schedule that would list all of the
22 prior releases or most of the prior releases of the
23 predecessor products. So if they were taking System V
24 Release 4.0, it would give them rights to 3.2, 3.0, 2, et
25 cetera.

1 Q. Now, you've just testified that you work for SCO's
2 predecessors. In the UNIX licensing business; correct?

3 A. Yes.

4 Q. Which of the companies that you worked for in the
5 UNIX business before SCO include prior products in their UNIX
6 licenses?

7 A. UNIX -- well, AT&T because we inherited the
8 agreements from them, UNIX System Laboratories, Novell and
9 Santa Cruz.

10 Q. Did any of those companies charge a separate
11 additional fee for the prior products?

12 A. No.

13 Q. So the licensee only paid royalties on the current
14 Release V license?

15 A. Yes.

16 Q. Do you know of any instance in which a licensee
17 paid a separate fee for the prior products?

18 A. No, not under the schedule.

19 Q. And that would be true for any of the companies
20 that you have worked for before SCO?

21 A. That is correct.

22 Q. Ms. Acheson, did you play any role in the
23 transition of the UNIX business from Novell to Santa Cruz?

24 A. Yes.

25 Q. And what role did you play?

1 A. Well, basically I was on various committees with
2 Novell and Santa Cruz personnel to, you know, discuss the
3 various clauses of the APA and, you know, how to execute the
4 transition smoothly between the two companies. My major
5 focus, especially later on in the transition, was on how to
6 report and how to administer the SVRX administration
7 arrangement under the APA with Novell.

8 Q. And during this period of transition of business,
9 how often did you have an opportunity to meet with Novell on
10 the issues that you are describing?

11 A. Well, first, of course, the meetings were almost
12 daily, and later on, especially around the reporting, it was
13 probably more on a monthly basis with the reports. And then,
14 of course, telephone conversations in-between if we had
15 questions on other things for the transition.

16 Q. I'd like to now show you what has been admitted as
17 SCO Exhibit 331. And can you tell us what that document is?

18 A. Well, it's the cover sheet of a report that we
19 would have sent to Novell for the January -- for the cash
20 collected during January of 1997.

21 Q. And can you briefly walk us through some of the
22 major items there on that chart?

23 A. Well, basically we're stating that there was --
24 that adjusted revenue was approximately -- sorry. It's pretty
25 blurry. I think it's 5.6 million. And that after the

1 administrative fees and other royalties are deducted, that the
2 total payment due to Novell for the period is 4.5 or
3 6 million.

4 Q. And if you turn the pages, what do the underlying
5 documents reflect?

6 A. Well, you know, sometimes our licensees aren't the
7 quickest on remembering who to pay what. And so consequently,
8 we sometimes -- the licensees would direct the cash to the
9 wrong company. So that next page was just returning cash to
10 Novell that belonged to Novell directly.

11 Q. And the next two pages, what do they reflect, the
12 spreadsheet?

13 A. That page is simply just the detail of the fees
14 that we administered under the agreement for the month of
15 January.

16 Q. How was the format of this report developed?

17 A. During the transition, Cindy Lamont, who had worked
18 for me in Novell as a contract administrator, and -- or I'm
19 sorry. Cindy Lamont was a contract manager and Barbara
20 Cavalla, who was the contract administrator, they remained
21 with Novell. And what happened is for the first time that we
22 needed to do a report for them, I sat down and figured out a
23 format that looked right. And then we reviewed it in light of
24 the clauses within the APA.

25 Q. Do you have a view as to how familiar Ms. Lamont

1 and Ms. Cavalla were with the UNIX business?

2 A. Well, quite familiar, because Cindy Lamont was a
3 contract manager. She had worked on developing many of the
4 schedules and the agreements and had worked with the
5 negotiations with the OEMs and other customers on these. And
6 Barbara Cavalla had worked directly for me as a contract
7 administrator actually reviewing many of the quarterly
8 reports.

9 Q. So if I understand correctly, these representatives
10 of Novell that you were meeting with were the colleagues who
11 just a few days before you had worked with intimately within
12 the Novell business?

13 A. That is correct.

14 Q. So the meetings with Novell developed the report
15 that we are looking at. Did Novell at any time say that you
16 would be reporting UnixWare royalties?

17 A. In this report? No.

18 Q. Or in any report?

19 A. No. None.

20 Q. Did Novell say to you that would you be reporting
21 royalties for any prior products listed in a UNIX license?

22 A. No.

23 Q. Did the reports that you, in fact, sent Novell
24 every month after that point in time ever contain any
25 information about royalties paid under UnixWare licenses?

1 A. No.

2 Q. After the transition period ended, did you have
3 further interactions with Novell representatives?

4 A. Yes. Each month as we sent this report in, you
5 know, they would call to discuss it. If they had questions
6 about certain of the revenues because, as I stated, Barb and
7 Cindy were pretty familiar with the OEMs and knew how to ask
8 the various questions in regards to it.

9 Q. I'd like to now show you what has been admitted as
10 SCO Exhibit 98. And this is a letter that you wrote to
11 Cindy Lamont of Novell whom you've testified about.

12 A. Uh-huh (affirmative).

13 Q. And as you can see, it's dated April 26, 1996.

14 A. Uh-huh (affirmative).

15 Q. And can you tell us who the people copied on this
16 e-mail?

17 A. Basically those were my co-workers at SCO. So T.
18 Dulin was my boss, Terry Dulin, Kathy Sensor was one of my
19 contract administrators. Burt Lavine was an attorney who had
20 come from AT&T and through Novell and out to Santa Cruz
21 Operations.

22 Q. And if you look at the very last paragraph where it
23 says:

24 We have given the pertinent Cray letter
25 agreements to Burt.

1 Who is Burt?

2 A. That was the Burt Lavine.

3 Q. So that was the same person that is copied on this
4 e-mail?

5 A. That is correct.

6 Q. And if you can focus on the subject matter, you see
7 that it says "Cray source"; right?

8 A. That's correct.

9 Q. Can you briefly describe what the issue that you
10 were discussing with Ms. Lamont on this issue of Cray source?

11 A. Yeah. Cray had been given a special right to
12 actually distribute source code. And during the review of one
13 of the monthly reports, I believe it was Barbara Cavalla
14 brought up because she was -- you know, knew the details of
15 the Cray reporting, that Cray had reported source code. And
16 since it was a reporting, she thought that possibly those
17 revenues would belong to Novell. I disagreed, and this was
18 why I disagreed. This was my argument for it.

19 Q. So is it fair to say that you are setting forth the
20 issue of the question in the first couple lines where you say:

21 Dear Cindy, we have looked in the ownership of
22 the revenues generated by Cray Research, Inc.'s
23 right to distribute source code products.

24 A. Yes.

25 Q. And then later on I believe you're expressing a

1 position that Santa Cruz came to with respect to those source
2 code sublicenses fees where you state:

3 SCO has a right to retain 100 percent of
4 the revenue.

5 A. That's correct.

6 Q. And there's a last paragraph where it says:

7 We have been given the pertinent Cray letter
8 agreement to Burt -- I'm sorry -- we have given
9 the pertinent Cray letter agreements to Burt, and
10 it is his opinion that these source revenues do
11 belong in full to SCO.

12 Do you see that?

13 A. Yes.

14 MR. MALAUGH: Objection, Your Honor. I think this
15 is a leading line of questioning.

16 MR. GONZALEZ: I'm asking about the document. I
17 can ask her what it says. It makes it more efficient.

18 THE COURT: Overruled. Go ahead.

19 Q. BY MR. Gonzalez: So you do see that language;
20 right?

21 A. Yes.

22 Q. And do you understand that to mean that you had
23 consulted with Mr. Lavine on this issue, and you were copying
24 him so that he would be aware of your communications with
25 Novell on the issue?

1 A. Yes.

2 Q. And what was Novell's response to the position that
3 Santa Cruz had taken with respect to Cray's source of
4 licensing fees?

5 A. After their review, they agreed.

6 Q. And I'd like to now show you what has been marked
7 as Exhibit 126.

8 THE COURT: SCO 126; right?

9 MR. GONZALEZ: Pardon me?

10 THE COURT: SCO 126.

11 MR. GONZALEZ: I'm sorry. SCO Exhibit 126.

12 Q. BY MR. Gonzalez: Is this an e-mail in which Novell
13 communicated to you its position?

14 A. Yes. They actually sent it to my boss,
15 Terry Dulin.

16 Q. And this is dated a few months later in August of
17 1996; correct?

18 A. Yes.

19 Q. So this is actually an e-mail that Terry Dulin,
20 your boss, sent to you?

21 A. Right. Forwarded it to me from Cindy Lamont.

22 Q. What was she forwarding to you?

23 A. Basically stating that Cindy stated that Novell
24 agreed that the source code fee paid by Cray did belong to
25 Santa Cruz.

1 Q. And would that language be reflected where it says:
2 This is to let you know -- Terry, this is to
3 let you know that Novell agrees that the fees that
4 Cray pays pertaining to their source sublicensing
5 provisions -- and we can skip down a little bit --
6 can be retained by SCO as a source code right to
7 use fee under Amendment Number 1 of the APA.
8 A. That's correct.
9 Q. Is that the position that Novell took, as you
10 understood it?
11 A. Yes.
12 Q. And we can go back to the prior exhibit, I believe
13 it was SCO Exhibit 98. In the second paragraph, do you see a
14 reference there to the Novell SCO agreement, section E?
15 A. Yes.
16 Q. Do you see that? Is that a reference to
17 Amendment Number 1?
18 A. I believe it is.
19 Q. And that's why Ms. Cindy Lamont communicated and
20 relied on the same position in her response?
21 A. Yes.
22 Q. Thank you.
23 Did Cray pay these sublicensing source fees to
24 Novell before the APA?
25 A. Oh, yes.

1 Q. Why do you say "oh, yes"?

2 A. Because it's been a relationship that's been
3 going -- went way back into the AT&T premie.

4 Q. Were the fees substantial?

5 A. It was a few 100,000 a year, at least afterwards.
6 I think it had been more substantial back in the AT&T days.

7 Q. Did Cray continue to pay these source sublicensing
8 fees to Santa Cruz?

9 A. Yes.

10 Q. And for how long did that occur?

11 A. I believe for several years thereafter. They would
12 still be obligated to pay today if they had the situation
13 arise.

14 Q. We can briefly go back to Exhibit, SCO Exhibit 126.
15 I meant to highlight for you in Ms. Lamont's e-mail to your
16 boss Terry Dulin, a Michael Gennaro was copied in that e-mail;
17 correct?

18 A. Yes.

19 Q. Who was Michael Gennaro?

20 A. He was the controller of Novell at that time.

21 Q. So Ms. Lamont was conveying Novell's position and
22 making Mr. Gennaro aware of the position they had taken;
23 right?

24 A. Yes.

25 Q. So going back to the history of Cray paying the

1 source sublicensing fees, you said he continued to pay Santa
2 Cruz a few years after the APA; correct?

3 A. Correct.

4 Q. Did I understand that correctly?

5 A. Yes.

6 Q. Did Novell ever ask later on for those fees?

7 A. No.

8 Q. Did Novell ever deviate from the position it took
9 in its 1996 e-mail that I've just shown you?

10 A. No.

11 Q. Did SCO or Santa Cruz, in fact, remit such
12 sublicensing fees to Novell at any time?

13 A. No.

14 Q. Do you recall we were talking about prior products
15 a little bit earlier?

16 A. Yes.

17 Q. What versions of UNIX did Novell license when it
18 was the owner of the UNIX product line?

19 A. Well, there was what we classified as the SVRX
20 products, which went up through, I think like Release 4.2 MP.
21 And then there was in what was classified as UnixWare,
22 UnixWare 1.1 and 2.0.

23 Q. Did Novell's UnixWare licenses include the list of
24 prior products?

25 A. Yes.

1 Q. Did those prior products include SVRX products that
2 are identified under the APA?

3 A. Yes.

4 Q. Let me show you now what has been marked as SCO
5 Exhibit 27. And as you can see, this is a license between
6 AT&T GIS and Novell executed July 1995. Do you recognize the
7 signature of the person who signed this at the bottom for
8 Novell?

9 A. Russ Holt.

10 Q. Are we looking at the same thing?

11 A. For Novell. I'm sorry. Bill Broderick. For AT&T
12 is Russ Holt.

13 Q. And what do you understand this document to be?

14 A. This was a licensing form that when both parties
15 had signed gave AT&T the right to use the UnixWare
16 Release 1.1.

17 Q. And if you turn to the next page, I take it this is
18 a table of contents for what the schedule includes?

19 A. Correct.

20 Q. And where do we find the prior products?

21 A. It's in Exhibit J, prior products, Page 27.

22 Q. And again, this was a license granted by Novell in
23 1995 for UnixWare 1.1; correct?

24 A. Yes.

25 Q. So we look at Exhibit J on Page 27. Is that the

1 list of prior products that you've been testifying about?

2 A. Yes, it is.

3 Q. Did Novell charge an separate fee for the prior
4 products?

5 A. No, they did not.

6 Q. How did you book the revenues from Novell's
7 UnixWare licenses?

8 A. As UnixWare and then whatever the release was. So
9 in this case, it would have been booked as UnixWare 1.1 or
10 UW 1.1.

11 Q. Did you book any part of the revenue from UnixWare
12 licenses at Novell as SVRX revenue to account for the prior
13 products?

14 A. No.

15 Q. To your knowledge, did anyone at Novell do that?

16 A. No.

17 Q. Did Santa Cruz later release its own versions of
18 UnixWare?

19 A. Yes.

20 Q. And do you recall what those versions were?

21 A. I believe it was the UnixWare 2.1 and then all of
22 the UnixWare 7 family.

23 Q. So let me show you what has been marked as SCO
24 Exhibit 371. And you see about three quarters of the way down
25 where it says, UnixWare 2.1 technology?

1 A. Yes.

2 Q. So what is this document?

3 A. It's also a licensing order form executed giving
4 Unisys the right to UnixWare 2.1 technology.

5 Q. Who are the parties of this license?

6 A. Unisys as the customer and Santa Cruz Operation.

7 Q. And do you see on the next page that there's also a
8 list of prior products?

9 A. Yes.

10 Q. At least an item for that identifying --

11 A. Yes.

12 Q. -- a page where the prior products are listed?

13 A. Yes. Exhibit I, Page 24.

14 Q. Turn to that, Exhibit I. Do you see the list of
15 prior products that you've been testifying about?

16 A. Yes.

17 Q. And did you book royalties under licenses for
18 UnixWare that Santa Cruz granted as UnixWare revenues?

19 A. Yes.

20 Q. Did you ever seek to break out those revenues as
21 UnixWare and prior products in any way?

22 A. No.

23 Q. Did Novell transfer its UnixWare licenses to
24 Santa Cruz?

25 A. Yes.

1 Q. Did Santa Cruz continue receiving royalties paid
2 under those licenses?
3 A. Yes.
4 Q. Did Santa Cruz remit any of those royalties to
5 Novell?
6 A. No.
7 Q. Did Santa Cruz remit to Novell any royalties for
8 prior products?
9 A. No.
10 Q. Did Santa Cruz remit any royalties paid under its
11 own UnixWare licenses to Novell?
12 A. No.
13 Q. Did Santa Cruz ever remit to Novell royalties for
14 the prior products in its UnixWare licenses?
15 A. No.
16 Q. Did Santa Cruz transfer its own and Novell's
17 UnixWare licenses to SCO in 2001?
18 A. Yes.
19 Q. Did SCO continue receiving royalties under those
20 UnixWare licenses?
21 A. Yes.
22 Q. Did SCO remit those royalties to Novell?
23 A. No.
24 Q. Ms. Acheson, have you had experience with audits?
25 A. Yes.

1 Q. How deep is your experience with audits?

2 A. Well, as a finance person in public companies, of
3 course, we have quarterly audits and the annual, you know,
4 major audit. Additionally, in a revenue group where we deal
5 with binary royalties, we had an audit group that audited many
6 of our customers or we worked through independent CPA firms to
7 audit customers. Additionally, we have been audited by
8 companies who have granted us licensing rates, such as
9 Microsoft and Mrs. Novell audited us twice.

10 Q. Did Novel audit the administration of the SVRX
11 royalties?

12 A. Yes.

13 Q. When did that take place?

14 A. One time in 1998 and then again in 2003.

15 Q. Who was audited in 1998?

16 A. It would have been Santa Cruz Operation in '98.

17 Q. What role did you play in the 1998 audit?

18 A. Well, my boss Terry Dulin at that time did the
19 majority of the negotiation of the auditors for timing and
20 scope. I worked with them as far as supplying the information
21 and data to them that they required.

22 Q. And based on your experience with auditing, how
23 thorough and detailed do you think Novell's auditors were in
24 that 1998 audit?

25 A. They were extremely detailed.

1 Q. Did Novell's auditors ask Santa Cruz for any
2 information or documents regarding SVRX licenses or royalties?

3 A. No; except for the 40-percent calculation which
4 they reviewed with my boss Terry Dulin.

5 Q. With that exception aside, did they ask for any
6 information about anything regarding royalties or licenses?

7 A. No, they did not.

8 Q. Did Novell at that audit request Santa Cruz to pay
9 UNIX for royalties?

10 A. No.

11 Q. Under UnixWare licenses?

12 A. No, they did not.

13 Q. Did Novell request any share of those royalties for
14 the prior products that were listed in the UnixWare licenses?

15 A. No, they did not.

16 Q. What role did you play in the 2003 audit of SCO --
17 I'm sorry. Was SCO audited later, you said?

18 A. Yes, it was SCO.

19 Q. In 2003; right?

20 A. Correct.

21 Q. What role did you play in that audit?

22 A. By that time, I had the direct negotiations with
23 the auditors, and, you know, working with -- my contract
24 administrator supplied them with the details that they
25 required under the audit.

1 Q. Did Novell's auditors ask SCO for any information
2 about Novell's or Santa Cruz' UnixWare licenses?
3 A. No, not from those.
4 Q. The licenses of those companies have executed?
5 A. No.
6 Q. As part of the audit did Novell request payment for
7 royalties from those licenses?
8 A. No, they did not.
9 Q. Did Novell request any share of those royalties for
10 the prior products listed in the UnixWare licenses?
11 A. No.
12 Q. To the best of your knowledge, Ms. Acheson, did
13 Novell ever ask to assign any value to the prior products in
14 UnixWare licenses and pay Novell for the licensing of those
15 products?
16 A. No, they didn't.
17 Q. To the best of your knowledge, did Novell ask the
18 same thing of SCO? I meant to say Santa Cruz before. But I
19 guess your answer applies to both Santa Cruz and SCO?
20 A. Well, with one exception.
21 Q. What --
22 A. No. They only asked auditing for the Sun and
23 Microsoft agreement.
24 Q. And no new information about UnixWare licenses
25 granted by Novell or Santa Cruz?

1 A. No.

2 Q. Do you recall a licensee called Unisys?

3 A. Yes.

4 Q. And so let me show you what has been marked as SCO
5 Exhibit 370.

6 And it's been admitted, Your Honor.

7 If you look at the second page, correct me if I'm
8 wrong, but I think I understand this to be a Unisys 2.0
9 license executed in 1995 between Unisys and Novell. Do you
10 read that document to be that?

11 A. Yes.

12 Q. And if you look at Paragraph -- Page 26 we find a
13 list of prior products; is that correct? On Page 26?

14 A. Yes.

15 Q. Was this license transferred to Santa Cruz for the
16 sale of the UNIX assets?

17 A. Yes, it was.

18 Q. Did Santa Cruz receive royalties from Unisys under
19 this particular license?

20 A. Yes, we did.

21 Q. Let me show you, then, what has been marked
22 Exhibit 387, SCO Exhibit 387. And this document was produced
23 by Novell in this litigation. Can you, please, briefly
24 describe or explain what this report reflects.

25 A. Basically it's one of the pages of the quarterly

1 reports submitted by Unisys to document the payment of their
2 various royalties under their various products schedules.
3 What they're doing on this report is they are summarizing for
4 about nine quarters the gross amounts due for both
5 UnixWare 2.0 and the SVRX 4 product. The net amount due after
6 discount is taken on the third matrix down basically shows the
7 geographic breakout of the UnixWare sales activity, and the
8 fourth segment of the report shows how they calculated their
9 discount.

10 Q. And how often did Santa Cruz receive this report?

11 A. Quarterly.

12 Q. Did Novell receive this report?

13 A. Yes.

14 Q. When it was the owner of the UNIX business?

15 A. Well, yes. When it was the owner, yes.

16 Q. And if I wanted to focus on the royalties that
17 Unisys was paying on their 2.0 license from Novell that we
18 just saw, where would I look within these tables?

19 A. The third table down would probably be the easiest.
20 It's basically breaking out the UnixWare 2.0 binary royalty
21 fees by geographic region, and the second column is the total.
22 The other columns are just the regions within Unisys.

23 Q. So if I look, for example, at the very last item,
24 it says first Q '99, how much did Unisys report and pay to
25 Santa Cruz under the 2.0 license?

1 A. \$152,966.

2 Q. Do you know how Novell came into possession of this
3 document?

4 A. More than likely through their audits of us.

5 Q. Did Novell at any time ask for the royalties that
6 Santa Cruz was collecting under the 2.0 license between Unisys
7 and Novell?

8 A. No.

9 Q. Did Novell ever ask for a share of those royalties
10 corresponding to the prior products?

11 A. No.

12 Q. Did Novell ask for any royalties under this license
13 even in its 2003 audit?

14 A. No, they did not.

15 Q. Just a couple of discrete questions, and we're
16 done.

17 Ms. Acheson, are you familiar with OpenServer?

18 A. Yes.

19 Q. What is OpenServer?

20 A. OpenServer is, well, Santa Cruz Operation's flavor
21 of UNIX.

22 Q. And is that a SCO product?

23 A. Now it is, yes.

24 Q. And how do SCO's UnixWare royalties currently
25 compare with SCO's OpenServer -- I'm sorry. How does SCO's

1 UnixWare revenues currently compare with SCO's OpenServer
2 revenues?

3 A. I believe in 2007, it was about 70-percent
4 OpenServer and 30-percent UnixWare.

5 Q. And how did those revenues compare in 2002?

6 A. At that point it was about two-thirds OpenServer
7 and one-third UnixWare.

8 MR. GONZALEZ: Nothing further. Thank you.

9 THE COURT: Thank you, Mr. Gonzalez.

10 Mr. Malaugh, you may cross-examine.

11 MR. MALAUGH: Thank you, Your Honor.

12 If I may approach?

13 THE COURT: Yes.

14 MR. MALAUGH: It's the list of exhibits that we may
15 be using during cross-examination.

16 CROSS-EXAMINATION

17 BY MR. MALAUGH:

18 Q. Good morning, Ms. Acheson.

19 A. Hello.

20 MR. MALAUGH: If I may approach the witness, Your
21 Honor.

22 THE COURT: You may.

23 Q. BY MR. MALAUGH: Ms. Acheson, I'm showing you
24 what's been pre-marked as Novell Exhibit 187. It's been
25 admitted. Do you recognize this document? This is the

1 agreement --

2 A. Yes.

3 Q. -- with Sun SCO entered into in 2003; is that

4 correct?

5 A. Yes.

6 Q. If I can ask you to turn to Attachment 1 of that

7 document. And the second page. This is SCO 1287219.

8 You see there's a list of SVRX versions here and

9 then OpenUNIX 8 release. Do you see where I'm pointing to?

10 A. Yes.

11 Q. And my first question is about the first version

12 listed here System V 4.1 ES/3B2. In the ordinary practice of

13 royalty remission, was this one of the SVRX versions that SCO

14 was under an obligation to remit royalties as to?

15 A. When it was separately licensed by the licensee,

16 yes.

17 Q. And the same is true of the next version listed

18 here, 4.1 C2/3B2?

19 A. Yes.

20 Q. And same is true of the next three lines, in fact,

21 4.1 ES, 4.2 and 4.2 MP?

22 A. Well, as long as it was the standalone version,

23 not -- not that which was included in UnixWare.

24 MR. MALAUGH: If I may approach.

25 Q. BY MR. MALAUGH: I'm showing you what's been marked

1 as SCO Exhibit 141. I think you may have actually seen this
2 during your direct testimony. This is a license supplement
3 with NCR. I'm sorry. SCO Exhibit 141. This is a license
4 supplement with NCR; is that right?

5 A. Yes.

6 Q. And it's listed as Supplement 112?

7 A. That is correct.

8 Q. And it's signed by Mr. Bill Broderick of the Santa
9 Cruz Operation?

10 A. That is correct.

11 Q. Let's turn to the prior products listing that we've
12 heard some testimony on today. I believe it is Exhibit I in
13 this document. It's on SCO 9776.

14 Now, I take it, it's your testimony and it's SCO's
15 position that once NCR had entered into this UnixWare 2.1
16 supplement with Santa Cruz, Santa Cruz was non-obligated to
17 pass along royalties on account of these prior products listed
18 in Exhibit I?

19 A. That's correct. NCR was purchasing UnixWare 2.1.

20 Q. So if we were to look at the royalty reports that
21 Santa Cruz was issuing and you've testified about --

22 A. Uh-huh (affirmative).

23 Q. -- we shouldn't see any royalties for the versions
24 listed here being remitted from Santa Cruz to Novell?

25 A. As long as it was -- as long as they were reporting

1 under the UnixWare schedule we would not have.

2 Q. I'm not sure what you mean by that. So if NCR is
3 out there using its System V Release 3.2 rights, is it SCO --
4 and paying money for using those rights, is it SCO's position
5 that because of this supplement SCO doesn't have to pay any
6 money to Novell?

7 A. Okay. No, that's not correct. Basically the
8 customers paid under the product schedule of which their
9 software release was. So if NCR had an older, it's just like
10 if you have Windows, you know, one of the older releases of
11 Windows versus a later or Vista, it's two separate products.
12 So, too, would NCR. They would have an older release. And if
13 that was under the standalone schedule for 3.2, then they
14 would pay royalties under that schedule. However, if they
15 upgraded their product to the UnixWare 2.0, then their new
16 releases they would pay under the UnixWare of 2.30.

17 However, customers still use the old products.
18 They want upgrades. They want new installation, so they would
19 continue paying under the 3.2. If that case happened, you
20 know, we would record the 3.2 as SVRX 3.2 and the UnixWare 2.0
21 as UnixWare 2.0.

22 Q. So let me see if I understand your testimony, thank
23 you. If NCR is out there, it's got derivative work. It's
24 made some changes to the source code, and the source code is a
25 derivative of it is 3.2 that we've been discussing. And it's

1 distributing that derivative work, the money for all of that
2 is still Novell's despite the fact that there's this new
3 supplement for 2.1.

4 A. Right. As long as they were distributing under
5 that original product supplement for 3.2.

6 Q. And that's the case despite the fact that they've
7 got this list of prior products rights in Supplement 112?

8 A. Yes.

9 Q. In fact, if we look at SCO Exhibit 387, which was
10 one of the last exhibits you testified about.

11 A. Uh-huh (affirmative).

12 Q. This was the Unisys reporting history. We see a
13 significant amount of money that's coming in for SVR4.
14 There's some entries at the top, and there's some entries down
15 at the bottom. Those all fees that SCO is continuing to remit
16 to Novell; is that right?

17 A. Yes.

18 MR. MALAUGH: I have no further questions of this
19 witness.

20 THE COURT: Thank you, Mr. Malaugh.

21 Mr. Gonzalez, any redirect?

22 MR. GONZALEZ: Yes. I have brief redirect, Your
23 Honor.

24 //

25 //

1 REDIRECT EXAMINATION

2 BY MR. GONZALEZ:

3 Q. Ms. Acheson, Mr. Malaugh just asked you about a
4 scenario in which a licensee took out, for example, a UnixWare
5 license, and at the same time had a derivative product based
6 on an earlier license, for example, for System V Release 3.2.
7 Do you recall that discussion with Mr. Malaugh?

8 A. Yes.

9 Q. And when you said the licensee would report under
10 the newer license for that product and then you pointed out it
11 would report royalties for the earlier license, the 3.2
12 license, are you referring to source code fees or binary fees?

13 A. Binary fees.

14 Q. And so when the licensee who took out the later
15 license pay any source code fees for the prior products listed
16 in that license?

17 A. Well, they were buying the UnixWare what -- they're
18 buying whatever the latest and greatest version is in that
19 product schedule.

20 Q. And they would pay the source code fees for what?

21 A. For whatever that product was. So if the product
22 schedule is UnixWare 2.30, then they would be purchasing
23 UnixWare 2.30.

24 Q. And they would pay the fees just for that later
25 release?

1 A. Correct.

2 Q. And just to be clear, there would not be any fees
3 for the prior products?

4 A. No.

5 MR. GONZALEZ: That's all, Your Honor.

6 THE COURT: Thank you.

7 Any recross?

8 MR. MALAUGH: No, Your Honor.

9 THE COURT: You may step down.

10 I assume this witness may be excused?

11 MR. MALAUGH: Yes.

12 MR. GONZALEZ: Yes, Your Honor.

13 THE COURT: You may call your next witness.

14 MR. NORMAND: Jeff Hunsaker, Your Honor.

15 MR. SINGER: Your Honor, we're going to have
16 another one of our attorneys put on Mr. Hunsaker. His name is
17 Jason Cyrulnik, and he'll be with the witness in a moment.

18 THE COURT: All right.

19 Come forward and be sworn, please, right here in
20 front of the clerk of court.

21 THE CLERK: Just right up here. Please raise your
22 right hand.

23 JEFF HUNSAKER,

24 called as a witness at the request of SCO Group,

25 having been first duly sworn, was examined

1 and testified as follows:

2 THE WITNESS: I do.

3 THE CLERK: Thank you. Please take the witness
4 stand over there.

5 MR. CYRULNIK: Good morning, Mr. Hunsaker.

6 THE COURT: Hang on just a minute.

7 THE CLERK: Please state your name and spell it for
8 the record.

9 THE WITNESS: Jeff Hunsaker. J-E-F-F
10 H-U-N-S-A-K-E-R.

11 THE COURT: You may proceed.

12 MR. CYRULNIK: Thank you, Your Honor.

13 DIRECT EXAMINATION

14 BY MR. CYRULNIK:

15 Q. Mr. Hunsaker, are you currently employed?

16 A. Yes.

17 Q. And what is your current employment?

18 A. I work for the SCO Group. My title is president
19 and chief operating officer of SCO Operations.

20 Q. And what is the relationship between SCO Operations
21 and the SCO Group?

22 A. It's a wholly-owned subsidiary of the SCO Group.

23 Q. How long have you been president and chief
24 operating officer of SCO Operations?

25 A. Since December of '07.

1 Q. And when did you first start working for SCO?

2 A. I started in January of 2000 with Caldera SCO.

3 Q. And can you briefly describe your prior positions
4 at SCO starting in January 2000?

5 A. Yes. I started as director of sales, and over
6 subsequent years I was over sales for the Americas division.
7 I was vice-president of worldwide marketing, vice-president of
8 worldwide sales, general manager of our UNIX division and also
9 general manager of our mobile business until recently
10 president, chief operating officer.

11 THE COURT: Until recently what? Excuse me. I
12 didn't hear you.

13 THE WITNESS: Until recently president and chief
14 operating officer of SCO Operations.

15 THE COURT: Thank you.

16 Q. BY MR. CYRULNIK: Mr. Hunsaker, did your
17 responsibilities generally remain the same during the course
18 of your time with SCO?

19 A. Yes. Primarily focussed on sales, marketing,
20 business development activities.

21 Q. Can you briefly describe your employment prior to
22 joining SCO in 2000?

23 A. In 1989, I started with a company called
24 WordPerfect Corporation in sales and marketing capacity. And
25 for the next seven, eight years until I believe it was 1998, I

1 was with the same company, but we were acquired by Novell and
2 Corel Corporation. And then in 1998, I worked for a company
3 called Baan, B-A-A-N, enterprise resource planning company in
4 a sales capacity until 2000 when I joined SCO Caldera.

5 Q. And what was the nature of your work at WordPerfect
6 and Baan?

7 A. I was a product marketing, regional sales manager,
8 so fairly consistent always focussed on sales marketing,
9 business development.

10 Q. So would it be fair to say you've had almost
11 20 years of experience in the sales or marketing aspects of
12 the computer industry?

13 A. Yes.

14 Q. Can you briefly summarize your educational
15 background for the Court?

16 A. Bachelor of Arts degree in business from Utah State
17 University.

18 Q. And when was that?

19 A. In 1989.

20 Q. Mr. Hunsaker, I'd like to go back to the 2002-2003
21 time period for the moment. And can you describe generally
22 your role during those particular years?

23 A. Yeah. During that time frame, I was vice-president
24 of worldwide marketing, also during that time vice-president
25 of sales.

1 Q. And what were your responsibilities as
2 vice-president of sales and marketing?

3 A. Generally in terms of marketing and sales, you're
4 focussed on the customers, products, making sure that your
5 product are messaged properly, they're priced properly, that
6 there's a way to distribute those products, that your sales
7 teams are out selling and talking to customers, the
8 administrative side, you know, of quotas and so forth. So
9 it's just generally driving those activities.

10 Q. What products was SCO primarily selling or
11 marketing during the 2000-2003 period?

12 A. We were selling UnixWare and OpenServer is our
13 primary flagship products.

14 Q. What was UnixWare?

15 A. UnixWare is an operating system that runs on
16 hardware that serves up applications, business applications,
17 that allow companies to function. And UnixWare comes, you
18 know, from the early days of AT&T, USL, Novell and through
19 SCO. And so that was that product.

20 Q. And what was OpenServer? That was the second
21 product you mentioned.

22 A. OpenServer is also an operating system, same
23 scenario. Runs on hardware required, and also serves up
24 applications for various customers. And we started in the
25 early days with SCO back in I think late '80s.

1 Q. Mr. Hunsaker, I believe you testified that UnixWare
2 and OpenServer, I think you used the term --

3 THE COURT REPORTER: I'm sorry?

4 MR. CYRULNIK: Sorry.

5 Q. BY MR. CYRULNIK: I believe you used the term they
6 were SCO's flagship products during that period?

7 A. That is correct.

8 Q. What percent of SCO's annual revenue do UnixWare
9 and OpenServer account for approximately?

10 A. At that time and still today, almost 100 percent of
11 our revenue. I mean, 95-plus, 98 percent of our revenue comes
12 from those two products as it relates to products.

13 Q. And are you familiar with the term installed base
14 as it's used with respect to an operating system?

15 A. Sure.

16 Q. Can you generally describe the size of OpenServer's
17 install base?

18 A. Well, we've stated for many years over the history
19 of this company we've sold approximately 2 million servers
20 that have been deployed with, you know, various installations.
21 And OpenServer has accounted for approximately two-thirds of
22 the overall installed base and revenue for our company.

23 Q. In your various sales and managerial positions, did
24 you have occasion to use the term UNIX?

25 A. Yes.

1 Q. Did you have occasion to use the term System V?

2 A. Yes.

3 Q. And how often did you use those terms?

4 A. You know, fairly frequently with customers, with
5 employees discussing our UNIX and System V technologies.

6 Q. Mr. Hunsaker, when you use those terms, what did
7 you mean to convey?

8 A. UnixWare and OpenServer. We're talking about our
9 products. And so when I use the term UNIX or System V, I'm
10 referring to the brand of UnixWare and/or OpenServer.

11 Q. Were you referring to a particular release when you
12 would use those terms?

13 A. Well, yeah. Release version of UnixWare or version
14 of OpenServer, yes.

15 Q. If you heard the term UNIX or System V being used
16 by a customer in the year 2000, for example, what product, if
17 any, would you have in mind that that customer was referring
18 to?

19 A. I don't recall exactly which version, but it would
20 be UnixWare Version 7, 7.1, perhaps.

21 Q. And that was the current release?

22 A. It was the current version at that time, yes.

23 Q. Mr. Hunsaker, was the latest release of UnixWare,
24 UnixWare 7, referred to by any other names?

25 A. Yeah. We referred to it as System V Release 5,

1 SVR5. It's synonymous with UnixWare 7.

2 Q. And is that same SVR 5 used internally?

3 A. Yes.

4 Q. Is it used externally?

5 A. Yes.

6 Q. Do you have any technical training or expertise?

7 A. No.

8 Q. Your expertise is in sales and marketing?

9 A. Correct.

10 Q. From a sales and marketing perspective,

11 Mr. Hunsaker, did you have an understanding as to the

12 relationship between the latest release of UnixWare, say

13 UnixWare 7, and the prior release UnixWare, say UnixWare 2?

14 A. Well, the relationship is -- we have always

15 understood from the sales and marketing perspective we're

16 selling the latest release of our products, UnixWare 7.13 or

17 whatever the version was at that point in time, which

18 incorporated the prior release technology and brought forward

19 any of the technology that was commercially valuable that

20 obviously was important to bring forth into the next version

21 of our products to sell to our customers.

22 Q. How about the relationship between that prior

23 release of UnixWare, say, UnixWare 2, and the proceeding

24 release System V, say SVR4.2?

25 A. Same scenario. Once again, it's all based on

1 whenever the time was we would be selling the latest version
2 of our product where it included the System V technology, and
3 we would bring forth and forward earlier technologies that
4 were relevant, that were commercially valuable, that were
5 needed by customers based on their requests and their input
6 and deliver this into a new product.

7 Q. Mr. Hunsaker, when you say that you understood the
8 latest release of UnixWare to include the commercially
9 valuable technology from the prior release, would you explain
10 to the Court what you mean by commercially valuable?

11 A. Well, I'm referring to, first of all, technology
12 that is current, that it runs and is supported by the latest
13 hardware, latest drivers, that is based on features and
14 functions that our customers need to run their products and
15 their application within their environment. And so it
16 obviously needs to incorporate relevant current technology
17 that we bring forth and then add to that technology for new
18 versions of our product.

19 Q. And how would SCO go about determining what
20 technology fit that description, what technology was
21 commercially valuable?

22 A. Well, from a sales perspective --

23 MR. ACKER: Your Honor, I object to this line of
24 questioning. The witness has testified he does not have
25 technical expertise. He has no involvement in the development

1 process, and we're really just asking the witness to speculate
2 now how the development process works.

3 THE COURT: Mr. Cyrulnik?

4 MR. CYRULNIK: Your Honor, I'm specifically asking
5 the witness about his sales perspective, and I believe the
6 witness has now testified his sales team was intricately
7 involved in determining the commercially valuable technology
8 being included in the next release.

9 THE COURT: I'll let you ask. Overruled. You can
10 go ahead.

11 THE WITNESS: Yes. Once again, from a sales
12 marketing perspective, which has always been my world, we meet
13 with our customers. We talk to them face to face, and we
14 have, whether it's user conferences or annual forum events, we
15 have webinars, just obviously, you know, need to need
16 discussions with customers to understand from them what's
17 relevant and what's important, what they need in terms of
18 their solutions for an operating system.

19 And we take this information, and we move it
20 forward. We talk to our engineers. And we convey to them,
21 you know, this technology is not needed or required. They're
22 looking for new technologies, new functions. And we have
23 what's called product meetings. The product managers and the
24 system engineers and our sales teams communicate updates from
25 the customers upon a weekly basis.

1 Q. BY MR. CYRULNIK: So the process of determining the
2 commercially valuable technology was a process that involved
3 the sales side of SCO and the engineering side together?

4 A. Yes; because the sales teams' responsibility was to
5 focus on the customer and understand their needs and then
6 convey that to the engineers who would then develop the
7 products and the applications.

8 Q. And with whom did you interact on the development
9 side, on the engineering side to convey the information
10 feedback that you were getting from the marketplace as to what
11 was commercially valuable?

12 A. Well, during that time frame, we spent time talking
13 to our product managers and engineering leads, Andy Nagle,
14 John Maciaszek, Wolf Bauer, Sandy Gupta and others in terms of
15 these meetings.

16 Q. And did you have an understanding as to what they
17 would do with the information you would to provide them?

18 A. Well, they would -- they're smart individuals, and
19 they understand the importance of customer feedback. And so
20 they would take the latest technology, and they -- functions
21 and technology that is relevant and current and move that
22 forward and then add new features and functions that the
23 product needed at that time to deliver that solution to a
24 customer so we could sell it.

25 Q. Were you involved in that process at all, the

1 engineering process?

2 A. Not the engineering process, but I was involved in
3 the sales communication process to the engineering teams.
4 That was my focus and my team's focus.

5 Q. Mr. Hunsaker, in addition to the various releases
6 of UnixWare and OpenServer that you said you were marketing
7 and selling during your tenure, were there other, any other
8 UNIX products that you were marketing or selling during that
9 time?

10 A. Yeah, there were other products. But once again,
11 almost exclusively and primarily our revenues were made up of
12 OpenServer and UnixWare. We had products such as SCOofficer
13 Server, as I recall, and Merge and a few others that don't
14 come to mind.

15 Q. That's fine.

16 During your tenure, did you or your sales team ever
17 market or sale older pre-UnixWare releases of UNIX? And I'll
18 call those SVRX for short.

19 A. No.

20 Q. Why didn't you ever market or sale to customers
21 pre-UnixWare releases of System V?

22 A. It doesn't really make sense to me. Our customers
23 weren't asking for old technology. They want the latest and
24 greatest technology. And so from the sales perspective, we're
25 focusing on selling our most current technology. You know,

1 the System V Release 5 technology at the time with UnixWare 7,
2 which once again incorporates all of the technology that's
3 commercially valuable over many years of work. And so that's
4 what they ask for, and, of course, that's what we're focusing
5 on selling.

6 Q. Mr. Hunsaker, did you have direct contact with
7 SCO's customers?

8 A. Yes.

9 Q. In the context of that contact, do you recall any
10 instance in which a customer or sales rep requested a license,
11 either source or binary, to a pre-UnixWare release of UNIX
12 System V?

13 A. No.

14 Q. Never?

15 A. Never.

16 Q. Do you recall any instance in which you personally
17 tried to sell or market or in which you told members of your
18 team to sell or market a pre-UnixWare version of UNIX
19 System V?

20 A. No. I wouldn't even know how.

21 Q. Mr. Hunsaker, you testified earlier that you were
22 working at SCO in the 2002-2003 time period in particular?

23 A. Yes.

24 Q. Are you familiar with the SCOSource program?

25 A. Yes.

1 Q. And can you generally describe what the SCOSource
2 program was?

3 A. This program was put in place to provide a
4 licensing mechanism for Linux customers that were perhaps
5 unknowingly using our intellectual property, our UNIX
6 technology. And it provided a way to make them whole or
7 clean, if you will.

8 Q. Were you involved in the administration of the
9 SCOSource program?

10 A. I was involved in the overall program based on my
11 responsibilities and sales in marketing, but I didn't run the
12 program.

13 Q. Who did run the program?

14 A. That was -- the general manager of that division
15 was Chris Sontag.

16 Q. And do you have a recollection as to how the
17 SCOSource program unfolded, how it came to be?

18 A. I do. I remember being in a sales call in the 2002
19 time frame, late 2002, as I recall, in Tennessee with a
20 customer, and they were, we found out, moving from our UNIX
21 platform to a Linux platform. And they -- in the course of
22 these discussions and so forth, we realized that they were
23 unbundling our libraries from our SCO UNIX technologies and
24 using those within Linux to allow for their Linux application
25 to run easily on Linux.

1 And, you know, a big flag went up and said, well,
2 you can't do that. Our licensing agreement, our ULA, UNIX
3 licensing agreement, does not allow customers to unbundle
4 technology to be put in Linux.

5 And so that's kind of the genesis for these
6 discussions. And we then developed a licensing program to
7 allow those customers that wanted to use those libraries, we
8 allowed them through this licensing program which they would
9 pay for.

10 Q. I'd like to show you what's been marked as Novell
11 Exhibit 387.

12 And, Your Honor, can I approach?

13 THE COURT: Yes.

14 MR. CYRULNIK: A book that contain all of the
15 exhibits that I intend to use.

16 THE COURT: All right.

17 THE WITNESS: Yes.

18 Q. BY MR. CYRULNIK: Mr. Hunsaker, do you recognize
19 Novell Exhibit 387 generally?

20 A. It looks like a presentation, a PowerPoint
21 presentation.

22 Q. And were you involved in creating PowerPoint
23 presentations of this sort?

24 A. Yeah. I was involved and reviewed and had, you
25 know, some say clearly in presentations that were communicated

1 out to our employees and customers.

2 THE COURT: This is Novell 387?

3 MR. CYRULNIK: Novell 387, yes.

4 THE COURT: Thank you. Excuse me. Go ahead.

5 Q. BY MR. CYRULNIK: Mr. Hunsaker, if you could turn
6 to Page, I believe it's 4 or 5. It's marked as 4267 in the
7 bottom right-hand corner as a Bate stamp. Once again it's
8 Novell 387. You can also access it on your screen. It's
9 easier.

10 A. I'll just look at it on the screen.

11 Q. Okay. And do you recognize this part of the
12 SCOSource presentation?

13 A. Yes. It looks like it's talking about what I just
14 described, the System V for Linux license.

15 Q. Do you recall being involved in creating this
16 presentation about SCOSource?

17 A. I recall being -- and reviewing these
18 presentations. I didn't author all of those documents.

19 Q. And the text of this slide reads:

20 SCO shared UNIX libraries from OpenServer and
21 UnixWare for use of Linux.

22 Is that correct?

23 A. Correct.

24 Q. Was SCO licensing libraries in any prior versions
25 of UNIX to its customers?

1 A. No. Once again, we're focusing on our latest
2 technologies of UNIX and OpenServer, which included all of the
3 commercially valuable technology from prior releases.

4 Q. Does SCO continue with SCOSource after those
5 initial concerns about the libraries, OpenServer and UnixWare?

6 A. Yes. We realized after a period of time that it
7 was more than just the libraries that were being used within
8 Linux and recognized there was additional code. And so we
9 furthered this program and instituted what is called, I
10 believe, the SCO IP license program, which included more of
11 our UnixWare code and technology that was found in Linux.

12 Q. Mr. Hunsaker, what was the nature of the agreements
13 that were used to license this technology?

14 A. To license the SCOSource technology?

15 Q. The SCOSource agreements.

16 A. Well, these agreements were based off of our
17 UnixWare technology. And it was simply a license that a
18 customer would use and to register, and then they would be
19 made clean, meaning we would not come out after them and sue
20 them, if you will, for using our code inappropriately. It was
21 obviously different from a UnixWare license because once
22 again, with the UnixWare license itself, you could not
23 unbundle, the ULA, the UNIX License Agreement didn't allow you
24 to unbundle the technology. So it was a new license, a new
25 product, if you will.

1 Q. So with respect to, say, the libraries just as an
2 example, the traditional type of UnixWare license would allow
3 you to use those libraries in what context?

4 A. Well, you would use those libraries on a Linux
5 deployment for those customers that were trying to migrate
6 UNIX applications to Linux. So they would purchase a license
7 in order to run those Linux -- those applications, UNIX
8 applications on Linux.

9 Q. And just to clarify that, what was allowed under
10 the SCO source license?

11 A. Correct.

12 Q. And under a pre-SCOsource license, UnixWare
13 license, would that be allowed?

14 A. No. No. Once again, you couldn't unbundle the
15 technology. And so that's why we developed the SCOsource IP
16 license.

17 Q. I believe you characterized these agreements in
18 your answer, a couple of answers ago, as types of UnixWare
19 licenses. Was that always your understanding of the SCOsource
20 agreements?

21 A. Yes.

22 Q. I'd like to show you what's been marked as
23 SCO Exhibit 236. And again, it's in your binder and will be
24 on the screen in a moment.

25 Do you recognize SCO Exhibit 236?

1 A. Yes. A press release that we issued in July
2 regarding UNIX and our copyrights and so forth. Yes.

3 Q. And again, were you involved in issuing these press
4 releases or creating or reviewing these press leases?

5 A. Primarily reviewing the press releases for content.
6 Did not author every word of the documents, no.

7 Q. I'd like to zoom in on the bottom third of the
8 press release that begins:

9 Following the distribution of our letter.

10 A. Uh-huh (affirmative).

11 Q. And press release quotes Mr. McBride saying:

12 Today we're delivering a very clear message to
13 customers regarding what they should do.

14 Intellectual property is valuable and needs to be
15 respected and paid for by corporations who use it
16 for their own commercial benefits. The new
17 UnixWare license accomplishes that objective in a
18 fair and balanced way.

19 Is that an accurate reading?

20 A. Yes.

21 Q. And does the language of that press release, is
22 that consistent with your recollection that you had always
23 termed this UnixWare license?

24 A. Yes, absolutely. The SCOsource program was all
25 built on our UnixWare licenses built around a UnixWare

1 license.

2 Q. Now, Mr. Hunsaker, you had testified -- well, I
3 think you said it was UnixWare license. It was different from
4 the traditional UnixWare license. Can you elaborate on the
5 specific difference between the UnixWare license, traditional
6 UnixWare license and the SCOSource UnixWare license?

7 A. Well, one is the target audience, I mean, for the
8 traditional UnixWare license, it was sold to SCO customers and
9 other SCO customers and new SCO customers that we wanted to
10 run our UnixWare technology on, our OpenServer technology on
11 their hardware. And it included a packaged product. It
12 included a manual. It included CDs. It included
13 registration, cards. It included a license agreement. And so
14 it was physically a packaged product that was delivered and
15 installed and it was ready to use.

16 On the other hand, a SCOSource IP license, while
17 it's based on the same technology of UnixWare, it was focussed
18 for Linux customers that just wanted to be made clean and one
19 against ensured them that we were not going to sue them. And
20 it didn't have anything to install. There was nothing
21 physical to it. It was simply a license that allowed them to
22 run this in that instance. There was no manual or other
23 things that I've talked about.

24 Q. Let me direct you to Novell, what we've marked as
25 Novell Exhibit 227. And if you'll briefly review that.

1 Do you recognize this document?

2 A. Yes.

3 Q. And the document appears to be a series of e-mail
4 exchanges that involved either you sending or receiving
5 e-mails?

6 A. Correct.

7 Q. Could you turn to Page 2, please, of the document,
8 Novell 227. And I'd like to focus in on the e-mail that you
9 sent on July 31st of '03. Do you see that second half of the
10 page?

11 A. Yes.

12 Q. And if you can specifically look at the line that
13 begins, Item 1.

14 A. Okay.

15 Q. You were the author of this e-mail?

16 A. Yes. It says my name. Yes.

17 Q. And, Mr. Hunsaker, you wrote on July 31st of '03:
18 The official name of this program will be the
19 SCO UNIX IP compliance license program. This is
20 not a UnixWare 7.1.3 SKU.

21 A. Yes.

22 Q. Mr. Hunsaker what's an SKU?

23 A. SKU or SKU is defined as a stock keeping unit.
24 It's more of a manufacturing operational term designed to
25 categorize or name a particular product. It's a unique

1 identifier for products that we deliver.

2 Q. And what did you mean when you were writing that,
3 this is not a UnixWare 7.1.3 SKU?

4 A. Well, it's not. It's different. And once again,
5 my mindset is always from a sales marketing perspective. I
6 mean, that's my focus. But from a -- so from a product
7 perspective, this was a different SKU than the SCO IP license.
8 It had a different part number. It had -- you know, like I
9 described earlier, it had a manual and CDs and disks and
10 license agreement that were unique to that.

11 Whereas, the SCO IP license was based on the same
12 technology. So if you look at the technology perspective,
13 it's the same. But from a pure product perspective, it
14 requires a unique identifier and different package.

15 So it's -- if I could -- perhaps let me just give a
16 quick analogy here. The way I view this is if you were
17 looking at an automobile, for example, a Chevrolet or a GMC
18 truck, they're very different in terms of products and
19 customers that they focus on, in terms of the brand. And
20 so -- but the underlying technology is pretty much the same.
21 I mean, it's based on the same engine, the same chassis. But
22 if you look at the product managers that are responsible for
23 the GM Division versus the Chevrolet Division, they're very
24 different.

25 As a customer, I'm a GMC guy. That's the truck I

1 prefer. And others like Chevy. So they're different from a
2 product perspective, but the technology is essentially the
3 same.

4 Q. And you were talking about from a technology
5 perspective or a product perspective?

6 A. I'm talking about it from a product perspective,
7 they were unique. From a technology perspective, they're
8 pretty much the same.

9 Q. Continue on in the e-mail. Pick up where we left
10 off:

11 The license is called the SCOUNIX IPC license
12 for Linux. The only rights that this license
13 provides is for Linux binary run-time copies.
14 When we are ready to issue a similar license for
15 AIX, it will be called the SCOUNIX IPC license for
16 AIX. There is no connection between
17 UnixWare/OpenServer and the SCOUNIX IPC license
18 whatsoever. They are independent.

19 Did I read that accurately?

20 A. Yes. I mean, that's what I wrote at the time.

21 Q. Mr. Hunsaker, can you explain once again what you
22 meant when you wrote this language?

23 A. Well, once again, you've got to remember the
24 perspective that I authored this from. I'm thinking of things
25 more in terms of binaries, in terms of a product. And this is

1 different. The SCO -- the IP license is different in terms of
2 a product, if you will, than it is from a SCO UnixWare
3 license. And so in that respect, they're very much different.
4 But in terms of the technology, it's the same technology.

5 Q. And were you involved from the technology
6 perspective at all, the licenses? Were you involved in
7 defining the technology?

8 A. Just providing feedback from what our customers
9 requested.

10 Q. Mr. Hunsaker, if you could turn to Page 1 of that
11 exhibit. I'm if following the chain of e-mail correctly, it's
12 a response to you're e-mail from someone named Kim Jenkins at
13 the bottom of the page?

14 A. Yes.

15 Q. Who was Kim Jenkins?

16 A. I believe Kim was a consultant for the company.

17 Q. And if you look at the response he gives, he
18 writes:

19 Item 1, name is fine by me. Separation from
20 UW 7.13 is also fine with me. I like the
21 simplicity but defer final decision to Chris.

22 Do you have any understanding as to what
23 Mr. Jenkins meant when he said he likes the simplicity of
24 separation of 7.13?

25 A. I don't know exactly what his intent was, but I

1 think it's similar to what I described previously.

2 Q. Mr. Jenkins continues:

3 Also as a clarification to your last sentence
4 Item 1, this license does not allow users to run
5 Linux legally. The license allows Linux end users
6 to be clean with SCO.

7 Did I read that correctly?

8 A. Yes.

9 Q. Mr. Hunsaker, do you have any understanding as to
10 what Mr. Jenkins meant when he said that?

11 A. I think as I previously testified, the license
12 allowed the infringing Linux customers to be clean with SCO.
13 We were not going to sue them because they had a license that
14 covered the technology that we owned. And they were clean
15 with SCO.

16 Q. And is Mr. Jenkins' understanding consistent with
17 your understanding?

18 A. Yes.

19 Q. And, Mr. Hunsaker, was it your understanding at the
20 time that you were offering SCOSource licenses that Linux
21 users were free from claims from any other company aside from
22 SCO if they bought the IP license from SCO?

23 A. Yeah. This related to our technology, and they're
24 clean with SCO. Others could make other claims if need be.
25 But once again, this is focused on our technology, our

1 UnixWare systems allowing them to be clean by licensing this
2 from us and from SCO. Others could do whatever they chose.

3 Q. Mr. Hunsaker, you just described a number of
4 differences between this license and the last, this UnixWare
5 license and the other UnixWare license. Do the differences
6 that you just described have any impact on how the SCOsource
7 program was administered or managed?

8 A. Well, yes; in that we created a new division. And
9 we had a general manager, Chris Sontag, that ran that
10 business. They focused on a different set of customers, a
11 different target market and its own products and revenue. And
12 so that's the difference from setting up a new division.

13 Q. So SCO had a new division to run this particular
14 type of license?

15 A. Correct.

16 Q. I'd like to show you what had been marked as
17 Novell's Exhibit 159. Do you recognize Exhibit Novell's 159?

18 A. Yes.

19 Q. And can you generally describe what Novell 159 is?

20 A. Well, it states:

21 SCO establishes SCOsource; New Division Created
22 to Insure and Protect Intellectual Property in Linux
23 Environments.

24 So it's announcing the creation of this business
25 division.

1 Q. And do you recall the creation of that new
2 division?

3 A. I do.

4 Q. And can you explain to the Court why a new division
5 was necessary to run this particular license?

6 A. Well, as I've described previously, the product was
7 being focused on the Linux customers, the Linux installed
8 customers. And so there was a new sales organization that was
9 focused on selling these licenses to that audience. And we
10 had a general manager running that business with the unique,
11 you know, SKUs and parts numbers for those products in the SCO
12 UNIX division. Once again, while the technology is consistent
13 across both, we were focused on selling to our installed base
14 and to new UNIX customers that wanted to employ our UnixWare
15 and OpenServer technology.

16 Q. Mr. Hunsaker, did you charge customers for a
17 SCOSource license?

18 A. Yes.

19 Q. Do you recall what you charged?

20 A. Yeah. We charged the same price as we charge for a
21 UnixWare 7.13 license. It was 1399.

22 Q. I'd like to show you what's been marked as Novell's
23 Exhibit 245.

24 THE COURT: Pick a good break point, Mr. Cyrulnik.

25 MR. CYRULNIK: Sure. I only have a couple

1 questions left, if Your Honor would like me to finish up with
2 this witness.

3 THE COURT: Go ahead.

4 Q. BY MR. CYRULNIK: Do you recognize Novell 245 as an
5 e-mail from John Maciaszek to a bunch of recipients that
6 attaches the document that begins on the second page of that
7 document?

8 A. Yes.

9 Q. What's that document that is attached?

10 A. It is the SCO IP compliance program for Linux.

11 Q. And I believe it's labeled, Internal Product
12 Announcement?

13 A. That's correct.

14 Q. And did you participate in drafting internal
15 product announcements?

16 A. I did not draft the announcements, but I reviewed
17 the announcements.

18 Q. If you would turn to the next page for a moment,
19 third paragraph. The internal product announcement writes:

20 Pricing of the Linux IP licenses is based on
21 standard pricing for the UnixWare 7.1.3 using the
22 business edition, which is 1-CPU as the starting
23 point.

24 Did I read that correctly?

25 A. That is correct.

1 Q. So you priced the SCO IP license, the SCOSource
2 agreement, the same based on the pricing of the
3 UnixWare 7.1.3?

4 A. Yes.

5 Q. And it's exactly the same price?

6 A. Yes.

7 MR. CYRULNIK: Nothing further. Thank you.

8 THE COURT: Thank you. We'll take a 15-minute
9 break.

10 (Recess.)

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1 THE COURT: You may cross-examine, Mr. Jacobs.

2 MR. JACOBS: Thank you, Your Honor.

3 CROSS-EXAMINATION

4 BY MR. JACOBS:

5 Q. Good afternoon, Mr. Hunsaker.

6 A. Good afternoon.

7 Q. You've spent by my calculation about over 10 years
8 in the computer business?

9 A. More than that. Since about 1989.

10 Q. Selling products?

11 A. Correct.

12 Q. Going to customers and saying, we've got a value
13 proposition for you?

14 A. Yes.

15 Q. And it's in the functionality of our software or
16 hardware, that value proposition?

17 A. Yes.

18 Q. It will do good things for your business. It will
19 allow you to perform functions better than you were performing
20 them before?

21 A. Are you saying generally speaking or in a certain
22 context?

23 Q. In selling the kinds of products you've sold in
24 your career in the computer industry.

25 A. Sure. You're trying to provide value for value to

1 the customers.

2 Q. But the value is value to the customer and actually
3 enhancing the operation of their business?

4 A. You want to improve, absolutely sell something that
5 they will need, that they'll use and add value to what they
6 will use.

7 Q. Have you ever done anything like SCOSource before?

8 A. No.

9 Q. Pretty usual product, isn't it?

10 A. I don't know in terms of how unusual it is. I just
11 know it's important for people to protect their intellectual
12 assets.

13 Q. That's what it was about it; right? It wasn't
14 about offering customers functionality to drive their
15 business; it was about SCO's efforts to protect what it
16 believed were its intellectual property assets; correct?

17 A. That's partially true. I mean, clearly some
18 customers wanted to and chose to use Linux, and so we offered
19 them a way to be clean, if you will, by using infringing SCO
20 technology.

21 Q. You actually stopped selling Linux; right? You got
22 out of the Linux business, and your relationship with Linux
23 was as asserter of intellectual property and licensor;
24 correct?

25 A. Yeah. Over time we stopped selling and

1 distributing our Linux release.

2 Q. Was UNIX System V Release 4, UNIX System V
3 Release 4 code commercially valuable in the context of
4 SCOsource?

5 A. It was commercially valuable as it related to -- we
6 were offering the latest versions of our UnixWare product in
7 our System V Release 5 technology. So as the commercially
8 valuable code that was found in prior versions of System V,
9 whatever version or release it was that came forward, that
10 technology and the latest version was commercially valuable.

11 Q. Different question. Now we're shifting over to
12 SCOsource, which you were involved in selling; correct?

13 A. I was involved absolutely in those activities. I
14 was not responsible for selling SCOsource licenses. That was
15 done by Chris Sontag and his own sales team. I was not
16 responsible for that sales organization, and frankly did not
17 sell the licenses myself.

18 Q. Well, let me ask it this way. When you were
19 examining the question of what's commercially valuable under
20 the direct examination of SCO's counsel, were you asking that
21 question -- were you answering that question in the context of
22 SCOsource?

23 A. I'm not sure I follow the question.

24 Q. Were you answering the question of whether older
25 code is commercially valuable, did you have in mind SCOsource

1 campaign when you were answering that question?

2 A. Once again, the focus that we put forth at the time
3 when we entered the SCOSource licensing was to develop a
4 licensing program based on our UnixWare technology, our latest
5 System V code. And we offered that to our customers and Linux
6 users to indemnify them, so to speak, based on our technology.

7 Q. Is it your testimony that System V Release 4 code,
8 whether or not it was carried forward into the latest release
9 of UnixWare but SCO believed was found in Linux, was not
10 commercially valuable?

11 A. What I'm saying is commercially valuable is the
12 technology that moved forward into at the time the UNIX System
13 V Release 5 code. And whatever code that was that came forth
14 was what we determined at that time commercially valuable
15 because that's what customers were willing to pay for. People
16 weren't interested in old technology that didn't run on
17 certain hardware or wouldn't work and function with drivers or
18 other -- or applications. They were looking for our latest
19 and greatest technology that was found in System V Release 5.
20 And that was the impetus of the SCOSource licensing program.
21 It was derived based on that technology.

22 Q. And that is a determination that you recall having
23 been made in the context of SCOSource?

24 A. I didn't have to make that determination. It
25 was -- and from my viewpoint, once again in sales and

1 marketing, I don't reflect back on old technology and old
2 products. It's just -- our customers don't look back at old
3 technology and old products as, yes, that's what I want. They
4 want the latest technology, the relevant technology that works
5 with their hardware and applications. And so that's what we
6 derive the program based on is the current version of the time
7 of our UnixWare technology. So it's based on that.

8 Q. But you weren't selling technology or product and
9 SCOSource to customers; you were selling immunity from
10 intellectual property lawsuits; correct?

11 A. We were selling a license that was based on our
12 latest technology, our UNIX System V technology.

13 Q. Do you know for a fact, Mr. Hunsaker, that the code
14 that SCO alleged was found in Linux was also found in
15 UNIX System V Release 5?

16 A. I'm not a legal expert. I'm not an engineer. I
17 don't know all the technical ins and outs. All I know is that
18 the code that was found in our UNIX System V or latest UNIX
19 products was what we found to be infringed upon in Linux. And
20 so that's what we focused our IP program around.

21 Q. And when did that become clear to you, sir?

22 A. Well, I think that's all I talked about. We
23 started learning about this in the late 2002 time frame based
24 on our libraries, and then in 2003 with other instances of our
25 technology.

1 But, you know, I think others could talk more about
2 that than myself. Once again, I was focussed on our products
3 and our product business and realized talking to customers
4 that, all right, there's some issues here.

5 Q. You understood that the SCOSource campaign had
6 another dimension that made it different from your traditional
7 product sales, which was that it was heavily -- heavily
8 involved lawyers; correct?

9 A. Well, I'm not sure I follow your question.

10 Q. By March 2003, SCO's in litigation with IBM; right?

11 A. Yes. I think it was about that time frame.

12 Q. And you knew there was a lot of legal activity
13 surrounding the SCOSource campaign?

14 A. I don't know if there was legal activity around the
15 SCOSource campaign or if there was legal activities around the
16 lawsuits that were going on at the time.

17 Q. And you're separating those from SCOSource?

18 A. Well, I'm just saying that the issue -- and once
19 again, I'm not an expert. I know there's a contract dispute.
20 It was one of the issues that relates to IBM, but I don't
21 think we're here to talk about that.

22 MR. JACOBS: Your Honor, may I approach?

23 THE COURT: Yes.

24 Q. BY MR. JACOBS: Mr. Hunsaker, I've handed you
25 Novell Exhibit 270. Would you take a look at that for a

1 minute, please.

2 A. Uh-huh (affirmative).

3 MR. JACOBS: This has been pre-admitted, Your
4 Honor.

5 Q. BY MR. JACOBS: Mr. Hunsaker, Novell's Exhibit 270
6 is an e-mail that you sent to the -- an e-mail that's called
7 execgroup. Do you see that?

8 A. Yes.

9 Q. And that's the senior executives of SCO?

10 A. Yes.

11 Q. And you were one of them?

12 A. Yes.

13 Q. And you attended a meeting on December 11th, 2003,
14 and you were responsible for taking notes that day.

15 A. I don't know if I was responsible for taking notes,
16 but it appears that I summarized some of the discussion points
17 of that day.

18 Q. And you were -- it's December 2003. SCOSource has
19 been under way for about a year. You're looking ahead to 2004
20 and you're laying your plans; correct?

21 A. It seems to be what we were discussing.

22 Q. And you had some revenue goals at SCO 48485. Do
23 you see that?

24 A. Yes.

25 Q. And that was discussed at that meeting?

1 A. Sure.

2 Q. And by the way, "OPS Council," what does that mean?

3 A. Operations.

4 Q. And you were part of the operations council?

5 A. Yes.

6 Q. And the operations council had various strategy
7 meetings around SCOSource?

8 A. This wasn't around SCOSource. This was around our
9 overall business.

10 Q. SCOSource was discussed at many OPS committee OPS
11 council meetings?

12 A. Well, as you can see here, we're talking about
13 we're running a company. So the operations council gets
14 together to discuss all aspects of running a business, setting
15 goals for the company, motivating employees, setting strategy,
16 direction, trying to create, you know, the next phase of our
17 business, yes.

18 Q. And the answer to my question is "yes"?

19 A. What was your question?

20 Q. The OPS council discussed SCOSource on various
21 occasions?

22 A. Yes.

23 Q. And if you go down among the goals for 2004, it
24 says, "emerge as industry leader for IP." Do you see that?

25 A. Uh-huh (affirmative).

1 Q. And then, "gain Linux justice." Do you see that?

2 A. Uh-huh (affirmative).

3 Q. And that was something that was discussed at the
4 meeting, "gain Linux justice"?

5 A. I don't recall specifically, but it is documented
6 here.

7 Q. And down at the next heading, the heading is
8 SCOSource, and it refers to Chris Sontag as the general
9 manager; correct?

10 A. Yes.

11 Q. And among the activities of SCOSource that's being
12 discussed there is litigation. Do you see that?

13 A. Yes.

14 Q. And litigation against IBM. Do you see that?

15 A. Yes, I see that.

16 Q. And end users and others. Do you see that?

17 A. Yes.

18 Q. So litigation was part of the SCOSource activities
19 that were contemplated when you were discussing SCOSource in
20 this meeting; correct?

21 A. Not necessarily. I mean, clearly there was
22 litigation going on at the time. So that was part ongoing
23 litigation as I believe at this time. I don't know if all my
24 days are correct. But, sure. That's a relevant discussion
25 when you're involved in litigation with other companies in OPS

1 council.

2 Q. And then there's a reference to the licenses that
3 SCOSource might offer. Do you see that?

4 A. Yes.

5 Q. And RTU, the right to use. That's the SCO
6 intellectual property license for Linux as you understood it;
7 correct?

8 A. Yeah. The right to use our intellectual property
9 in Linux.

10 Q. And then SCOX actually is about product
11 development; correct?

12 A. Yeah. It was a name we used for a certain period
13 of time to describe our general UNIX business.

14 Q. I'd like to scroll down, I'd like you to look down
15 and we will scroll down to the bottom fifth of the e-mail.
16 You took the following notes:

17 What is our business model for SCOSource and
18 SCOX? SCOSource. Take 1500 penguins and create a
19 room in Lindon and line them up and place the
20 company brand on each one of them. We then send
21 out a letter within the next few weeks which takes
22 our code claims and demonstrates to customers what
23 we have found to date. We let the end user know
24 that, "if they want to be safe, they need to
25 remove the offending code from Linux in order to

1 continue to use legally. Once you have cleaned up
2 your system, you will be clean."

3 Do you see that?

4 A. I do.

5 Q. That was something discussed at this meeting as a
6 undoubtedly humorous way of discussing the SCOSource ideas at
7 the time; correct?

8 A. I do not recall that discussion, but I see it here
9 in this document.

10 Q. And then it refers to the codes. It says:
11 Code such as JFS, Malloc, RCU, et cetera.

12 Do you see that?

13 A. Yes.

14 Q. And that was the code in this discussion SCO was
15 thinking about making clear to customers is contained in
16 Linux; correct?

17 A. Based on what it states here, that's what it's
18 referring to. I'm not going to testify specifically what code
19 is or is not found in Linux. That's not my area of expertise.
20 I don't understand all the technology.

21 Q. And you don't know whether JFS is found in System V
22 Release 4 code?

23 A. Once again, you're talking to the wrong guy about
24 those types of issues. I was focused on sales and marketing
25 activities.

1 Q. If JFS was found in System V Release 4, would you
2 agree that it is commercially valuable in the context of the
3 SCOSource as represented by this discussion?

4 A. Well, I'll repeat. Once again, what we do, if it
5 was valuable it would be found in our latest versions of our
6 UNIX System V technology. And that's where it would be found
7 because that's where we were focusing on licensing and
8 selling. So I can't recall -- I can't talk about older
9 technology.

10 Q. So let me understand the basis for what you've said
11 because you said it several times.

12 Do you recall a specific discussion in the context
13 of SCOSource in which it was represented to your satisfaction
14 that all the code that was the focus of the SCOSource campaign
15 was found in the latest release of SCO's software?

16 A. You know, once again, I don't know if I'm the --
17 have the technical understanding of all the codes, so I'm not
18 going to pretend to know that. All I know is that we were
19 selling and marketing our latest versions of our products to
20 our UNIX customers. And then when it came to our SCOSource IP
21 agreements, it was a license based on our latest technology of
22 our products and all the commercially valuable technology that
23 was found in our latest releases. You'll have to talk to
24 other experts about specific codes. I don't know. I just
25 know that we sold what customers wanted, and it was the latest

1 and greatest stuff.

2 Q. And then the notes recount the discussion around
3 what would happen next after the penguins were released, I
4 suppose:

5 We will require the CEO and CIO to respond to
6 this letter call to action.

7 Do you see that?

8 A. Yes.

9 Q. And then you describe what the letter -- or the
10 meeting -- in the meeting there was a discussion of what the
11 letter needs to state. Do you see that?

12 A. I do.

13 Q. And it says:

14 We will state the facts and the demands, the
15 timeline and the consequence.

16 Do you see that?

17 A. I do.

18 Q. And the consequence is the license cost of, gee,
19 only \$700 or \$1400 a server, and litigation, \$\$\$\$. Do you see
20 that?

21 A. I do.

22 Q. And that was part of the discussion that the
23 license would be cheaper than the litigation; right?

24 A. I don't know what it means. I don't remember this
25 document, frankly.

1 Q. And then there was some analysis in the meeting
2 about who might take what course of action. Do you see that?

3 A. Uh-huh (affirmative).

4 Q. And that there was a plan that was described
5 including, if you go -- scroll down a little bit, lawsuit 1
6 and lawsuit 2. Do you see that?

7 A. Yes.

8 Q. And then scrolling up a little bit. Item 2,
9 letters send December 17th. Do you see that?

10 A. Yes, I do.

11 Q. So let me ask you about an exhibit we saw here
12 previously. Novell Exhibit 274. Novell Exhibit 274 is a
13 letter sent on December 19th, two days after the December 17th
14 date referenced in the plan of action that we just discussed.
15 Do you see that?

16 A. Yes.

17 Q. And if you -- if we scroll down on the letter now,
18 and illuminate that paragraph. And do you see that it refers
19 to AT&T binary interfaces down there?

20 A. Could you highlight that for me?

21 Q. Yes. That paragraph right there.

22 A. Okay.

23 Q. Do you see it's referring to AT&T binary
24 interfaces?

25 A. I see where it states that, yes.

1 Q. Could you take a look at this letter and tell me
2 whether it says anywhere anything about SCO's latest and
3 greatest technologies?

4 A. No. I didn't author this letter. I don't remember
5 any details in the letter. And so once again, I'm not able
6 really to testify specifically about the contents and the
7 timeframe in which it was written.

8 Q. I want to ask you about OpenSolaris. What do you
9 know about OpenSolaris?

10 A. Not a whole lot. I do know that that it's a Sun
11 product.

12 Q. What kind of Sun product? Is it a word
13 processing --

14 A. It's an operating system.

15 Q. So you know it's an operating system. You know
16 that OpenSolaris is open source operating system; right?

17 A. Yes.

18 Q. And you know that it's based on System V code that
19 predates the asset purchase agreement in 1995?

20 A. I don't know what it's about. Again, my focus has
21 not been in the technology as much as selling and marketing.

22 Q. Did you have selling and marketing concerns around
23 the release of OpenSolaris?

24 A. I remember I had questions at the time, but I don't
25 remember anything specifically.

1 Q. All right. Let's take a look at your questions.

2 May I approach?

3 THE COURT: Yes.

4 Q. BY MR. JACOBS: We're looking at Novell
5 exhibit 327. And Novell Exhibit 327 is an e-mail from you
6 to -- an e-mail that's called "Darlstaff." Do you see that?

7 A. Yes.

8 Q. Is that another e-mail for the executive team?

9 A. It was an alias for the directed course of Darl
10 McBride.

11 Q. And you labeled it, "internal confidential." Do
12 you see that?

13 A. I do.

14 Q. And it attaches -- it attaches several articles,
15 but it attaches an article about SCO having given the green
16 light to OpenSolaris. Do you see that?

17 A. Yes.

18 Q. And let's go through the article first so we can
19 see the context of your question. So if you can scroll down.
20 And this is an article that came out in April 15th, 2005. Do
21 you see that?

22 A. Yes.

23 Q. And it reports an announcement by SCO that it won't
24 raise legal challenges to Sun's plan to open source the
25 Solaris UNIX operating system. Do you see that?

1 A. Yes.

2 Q. And then it goes on to talk about the fact that SCO
3 is in litigation with IBM. And then if we scroll down a
4 little bit more. And the article reports:

5 Sun plans to release OpenSolaris under its own
6 open source common development and distribution
7 license this summer. And SCO's chief executive
8 Darl McBride said SCO has no problem with that.
9 "We believe we have a pretty good idea of what Sun
10 is trying to do, close quote.

11 Do you see that?

12 A. I see it.

13 Q. And then he goes on to say:

14 After reviewing what their plans are and
15 reviewing what our agreements with them are, we
16 feel comfortable with the direction they're going,
17 he added. Sun took out a fresh UNIX System V
18 license from -- there's a typo there. It must
19 mean SCO -- in February 2003 joining Microsoft
20 Corp. as one of only a handful of SCO source
21 licensees.

22 Do you see that?

23 A. Yes.

24 Q. And then you read this letter, and then you ask to
25 Darlstaff:

1 Do you really give the green light? Are
2 we as confident in Sun's position with OpenSolaris
3 as this article intimates? I personally still have
4 my doubts. I think we should discuss.

5 Do you see that?

6 A. I do.

7 Q. So this got your attention, this announcement.

8 A. Apparently so.

9 Q. Different from Sun's release it and refresh it of
10 the regular Solaris system; correct?

11 A. I don't know specifically.

12 Q. Well, something about these plans caught your
13 attention. It wasn't the fact that it was a new release; it
14 was the fact that it was open source, wasn't it?

15 A. I think I was trying to ask, since I had nothing to
16 do with any license agreements to Sun or others, that I was
17 wanting to understand what this means. And so I was posing a
18 question here. Help me understand this so I can then convey
19 what I need to my team.

20 Q. Well, you said:

21 I personally have my doubts.

22 What do you mean by that?

23 A. I don't know what I meant by that. I just wanted
24 more clarification. I needed to understand asking some
25 questions. Once again, I was not involved in those

1 transactions. I just needed to understand some specifics if I
2 needed to answer any questions.

3 Q. Well, do you think you would have written that
4 e-mail if you had concluded this was a minor blip in the
5 evolution of operating systems software?

6 A. Well, I would hope as a responsible sales manager
7 that represents employees and customers that I would need to
8 understand the specifics about such announcements so I would
9 ask questions. It doesn't mean things weren't right or wrong.
10 It's just part of a process you go through in day-to-day sales
11 or marketing management. Help me understand. You know,
12 digest the information and move forward.

13 Q. I think I'm not asking simple enough questions, so
14 let me ask a very simple one.

15 Did you consider the announcement of OpenSolaris,
16 an open source version of Solaris operating system to be
17 significant?

18 A. I didn't know the significance because I didn't
19 understand what it meant. So that was why I was asking the
20 question.

21 Q. As you sit here today, do you think it's
22 significant?

23 A. It's relevant. I don't know how significant it is.

24 Q. Let's take a look at Exhibit 227. You have that in
25 front of you from before. But if it's not right there, I have

1 another copy. This is the e-mail that you were asked about on
2 your direct examination.

3 A. Uh-huh (affirmative).

4 Q. Do you have it handy?

5 A. The one from the previous?

6 Q. No. No. Sorry. I'll give you another copy.

7 May I, Your Honor?

8 THE COURT: Yes.

9 Q. BY MR. JACOBS: Now, just to set the context,
10 Mr. Hunsaker, this e-mail is being written in the summer of
11 2003; correct?

12 A. That's what it says, yes.

13 Q. And litigation is already under way between SCO and
14 IBM; correct?

15 A. I believe so. I don't recall the exact date.

16 Q. And you're aware by this time of the significance
17 of litigation to the preparation of documents and e-mails;
18 that is, that what you write is likely to be discovered in
19 litigation; correct?

20 A. I don't recall if I was fully aware of all those
21 items.

22 Q. Did you have an understanding by this time that you
23 could continue on as normal and write casual e-mails?

24 A. Well, I hope, you know, I wouldn't write casual
25 e-mails. I want to write e-mails that make sense and reflects

1 thought at that time.

2 Q. Now, you've testified probably between half a dozen
3 and a dozen times that SCOSource was selling the latest and
4 greatest technology; correct?

5 A. Yes.

6 Q. And how do you square that, sir, with what you
7 wrote in this e-mail? That is, that UnixWare has nothing to
8 do with SCOSource?

9 A. Once again, you must remember I'm not an engineer.
10 And from the perspective that I had at the time and I have
11 today, it's based on a product, a specific deliverable, a SKU
12 that was called UnixWare and/or OpenServer. And it is
13 different because that's how we think in the sales and
14 marketing world. We're selling and marketing a particular
15 product to our customer. And as I stated, it has its part
16 number and materials and CDs and so forth.

17 And so in that respect, it was absolutely
18 different. And it's very clear to me. There's nothing here
19 that I'm hiding, if you will, because in my mindset, it was
20 different in terms of the product. But as it relates to the
21 technology, the underlying technology, it's based off of our
22 UnixWare 7.1.3 technology.

23 Q. And we just explored that, sir. And I believe you
24 testified that you weren't really the right person to ask
25 about whether the SCO intellectual property license for Linux,

1 what technology was implicated in that. Isn't that what you
2 told me a few minutes ago?

3 A. What I said is understanding all the technical bits
4 and bites within the operating system, I'm not one to testify
5 on that. All I know is that we sell the latest technology
6 that we have that is relevant to customers that has what they
7 need in the product.

8 Q. So let me ask you again, sir. Do you recall a
9 specific discussion in which it was represented to you that
10 with the SCO intellectual property license for Linux, SCO is
11 licensing its customers to its latest -- the Linux licensees
12 to its latest and greatest technology?

13 A. Sure. Yes.

14 Q. And when you recorded notes at this meeting in
15 December, you believe that JFS, Malloc and RCU were SCO's
16 latest and greatest technologies?

17 A. Once again, I'm not going to comment about the
18 technology code that you've talked about. If it was relevant
19 and needed by our customers, it would still be found and
20 contained in the latest version of our UNIX System V
21 technology.

22 Q. And who represented that to you, sir? Who
23 represented to you that what is at issue in the Linux
24 operating system and the accusations SCO was making about it
25 is in SCO's latest and greatest technology?

1 A. It seems pretty obvious to me just in the course of
2 discussions that we're developing a license based on UnixWare.
3 You've seen evidence of that, and we priced it accordingly.
4 Once again, we don't sell old stuff that is irrelevant; we
5 sell our latest technology and bring that forward. So it was
6 1 plus 1 equals 2.

7 Q. Do you believe, sir, that whatever was incorporated
8 or that you believed, you institutionally, SCO, the company
9 believed was incorporated in the Linux from UNIX was
10 commercially viable?

11 A. Can you repeat the question?

12 Q. Yeah. It's not a very good one. Let me start
13 over.

14 You had a belief about methods and concepts and
15 codes from UNIX having been incorporated into Linux; correct?

16 A. That's my understanding.

17 Q. Do you believe that those methods and concepts and
18 codes are commercially valuable?

19 A. Yes.

20 Q. And why do you believe that?

21 A. It's how -- based on how the product has been
22 developed and the intellectual property that we've created as
23 a company and how we derived our releases, it's spent years
24 and years developing that technology. And someone takes your
25 stuff, you're going to protect and fight for your rights.

1 Q. In fact, you believe, sir, that that code and those
2 methods and concepts converted Linux into a hardened
3 enterprise quality operating system, don't you?

4 A. Well, once again, I'm not sure I'm the best one to
5 testify on those issues. I did not -- was not responsible for
6 the SCOSource business. I did not sell the SCOSource
7 technology. We had a separate division and team, sales team
8 that focussed on those areas. We were just focussed on
9 protecting our intellectual property and selling the latest
10 and greatest technologies to our customers, whether it be to
11 our Linux or IP license.

12 MR. JACOBS: Your Honor, I would like to publish
13 Mr. Hunsaker's transcript in the IBM case dated November 10,
14 2005. And I'd like to read from that transcript.

15 THE COURT: Tell us pages and lines.

16 MR. JACOBS: Yes. Page 45 Line 3 through
17 46 Line 1.

18 THE COURT: Go ahead.

19 Q. BY MR. JACOBS: And you have a copy of that
20 transcript in front of you, sir, if you would like to follow
21 along.

22 A. Sure.

23 Q. Question. Let's first take from a
24 business perspective.

25 Answer. Well, the relationship clearly

1 over time waned in terms of the relationship as
2 they were looking to migrate their solutions to
3 a Linux platform. So, therefore, as a result of
4 that, our revenues declined. And the relationship
5 has become, you know, very stagnant, if anything
6 at all. And once again, we attribute that. And
7 had this not all occurred with the rise and support
8 from IBM and other companies, you know, using
9 SCO's intellectual property and disclosing methods
10 and concepts that, you know, Linux from the outset
11 was always viewed as a hobbyist operating system
12 mainly for desktops for scale and architecture, not
13 at the enterprise, not hardened, not ready to
14 run mission critical applications like you'll
15 see within Sherwin Williams, within AutoZone,
16 within these customers.

17 UNIX and SCO was the de facto standard for the
18 Intel architecture. And through various initiatives
19 and breach of contracts, Linux was given a huge
20 boost through various, you know, code and methods
21 and information such as it would cause extreme
22 damage to SCO's business.

23 Did you give that testimony in response to that
24 question?

25 A. I don't recall. I spent 30 hours in depositions.

1 I don't recall just a slice of that. But if that's what was
2 stated, yes.

3 Q. And, in fact, didn't you believe, sir, that the
4 contribution of what you believed to be SCO intellectual
5 property to Linux converted Linux from a hobbyist desktop
6 system into a hardened enterprise ready to run mission
7 critical applications operating system?

8 A. Clearly there was a direct correlation between the
9 code that was found within our technology, within SCO UNIX
10 that was placed in Linux illegally, we believe, through a
11 breach of contract that did propagate the Linux operating
12 system through our latest technologies.

13 Q. Did the alleged contribution of code and methods of
14 concepts -- and methods and concepts from what you believed to
15 be SCO UNIX into Linux convert Linux from a hobbyist desktop
16 operating system to an enterprise hardened ready to run
17 mission critical applications operating system?

18 A. As I testified there, that is part and parcel to
19 what went wrong and how we believe and I believed at the time
20 Linux did advance through the use of our technology.

21 Q. Thank you, Mr. Hunsaker.

22 MR. CYRULNIK: No questions.

23 THE COURT: Thank you, Mr. Jacobs.

24 I assume this witness may be excused.

25 And you may call your next witness.

1 MR. CYRULNIK: Your Honor, we call Jay Peterson.

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

4 THE CLERK: Come right up here, please. Raise your
5 right hand.

6 JAY PETERSEN,
7 called as a witness at the request of SCO Group,
8 having been first duly sworn, was examined
9 and testified as follows:

10 THE WITNESS: I do.

11 THE CLERK: Thank you. Please take the witness
12 stand.

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

14 THE WITNESS: Jay Petersen. J-A-Y P-E-T-E-R-S-E-N.

15 THE CLERK: Thank you.

16 THE COURT: Go ahead, Mr. Cyrulnik.

17 MR. CYRULNIK: Thank you, Your Honor.

18 DIRECT EXAMINATION

19 BY MR. CYRULNIK:

20 Q. Good afternoon Mr. Petersen. Are you currently
21 employed?

22 A. Yes, I am.

23 Q. What is your current employment?

24 A. I'm director at UNIX Engineering at SCO Group.

25 Q. How long have you held that position a director for

1 SCO?

2 A. Since 1997.

3 Q. And when did you first start working for SCO?

4 A. 1995 when SCO acquired the UNIX business from
5 Novell.

6 Q. And were you involved in the UNIX business prior to
7 joining SCO?

8 A. Yes, I was. I joined Bell Labs in 1980, did
9 systems engineering for five years. In 1985, I joined the
10 UNIX development group in Bell Labs, worked there that until
11 1990. At that point, I left and went to a Windows startup
12 software company for a few years. I came back to Novell,
13 again came back to UNIX in 1993 and stayed there through the
14 transition desk of SCO.

15 Q. So with the exception of the three-year period when
16 you joined the startup company, you were involved in the UNIX
17 companies for almost 20 years?

18 A. Right.

19 Q. And before you began with Bell Labs in 1980, can
20 you briefly describe your employment?

21 A. Yeah. Before that I had a career in academia as a
22 physicist. I worked at the University of Minnesota and the
23 last five years at Yale University. I did a lot of
24 programming in the course of that work.

25 Q. And so it's fair to say you've almost got 35 years

1 worth of programming experience?

2 A. Yes.

3 Q. And can you briefly summarize your educational
4 background for the Court?

5 A. Yeah. I have a bachelor's degree in math from the
6 University of Michigan in 1969; a master's degree in 1971 and
7 a PhD in physics in 1974.

8 THE COURT: Could you pull the mike down just a
9 little bit?

10 THE WITNESS: Sure.

11 THE COURT: Thank you.

12 Q. BY MR. CYRULNIK: Mr. Peterson, I'd like to go back
13 to the 2000 period, 2000 to 2003 time period for the moment.
14 And can you generally describe your role with SCO during that
15 period?

16 A. Yeah. At that point I was involved in the
17 development of new releases of the UnixWare, probably 7.12 in
18 that time frame.

19 Q. And what were your responsibilities?

20 A. I was managing a group of engineers that were
21 building that product.

22 Q. And you say you were involved in developing
23 UnixWare 7.12, I believe it was?

24 A. Right.

25 Q. At that time?

1 From an engineering perspective, did you have an
2 understanding as to how a new release of UnixWare was
3 developed?

4 A. Yes. I'd seen that going on for 20 years and was
5 involved in that process at that point, too.

6 Q. And can you explain to the Court what your
7 understanding was as to how a new release of UNIX System V was
8 developed?

9 A. Yeah. We would, of course, start with the previous
10 lease, work with our customers to understand what new things
11 needed to be added, what other things could be taken out.
12 This is a commercial product, of course, so that was all
13 driven by the value, either value had to be added to that
14 system or there were parts that were no longer any commercial
15 value, and we dropped those out.

16 Q. And Mr. Peterson, during your 20 years in the UNIX
17 business, were you personally involved in that process of
18 designing a new release?

19 A. Yes, I was. Often my role involved working with
20 some of our major customers, hardware vendors, for example.
21 They were the ones most interested in giving us requirements
22 for new features. As they developed new hardware, the
23 operating system had to reflect those new features or it
24 wouldn't be useful, and the hardware wouldn't be fully taken
25 advantage of.

1 Q. And can you give the Court an example or some
2 examples of features or technology that would not have been
3 carried forward to the next release of UNIX System V?

4 A. Yeah. A lot of that was driven by the evolution of
5 the hardware itself. Either the core processor or the devices
6 that are connected to the computer. Simple examples are some
7 kind of devices just became completely obsolete and wouldn't
8 be recognized today, things like paper tape readers and
9 teletypes, any special support we had in the operating system
10 for those things is long gone at this point.

11 Q. So there was specific codes in the operating system
12 that dealt with interfacing with those things that you
13 mentioned, tapes or floppy disks?

14 A. Right. Drivers in those cases and other hardware
15 aspects. Typically everything new about hardware or not had
16 some analog or supporting code in the operating system.

17 Q. So with respect to that specific code that dealt
18 with a piece of hardware, for example, a floppy disk, would
19 you carry that piece of code forward when replacement of
20 floppy disks came out, for example?

21 A. No, we wouldn't. We would want to simplify our
22 code base. And our customers would tell us they didn't want
23 that in there. They didn't want to struggle with supporting
24 things, old devices, either. So we were both decided to move
25 old code out.

1 Q. And code related to hardware that was still in use
2 and wanted in the marketplace, what did you do with that code?

3 A. We carried it forward. You know, for example, if
4 we added something new in a particular release and that kind
5 of hardware continued. USB is an example of that. We added
6 that in the late '90s, and, of course, USB has gotten more and
7 more important. So that code has been carried forward and
8 further evolved.

9 Q. Mr. Peterson, I'd like to now turn to a little
10 later in the time period 2002-2003 and focus in on then for a
11 moment. Were you involved with any agreements that SCO
12 entered into during that time period?

13 A. Yes, I was.

14 Q. And which agreements were those?

15 A. We had a source license agreement with Sun and
16 another one with Microsoft.

17 Q. Let's begin with the Microsoft agreement. I'd like
18 to show you Exhibit SCO 237.

19 MR. ACKER: Can I have a copy of that, please?

20 MR. CYRULNIK: Sure.

21 Your Honor, may I approach?

22 Q. BY MR. CYRULNIK: If you can flip approximately to
23 the sixth or seventh page of that Exhibit SCO 237.

24 Do you recognize this document, Mr. Peterson?

25 A. Yes, I do.

1 Q. And is this a document that memorialized the
2 agreement of Microsoft that you said you were involved in in
3 2003?

4 A. Yes, it is.

5 Q. Were you involved in negotiating the Microsoft
6 agreement?

7 A. A little bit, yes.

8 Q. Who was the lead negotiator of that agreement?

9 A. Chris Sontag.

10 Q. What was the primary involvement that you had with
11 that agreement?

12 A. As I said, a little bit while it was being drafted,
13 but most of the work I did on this was delivering technology
14 that was licensed by Microsoft from us.

15 Q. And which sections of this agreement relate to the
16 technology that you delivered to Microsoft?

17 A. I think Section 3 is a licensing UnixWare and is a
18 delivery of UnixWare code, and Section 4 gives further rights
19 to the UnixWare code and also adds OpenServer code and prior
20 products.

21 Q. And I believe you stated --

22 MR. ACKER: I'm sorry. The exhibit is on the
23 screen. What exhibit is it?

24 MR. CYRULNIK: It's SCO 237.

25 (Discussion held off the record.)

1 THE COURT: Did you want that on the record?
2 Because she couldn't hear you if you did.

3 MR. CYRULNIK: Sorry about that.

4 MR. ACKER: No, Your Honor. It's just the copy of
5 the agreement that he's given me has the amendment in front so
6 I'm confused, but I think I found where I am. Thank you.

7 Q. BY MR. CYRULNIK: Mr. Petersen, I believe you
8 testified that Section 3 of the Microsoft agreement related to
9 an option to purchase UnixWare license?

10 A. Yes.

11 Q. And then you said Section 4 of the agreement, I
12 believe you testified, related to an option to purchase a full
13 UnixWare license, an OpenServer license and you said older
14 technology, as well?

15 A. Yes.

16 Q. And did you have an understanding as to the
17 difference between the UnixWare license under the first
18 option, Section 3, and the expanded UnixWare license under
19 Section 4 that you referenced?

20 A. Yes, I did. And in Section 3 there were some
21 limitations on the way Microsoft could use the code it was
22 licensing. It could only use it in a subset of the products
23 it sold, and I think it had to appear in something called the
24 SFU, services for UNIX. So it kind of restricted the amount
25 of places that they could sell this code.

1 Q. And if you could turn to Section 3.7 of the
2 agreement. Are those the license limitations that you were
3 referring to when you said the Section 3 license had
4 limitations?

5 A. That's right. Yes.

6 Q. And as an engineer or based on your involvement in
7 the negotiations of the agreement, did you have an
8 understanding as to why Microsoft would want the restrictions
9 in Section 3.7 lifted?

10 MR. ACKER: Objection; calls for speculation as to
11 what Microsoft thought.

12 THE COURT: Well, he asked if he had an
13 understanding.

14 Did you have one?

15 THE WITNESS: Yeah, I had an understanding.

16 THE COURT: You can ask him how he obtained it.

17 MR. CYRULNIK: Sure.

18 Q. BY MR. CYRULNIK: What was the basis for that
19 understanding?

20 A. Well, the way that the license was structured and
21 the conversations that I had in particular about this section,
22 Microsoft was concerned about how it could use this technology
23 to provide compatibility through this SFU feature. And the
24 negotiations about 3.7 involved what was the scope of that,
25 how many systems, what kind of limitations they could have on

1 that, so....

2 Q. Did you have an understanding at the time as to the
3 significance of that restriction?

4 A. Yeah. It was my understanding was what they were
5 doing was this license was so they could add better
6 compatibility to UNIX into Microsoft. And that's why they
7 wanted this.

8 Q. And, Mr. Peterson, under Section 4 under the
9 Microsoft agreement, under the option delineated in Section 4,
10 were the restrictions or those that you just described, were
11 those lifted?

12 A. Yeah. It basically gave them broader rights to use
13 this compatibility, take this compatibility approach with
14 every version of Windows if they wanted to. And it kind of
15 broadened their ability.

16 Q. I believe you testified, look at Section 4 now,
17 that there were in addition to the expanded UnixWare license
18 there were other under Section 4 there was an OpenServer
19 license?

20 A. Right.

21 Q. And there was also Legacy UNIX product that were
22 provided under Section 4?

23 A. That's right.

24 Q. And I believe you testified, were you involved in
25 collecting the deliverables, the source code that was

1 ultimately provided to Microsoft under this agreement?

2 A. Yes, I did collect that and deliver it to
3 Microsoft.

4 Q. I'd like to direct your attention to SCO
5 Exhibit 391. And if you'll take a look at that document.
6 Tell me if you recognize it.

7 A. Yes, I do.

8 Q. And this document appears to be a series of e-mail
9 exchanges between you and someone named Doug Miller or
10 Rich Wickham?

11 A. That's right.

12 Q. Who's Doug Miller?

13 A. Doug Miller was a UNIX -- or rather a Microsoft
14 technical director.

15 Q. And did you interact with Doug Miller during the
16 2003 time period?

17 A. Yeah. Through e-mails like this.

18 Q. Turn to Page 2 of that exhibit. And I believe
19 there's an e-mail dated September 2nd, 2003, to you from
20 Doug Miller. Do you see that on the back of the page?

21 A. Yes, I do.

22 Q. And will you zoom in on the bottom lines? You
23 write:

24 As was suggested in Exhibit C, there are a few
25 older items, items that we no longer have. These

1 are noted as not available on the spreadsheet.

2 Regards.

3 A. Right.

4 Q. Do you recall writing that?

5 A. Yes.

6 Q. Mr. Petersen, did you collect all the source code
7 that was ultimately delivered to Microsoft?

8 A. Yes, I did.

9 Q. You were personally in charge of that?

10 A. Yes.

11 Q. And did you provide Microsoft with all the UnixWare
12 source code?

13 A. Yes.

14 Q. Did you provide Microsoft with all the OpenServer
15 source code?

16 A. Yes.

17 Q. And did you provide Microsoft with all the older
18 UNIX technology source code?

19 A. No. We didn't provide them everything on that
20 list. And that's why I sent this e-mail and also had a
21 spreadsheet that kept them apprised of what we could or
22 couldn't find.

23 Q. In response to this e-mail, do you recall
24 Mr. Miller ever communicating to you that Microsoft had a
25 problem with SCO's inability to provide some of the older

1 legacy code?

2 A. No.

3 Q. Did Microsoft ever ask for an adjustment of the
4 price that they paid under Section 4?

5 A. No.

6 Q. Were you surprised that Microsoft didn't demand any
7 adjustment for the price after writing this e-mail?

8 A. No, not at all.

9 Q. And as an engineer, do you have an understanding as
10 to why Microsoft didn't demand any adjustment for the price?

11 MR. ACKER: Same objection; calls for speculation.
12 Calls for hearsay. It's based upon a conversation.

13 THE COURT: Sustained.

14 MR. CYRULNIK: I'll rephrase.

15 Q. BY MR. CYRULNIK: Did you ever have any
16 conversations with Mr. Miller with respect to the inabilities
17 of SCO to provide older legacy technology to Microsoft?

18 MR. ACKER: Objection; calls for hearsay.

19 THE COURT: Well, he can answer that yes or no, so
20 we don't know whether it does or not.

21 MR. ACKER: All right. I agree.

22 THE WITNESS: No.

23 Q. BY MR. CYRULNIK: Okay. Would you turn to Page 1
24 of the document that you're looking at, it's a subsequent
25 e-mail nine days later, September 11th. And it's an e-mail

1 from you again to Doug Miller. And focus in on the bottom
2 Number 2. You write:

3 CD number 2 in the OpenServer source product
4 contains restricted third party source, the
5 OpenServer analogs of Exhibit B restricted source
6 for UnixWare. Since the focus of the contract was
7 on UnixWare technology, we never addressed the
8 restricted source that is in the OpenServer
9 product.

10 Is that a fair reading of what you wrote?

11 A. Yes.

12 Q. Can you explain what you meant by, "since the focus
13 of the contract was on the UnixWare technology," when you
14 wrote that in 2003?

15 A. Well, Section 3, of course, was all about UnixWare.
16 The discussions that we had was providing compatibility for
17 the latest version of UNIX, which was UnixWare. So my
18 assumption, then, was what they were most interested in was
19 UnixWare compatibility. That's why we had all this detail
20 about the parts of UnixWare that they could use. This was a
21 question about, did they require the same thing for
22 OpenServer? And they didn't. And that's why they were
23 interested in that product.

24 Q. I'd like to now turn to the other agreement you
25 said you were involved in. I believe you testified you were

1 involved in the Sun agreement in 2003, as well?

2 A. Yes.

3 Q. Let me show you SCO Exhibit 185. Do you recognize
4 that document, Mr. Petersen?

5 A. Yes, I do.

6 Q. What is that document?

7 A. This is the license that we negotiated with Sun.

8 Q. Were you involved in the negotiating the Sun
9 agreement?

10 A. No, I was not.

11 Q. Who did negotiate that agreement?

12 A. Chris Sontag.

13 Q. What was the extent of your involvement with the
14 Sun agreement?

15 A. I was given a copy of it after it was signed and
16 told to deliver the technology that we -- Sun had gotten
17 rights to in this agreement.

18 Q. I'd like to -- if you can flip on SCO Exhibit 185
19 to Attachment 1, which is towards the end. Page 11 of the
20 agreement.

21 A. Okay. Yep.

22 Q. Mr. Peterson, when you say you were involved in the
23 technology, is this the technology that you were providing Sun
24 under the 2003 agreement?

25 A. Yes, that's right.

1 Q. And can you briefly review for the Court the
2 deliverables that SCO provided to Sun under this agreement?

3 A. I'm sorry. Repeat that.

4 Q. Sure. Can you briefly review for the Court the
5 deliverables that SCO provided to Sun under the 2003
6 agreement?

7 A. All right. There was a current UNIX source code
8 described here. Drivers for UnixWare and for OpenServer and
9 then prior UNIX products.

10 Q. And that current UnixWare source code, that was
11 listed under Page 12 on Number 2?

12 A. Right. That was open UNIX 8 UnixWare 7.1.2, 7.1.3.

13 Q. And before that list, I think you said the other
14 older technologies that you provided to Sun?

15 A. Right.

16 Q. And under Number 3 on Page 12 of the agreement, are
17 those the drivers that you were referring to?

18 A. Yes, that's right.

19 Q. I'd like to start with the UnixWare on the old UNIX
20 source code that you provided Sun. Did you collect that code
21 personally?

22 A. Yes, I did.

23 Q. And did you provide Sun with all of the older
24 releases of System V?

25 A. No. We couldn't find all the releases on this

1 list. So I had to tell them we couldn't deliver everything.

2 Q. And did Sun ever communicate to you it had a
3 problem with the fact that you weren't able to deliver all of
4 the older releases of System V?

5 A. No.

6 Q. Did it ever ask for a price adjustment?

7 A. No.

8 Q. Were you able to provide Sun with all of the
9 UnixWare source code?

10 A. Yes.

11 Q. And I believe you said the other aspects of what
12 you provided in addition to UnixWare and the older UNIX source
13 code were their drivers?

14 A. Right.

15 Q. Mr. Peterson, what are drivers?

16 A. That's software that's added to the operating
17 system to support a particular device, a special kind of disk
18 drive or some other thing that gets connected to a computer.

19 Q. All right. Are drivers important in an operating
20 system?

21 A. Yes, they are. Typically when a person buys a
22 computer they want to have peripherals added to it. Most of
23 those are supported by drivers.

24 Q. Did you personally collect and deliver to Sun the
25 drivers that were required to be provided to Sun under this

1 agreement?

2 A. Yes.

3 Q. And where were those drivers from? Which operating
4 system?

5 A. UnixWare and OpenServer.

6 Q. Do you remember how many drivers you provided?

7 A. It was hundreds.

8 Q. I'd like to show you SCO Exhibit 19. I'd like to
9 ask you if you recognize the document?

10 A. Yes, I do.

11 Q. And it's entitled, Clarification of License Grant
12 to UnixWare and OpenServer Drivers; is that correct?

13 A. That's correct, yep.

14 Q. And what role did this document play in your
15 collecting and gathering the drivers that were required to be
16 provided to Sun under the 2003 agreement?

17 A. Well, we needed to provide Sun. The OpenServer and
18 UNIX were drivers, but there was a difference in the rights we
19 had and the rights we could transmit to Sun. So this document
20 explained that. Most of the drivers, you know, we had the
21 source code and we could provide the source and Sun could use
22 the source. In some cases the drivers had come from third
23 parties, and there were restrictions associated with those
24 drivers. And this document explained those.

25 Q. Mr. Peterson, did you provide Sun with any

1 non-UnixWare or OpenServer in particular any pre-UnixWare
2 System V drivers?

3 A. No.

4 Q. And as an engineer, did you have an understanding
5 as to what Sun would be able to do with drivers in conjunction
6 with the operating system it was getting?

7 A. Yeah. We would let them produce a version that
8 would support this hardware. In the case of Sun, Sun had a
9 Solaris for Intel products, and these drivers could be used or
10 modified to provide support for those hardware devices in
11 Solaris.

12 Q. Did Sun ever request any older drivers?

13 A. No.

14 Q. I'd like to direct your attention to SCO
15 Exhibit 391, please. And if you could turn to the middle of
16 that exhibit. I apologize. It's not numbered in an easy
17 fashion. But if you turn to the middle of the exhibit,
18 there's a page labeled 74 at the bottom. It appears after
19 Exhibit D. And the top of the page it's an e-mail.

20 A. Okay. Yes, I have it.

21 Q. I think we have it on the screen over here. I'd
22 like to zoom in on the top half. And do you recognize what
23 that e-mail exchange was?

24 A. Yes, I do.

25 Q. And I believe it says it's an e-mail from you,

1 Jay Petersen, to Andy, A-N-D-R-E-W-R, at Sun, dated Monday,
2 the 21st of April 2003?

3 A. Yes.

4 Q. Who is Andy?

5 A. Andy was Andy Roach. He was a technical director
6 in the UNIX development group at Sun. He's the person that I
7 delivered all the code to.

8 Q. Okay. You wrote to Andy in the second paragraph of
9 that e-mail:

10 I have a question about older binary drivers.
11 There are binary drivers in some of the earlier
12 versions of UnixWare. In some cases, these are
13 just earlier versions of the latest binary
14 drivers. And in other cases, they may simply be
15 obsolete. The vendor may be out of business, et
16 cetera. Do you think we need to list all the
17 binary drivers in all the earlier versions of
18 UnixWare that we have shipped you? My feeling is
19 that if you wanted to use any driver, the version
20 you would want would be the one from the latest
21 version of UnixWare or OpenServer, parentheses,
22 the list in the letter, end paren.

23 Do you see that, Mr. Petersen?

24 A. Yes.

25 Q. Can you explain the background of what prompted you

1 to ask Andy Roach that question?

2 A. Yeah. We'd done a lot of research on the current
3 drivers so we knew what our rights were, and we knew what we
4 could tell Sun about. There were older drivers and older
5 versions of UnixWare. And this was really a question whether
6 we had to do all that hunting down to find out whether, you
7 know, exactly what the situation was with the older drivers.
8 I don't think they were important to Sun. That's why I wrote
9 this e-mail.

10 Q. And those old drivers were from the older versions
11 of UnixWare. Those were a couple years old. How old were the
12 versions of UnixWare?

13 A. Yeah. It would have been the oldest 1995. And
14 some of the other ones would have been in the late '90s.

15 Q. Did you ask Andy whether he wanted you to provide
16 him with the even older drivers of pre-UnixWare releases?

17 A. No. That didn't come up.

18 Q. Why not?

19 A. Well, he didn't ask for them, and it wasn't spelled
20 out in the agreement. And the focus really was on the latest
21 drivers, again, because they were the most valuable and useful
22 things.

23 Q. Okay. Mr. Petersen, I'd like to show you one other
24 series of exhibits. And they're in your booklet. They begin
25 with Novell Exhibit 440. And I'm just going to list them for

1 the record. It's Novell Exhibits 440, 441, 442, 443, 444,
2 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456,
3 457, 458 and 459.

4 A. Right.

5 Q. And can you briefly look at those exhibits,
6 Mr. Petersen?

7 A. Yes, I have.

8 Q. The let's take the first one as an example.
9 Exhibit, Novell Exhibit 440. Can you describe what that is?

10 A. Yeah. It's a comparison of a file called diskusg.c
11 in OpenSolaris on the left-hand side; and on the right-hand
12 side, it's a file with the same name taken from the source
13 code tree of System V Release 4-386.

14 Q. As an engineer, have you had occasion to review
15 source files such as these?

16 A. Yes, I have.

17 Q. And this particular document, 440, is comparing,
18 like you said, two source files?

19 A. Right.

20 Q. And it was a source file from OpenSolaris on the
21 left-hand side and AT&T SVR4 on the right-hand side?

22 A. Yes.

23 Q. What does the comparison show?

24 A. It shows there is code in the OpenSolaris file that
25 is the same code in the SVR4 file. The two files aren't

1 identical. There's more code usually on the Solaris side, but
2 there are exact matches on many lines.

3 Q. So would you say these are similar?

4 A. Yes.

5 Q. Mr. Petersen, do you know whether the file that's
6 identified over here from OpenSolaris, the source file from
7 OpenSolaris, whether that also appears in UnixWare?

8 A. Yes, it does.

9 Q. It does.

10 A. UnixWare 1.1 in particular, that's the one that I
11 looked at, has the same file with the same name.

12 Q. I'd like to turn to Novell Exhibit 441. This is
13 the second of 21 exhibits that Novell has introduced on this
14 front.

15 Can you briefly describe the relationship between
16 in exhibit and the previous one?

17 THE COURT: While he's finding that, I don't know
18 what Kim's list shows, but mine shows that 444 and 454 and 457
19 were not admitted. They're your exhibits, though, so I assume
20 you're going to use them and you don't care.

21 MR. ACKER: They're fine.

22 MR. CYRULNIK: I will move to admit them.

23 THE COURT: 444, 454 and 457 are received.

24 (Whereupon, Novell Exhibits 444, 454 and

25 457 are received.)

1 Q. BY MR. CYRULNIK: I'll repeat the question. I'm
2 just asking if you can briefly describe to the Court what this
3 Exhibit 441, Exhibit 441 depicts?

4 A. Yeah. This is the same format as the previous
5 exhibit, except it's now talking about a file called
6 dispadmin.c. And again, there's a Solaris version and there's
7 a SVR4-386 version. And once again, OpenSolaris lines
8 superset, that is, many of the lines in the right-hand side
9 are present in the left-hand side.

10 Q. I'd just like to ask you the same question that I
11 asked you with respect to the previous exhibit. Mr. Petersen,
12 do you know whether the OpenSolaris source file on the
13 left-hand side of the page also appears in UnixWare?

14 A. Yeah. The same case as before, there's a file of
15 exactly the same name and UnixWare 1.1, and it's substantially
16 similar to both of these files.

17 Q. And I'm not going to bore everybody with all the
18 exhibits. But did you do a similar exercise in terms of
19 researching the 21 exhibits, the 21 source filings?

20 A. Yes.

21 Q. That are OpenSolaris and SVR 4?

22 A. Yeah. I looked at every one of these and found the
23 same file in UNIX 1.1.

24 Q. Every one of the 21 filings in OpenSolaris are in
25 UnixWare, as well?

1 A. Yes.

2 Q. Thank you, Mr. Petersen.

3 No further questions, Your Honor.

4 THE COURT: Thank you, Mr. Cyrulnik.

5 Mr. Acker, you may cross-examine.

6 MR. ACKER: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. ACKER:

9 Q. I hand you a copy of your prior testimony. It's
10 crowded up there.

11 Good afternoon, Mr. Petersen.

12 You testified a bit about your impressions
13 regarding the Sun and Microsoft license on direct; correct?

14 A. Yes.

15 Q. Is it fair to say that you were not involved in the
16 negotiation of the Microsoft license; correct?

17 A. No. I was involved a little bit in the negotiation
18 of the Microsoft license, the wording in Section 3.

19 Q. Okay. Why don't we take a look at your deposition.
20 It's your IBM deposition on February 27th, 2006. And it's at
21 Page 150, Lines 1 to 10.

22 THE COURT: Has that been published?

23 MR. ACKER: If I could, Your Honor.

24 Q. BY MR. ACKER: And you provided this testimony back
25 in 2006.

1 Okay. Do you know how many source code
2 licenses were sold during that time frame?

3 That's the question.

4 Answer. Two that I'm aware of.

5 Question. Two from October 2002 to fall
6 2003?

7 Answer. Right.

8 And who were those sold to?

9 Answer. Sun and Microsoft.

10 Question. And were you involved in the
11 negotiations for these source code licenses?

12 Answer. No.

13 A. Yes.

14 Q. Is that testimony accurate?

15 A. Yes, it was. If you read a little further, you'll
16 see that I modified that testimony.

17 Q. Well, what you modified when you testified further
18 was that you were involved in collecting and delivering source
19 code pursuant to the licenses; correct?

20 A. No. But I think if I read starting from Line 12,
21 it says:

22 Chris Sontag was. I don't know who else was
23 in both cases -- well, let me clarify that. I was
24 not involved at all in the Sun license. I was
25 involved in negotiating some of the details in the

1 Microsoft license now that I think about it.

2 Q. And those details related to the amendment of the
3 license; correct?

4 A. No. They related to the wording in Section 3.

5 Q. As to the Sun license, you never sat down with
6 anyone from Sun and engaged in negotiations with them about
7 the license; that is correct?

8 A. That's right. With Sun, no.

9 Q. So when you testified in direct that you made
10 certain assumptions about the Sun licenses and Microsoft
11 licenses, those were just that, assumptions; correct?

12 A. Yes.

13 Q. And that's not based on any interaction you had
14 during the negotiation process with anyone from Sun; correct?

15 A. I didn't negotiate with anyone from Sun during
16 that, yeah, during the contract negotiation, that's right.

17 Q. And you were actually part of the SCOSource
18 program; correct?

19 A. Yes. I worked for Chris Sontag at that point.

20 Q. You were Chris Sontag's deputy beginning the fall
21 of 2002 in the SCOSource program; correct?

22 A. That's right.

23 Q. But you were not involved in the negotiation of the
24 Sun license; correct?

25 A. That's right.

1 Q. And you were only minimally involved in the
2 negotiation of the Microsoft license?

3 A. Right.

4 Q. And any testimony that you've given of either of
5 those licenses are simply assumptions; right?

6 A. That's right. Based on my technical understanding
7 of what was going on.

8 Q. But not based on discussions with anyone at Sun or
9 Microsoft during those negotiations; right?

10 A. The only exchanges I had were e-mail exchanges
11 clarifying things we could or couldn't do. So I got an
12 impression of what they were thinking about doing from that.
13 But, you're right. Nobody from Sun said precisely, this is
14 what we're going to do.

15 Q. And no one from Sun precisely said, this is why we
16 entered into this license; right?

17 A. That's right.

18 Q. And similarly, for Microsoft you talked about what
19 might or might not be delivered after the license was
20 executed; correct?

21 A. That's right.

22 Q. Now, as I mentioned, you were asked late in 2002 to
23 join Mr. Sontag to run the SCOsource licensing campaign at
24 SCO; correct?

25 A. Right.

1 Q. And you were brought in to help with SCOSource in
2 order to generate more revenue from SCOSource code licenses or
3 to generate new source code licenses; correct?

4 A. Well, to generate more revenue from SCO's
5 intellectual property, not necessarily limited to source
6 licensing.

7 Q. All right. Why don't we take a look at your
8 deposition 2-27-08, IBM deposition. At Page 117 Line 16 to
9 24.

10 If I could publish that, Your Honor.

11 THE COURT: Yes, you may.

12 THE WITNESS: I'm sorry. What page was that again?

13 Q. BY MR. ACKER: Sure. 117.

14 A. Okay.

15 Q. Line 16 to 24.

16 MR. CYRULNIK: You said 2-27-08. Did you mean
17 2-27-06?

18 MR. ACKER: I did.

19 Q. BY MR. ACKER: Do you have that page, sir?

20 A. Yes, I do.

21 Q. And we have it up on the screen for you. And you
22 were asked the following questions and provided the following
23 answers:

24 And why don't you then help me explain
25 that. You said you were brought on to help

1 generate more source code license sales; is that
2 correct?

3 There's an objection and you answered:

4 No. Yeah, I was brought on to explore new
5 ways of generating revenue from our source code
6 licenses or generating new source code licenses.

7 Correct?

8 A. Right.

9 Q. And that's why you were asked to join -- that's why
10 you understood why you were asked to join SCOSource; right?

11 A. Right.

12 Q. And the source code that was going to be licensed
13 in the SCOSource program was SCO's UNIX source code; correct?

14 A. Right.

15 Q. And after you were assigned to SCOSource, you soon
16 met with lawyers including Darl McBride's brother
17 Kevin McBride to map out the strategy for the SCOSource
18 campaign; correct?

19 A. Yes. I was involved in that, yes.

20 Q. So you come on in October, and immediately you're
21 meeting with lawyers including Mr. McBride's brother in order
22 to map out how SCOSource is going to work; right?

23 A. Yes.

24 Q. And that included working out a litigation
25 strategy; right?

1 A. There was some discussion of litigation at that
2 point, I think. Yeah.

3 Q. And it's true, isn't it, that the SCOSource
4 licenses and the SCOSource program are broader than the
5 traditional AT&T licenses and give broader source code rights?
6 Isn't that right?

7 A. Well, I'm not an expert in licensing. My
8 impression is, yes, they do give broader rights.

9 Q. And the SCOSource licenses were licensing the,
10 quote, same materials as the traditional AT&T source code
11 licenses; right?

12 A. I'm not sure I understand what you mean by the same
13 materials.

14 Q. Okay. Let's take a look at your deposition again
15 at Page 315 Line 24 carry over to 316-7.

16 If I could publish that?

17 THE COURT: Yes.

18 Q. BY MR. ACKER:

19 Question. What's the difference, then? Why
20 were some of them SCOSource licenses as opposed to
21 just source code licenses?

22 And your answer:

23 As much as anything it's the time when
24 they sign the license. The licenses are broader,
25 give broader source code rights than some of

1 the -- than the traditional AT&T licenses. But
2 nonetheless, they're licensing the same materials.
3 The rights are just different.

4 Correct?

5 A. Okay. That's what I said, yes.

6 Q. That's a true statement; right?

7 A. Yes. And this -- yes. And what I meant here by it
8 was the same materials, meaning the source code, the
9 intellectual property and that source code.

10 Q. And when you referred to that, you were referring
11 to the UNIX, the SCO UNIX source code; correct?

12 A. Yes.

13 Q. And the source code rights under the SCOSource
14 licenses were broader than other SCOSource codes licenses --
15 strike that.

16 And the SCOSource licenses under the SCOSource
17 program were broader than other SCO regular code licenses
18 because they had fewer restrictions on sublicensing and
19 distribution and exposure of the source to the licensing
20 customers; correct?

21 A. That's right. Given as shown by the two examples
22 that we've already seen, the Sun and the Microsoft license.

23 Q. And in both the Sun and the Microsoft licenses,
24 they obtain broader rights, that is, Sun and Microsoft did, to
25 sublicense the code they got to their customers; correct?

1 A. Yes.

2 Q. And that was the SCOSource program; right?

3 A. Yes. That was part of it.

4 Q. Both were part of the SCOSource program; correct?

5 A. Yes.

6 Q. Let me show you an exhibit. Exhibit 233.

7 Have you had a chance to look at that exhibit that

8 we marked as Exhibit 233?

9 A. Okay.

10 Q. Why don't we start at the bottom. And if you could

11 highlight -- this is an e-mail. In the middle of the document

12 is an e-mail from you, and you've attached to the bottom a

13 snippet from an article or it looks like a link to an article

14 regarding Sun OpenSolaris; right?

15 A. Right.

16 Q. And you sent the e-mail to Chris Sontag on the 6th

17 of August 2003; right?

18 A. Yes.

19 Q. And what the article is talking about is that, Sun

20 takes a crack at desktop Windows, eWEEK. Do you see that?

21 A. Yes.

22 Q. And it says:

23 A Sun Microsystem executive told a Linux world

24 audience that its new Mad Hatter product, a

25 unified desktop offering based on Linux, will be

1 priced at half of the Microsoft charges for a
2 Windows environment. Sun's chief software
3 engineer, Jonathan Schwartz, also said that Sun
4 would protect its customers from any potential
5 Linux-related legal action from SCO.

6 Do you see that?

7 A. Yes.

8 Q. And you were the deputy of the SCOSource program --

9 A. Yes.

10 Q. -- at this time?

11 A. Yes.

12 Q. In July of 2003?

13 A. Yes, I was.

14 Q. And the purpose of that program was to give -- take
15 licenses or get licenses of people who are using Linux;
16 correct?

17 A. No, not necessarily. The licenses we've just
18 talked about are for Sun and Microsoft, and they didn't use
19 Linux.

20 Q. But the focus of the SCOSource program was to --
21 1,000 letters went out from Mr. McBride to Linux users all
22 over the country; correct?

23 A. That was one of the aspects of that program.

24 Q. And in that letter, Mr. McBride told those users of
25 Linux, Hey, we think our IP is in Linux; correct?

1 A. That's correct.

2 Q. And he told them, you better take a license from us
3 or you're going to get sued; correct?

4 A. I don't remember exactly how he said that. But,
5 yes, that was the impression.

6 Q. And that was the SCOSource program; right?

7 A. Yes.

8 Q. And when you see this, you become concerned;
9 correct?

10 A. Yes. Yeah.

11 Q. And why don't we take a look at your e-mail up
12 above.

13 You wrote to Chris Sontag, your boss, head of
14 SCOSource:

15 Hi, Chris. Looks like Sun intends to use its
16 broader license to protect its Linux customers.

17 Do you see that?

18 A. Yes, I do.

19 Q. And then you wrote:

20 That's fine. But I hope they don't decide to
21 go after the rest of the market.

22 Do you see that?

23 A. Yes.

24 Q. What did you mean when you wrote that?

25 A. Well, I knew that Sun had broader rights and that

1 they could sublicense some of those rights. And I was
2 wondering whether they were going to -- whether that was the
3 interpretation. What they were talking about here was their
4 Linux stuff, their Linux program. And I wondered whether they
5 would try to take that and do anything more than that.

6 Q. You were worried that they were going to provide
7 indemnity to all of these Linux users out there; right?

8 A. I didn't know if they could or not, but I wondered
9 if whether that was an issue.

10 Q. And that was a concern for you as a deputy at
11 SCOsource; correct?

12 A. Yes.

13 Q. And that would have been a commercial -- that would
14 have commercial value for Sun if they could provide indemnity
15 to customers that were using their OpenSolaris product; right?

16 A. It would.

17 Q. It would be valuable, extremely valuable; right?

18 A. Yes.

19 Q. And it would seriously undermine the SCOsource
20 program; correct?

21 A. It could, yes.

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

23 THE COURT: Thank you, Mr. Acker.

24 Any redirect, Mr. Cyrulnik?

25 MR. CYRULNIK: No, Your Honor.

1 THE COURT: You may step down Mr. Petersen.
2 I assume this witness may be excused?
3 MR. ACKER: Yes. On behalf of Novell, Your Honor.
4 MR. CYRULNIK: And on behalf of SCO.
5 THE COURT: You don't want to do another witness
6 today? You better tell me where we are and whether we need to
7 come in at 8 o'clock to get out at 1:30.
8 MR. SINGER: Your Honor, we only have one remaining
9 witness. It will be a short witness, Mr. Nagle. I think the
10 direct will be 10 or 15 minutes. I don't know about cross.
11 THE COURT: Do you have any rebuttal?
12 MR. JACOBS: I don't think we'll have a rebuttal
13 case, Your Honor. The last thing we need to do is there are a
14 few exhibits we need to move in.
15 THE COURT: So you only have one more witness, and
16 the witness won't take very long?
17 MR. SINGER: That's right, Your Honor.
18 THE COURT: Well, let's come in at 9:00, then.
19 How long will your closing arguments?
20 MR. SINGER: I think 30 minutes would be
21 sufficient.
22 MR. ACKER: 30, 45, Your Honor.
23 THE COURT: So maybe an hour and a half total.
24 All right. So let's see. We'll see you at
25 9 o'clock in the morning.

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MR. SINGER: Thank you, Your Honor.

THE COURT: You'll get an extra half hour of sleep
or worry.

Thank you. We'll be in recess.

(Whereupon, the court proceedings were concluded.)

* * * * *

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 May 1, 2008, and thereat reported in
8 Stenotype all of the testimony and proceedings had, and caused
9 said notes to be transcribed into typewriting; and the
10 foregoing pages number from 503 through 636 constitute a full,
11 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