

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

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

\_\_\_\_\_  
THE SCO GROUP, INC., a Delaware )  
corporation, )  
)  
)  
Plaintiff and Counterclaim- )  
Defendant, )  
)  
)  
vs. )  
)  
NOVELL, INC., a Delaware )  
corporation, )  
)  
)  
Defendant and Counterclaim- )  
Plaintiff. )  
\_\_\_\_\_)

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

BEFORE THE HONORABLE DALE A. KIMBALL  
DATE: APRIL 29, 2008  
REPORTER'S TRANSCRIPT OF PROCEEDINGS  
TRIAL TRANSCRIPT

Reporter: REBECCA JANKE, CSR, RMR  
KELLY BROWN HICKEN, CSR, RMR

1  
2  
  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

1

2

3

I N D E X

4

5 WITNESSES	EXAMINATION	PAGE
-------------	-------------	------

6

7 JOSEPH LA SALA	Direct by Jacobs	45
	Cross by Singer	64
8	Redirect by Jacobs	75

9

10 CHRISTOPHER SONGAG	Direct by Acker	77
11	Cross by Normand	151

12

13

14

E X H I B I T S

15 NOVELL'S	RECEIVED
-------------	----------

16 215	47
220	50
17 234	53
280	55
18 293	56
297	59
19 303	60
317	64
20 27	126
30	126

21

22 SCO'S

23 189	193
--------	-----

24

25

1 APRIL 29, 2008

SALT LAKE CITY, UTAH

2

P R O C E E D I N G S

3

\* \* \*

4

THE COURT: Good morning. I'm advised that we  
5 had a few calls about lap tops. The court policy is that  
6 you can't have them here. You can have your cell phones,  
7 but they need to be off.

8

We're here for the trial of the issues  
9 remaining in SCO Group vs. Novell, 2:04-CV-139.

10

SCO is represented by Stuart Singer.

11

MR. SINGER: Good morning, Your Honor.

12

THE COURT: Good Morning. Mr. Ted Normand.

13

MR. NORMAND: Good morning, Your Honor.

14

the court: Mr. Brent Hatch.

15

MR. HATCH: Good morning, Your Honor.

16

THE COURT: And Mr. Jason Cyrulnik.

17

MR. SINGER: He will be here shortly, Your  
18 Honor.

19

THE COURT: All right.

20

And defendant Novell by Mr. Michael Jacobs.

21

MR. JACOBS: Good morning, Your Honor.

22

THE COURT: Good morning.

23

Mr. Eric Acker.

24

MR. AKCER: Good morning, Your Honor.

25

THE COURT: Good morning.

1           And Mr. David Melaugh.

2           MR. MELAUGH: Good morning, Your Honor.

3           THE COURT: I received a joint statement and  
4 then an amended one. I was going to say you people ought  
5 to teach everyone else how to conduct a trial with that  
6 one statement. But I haven't had a chance to read the  
7 amendment. How is it different, the amended joint  
8 statement?

9           MR. NORMAND: Your Honor, that is one exhibit  
10 that Novell had not addressed in the original  
11 stipulation.

12          THE COURT: All right.

13          MR. NORMAND: But to which we had reached an  
14 agreement as to the admissibility.

15          THE COURT: Very good. Is it the last one?

16          MR. NORMAND: Yes, sir. It's 411, I believe.

17          THE COURT: 411? Is that right? And does  
18 either party want to invoke the witness exclusion?

19          MR. SINGER: We do, Your Honor.

20          MR. JACOBS: I'm afraid so, Your Honor.

21          THE COURT: All right. So, is there anyone  
22 sitting back there who is going to testify who is not one  
23 of your client -- who is not a client representative?  
24 They have to leave until their testimony is complete.

25          MR. JACOBS: Each side may have one client

1 representative, correct?

2           THE COURT: Yes. Each of you has a client  
3 representative, of course. They can stay, even if  
4 they're going to be a witness.

5           Now, will part of the trial have to be sealed?  
6 Some of the material is proprietary. Talk to me about  
7 that for a moment.

8           MR. SINGER: We believe we have worked that out  
9 and that it will not be necessary to close the courtroom  
10 or take any extraordinary efforts in that regard.

11          THE COURT: Thank you.

12          MR. JACOBS: That's our understanding as well,  
13 Your Honor.

14          THE COURT: All right. Who's going to make the  
15 opening statement for Novell.

16          MR. JACOBS: I will, Your Honor.

17          THE COURT: Mr. Jacobs, go ahead.

18          MR. JACOBS: Well, here we are, Your Honor.

19          THE COURT: Who's going to -- who do you  
20 propose, by the way, counsel, keeps the time limits  
21 you've set on yourselves?

22          MR. JACOBS: Yes. I think we worked that out,  
23 the time limits.

24          MR. ACKER: We have agreed between SCO and  
25 Novell, but we are prepared to keep track of time.

1           MR. SINGER: We have worked out, as this Court  
2 is aware, an allocation of time so that we will  
3 definitely finish in the time allotted by the Court, and  
4 everything, including opening, will count against our  
5 respective time.

6           THE COURT: It's one thing to work out an  
7 allocation. It's another to abide buy it.

8           MR. SINGER: We have a number of people here  
9 with watches.

10          THE COURT: All right, go ahead, Mr. Jacobs.

11          MR. JACOBS: Your Honor, in this bench trial,  
12 we seek a recovery of exactly \$19,979,561 from SCO, based  
13 on the Court's earlier findings of breach of fiduciary  
14 duty, conversion, unjust enrichment. This is an amount  
15 we seek from SCO based on its licenses to Sun, Microsoft  
16 and what we're referring to as the SCOSource licenses.  
17 And we'll be going through those in the course of both my  
18 opening statement and this trial.

19                 In view of the Court's earlier findings, our  
20 case rests on four basic points, and the evidence will,  
21 over the course of this trial, Your Honor, prove these  
22 points.

23                 First. Contrary to what SCO would have the  
24 Court believe in this trial, when it was active,  
25 SCOSource was all about SVRX. It was not about

1 SCO-written code or Santa Cruz-written code. It was not  
2 about UnixWare, in the sense that it was not about the  
3 code that Santa Cruz contributed to the code base that  
4 evolved over time and became UnixWare.

5           It was, rather, all about SVRX, the rights that  
6 SCO claimed to have acquired from Novell but the Court  
7 has found that it did not.

8           Second. The SCOSource licenses convey  
9 substantial SVRX rights; not merely trivial SVRX rights,  
10 not merely unimportant SVRX rights, but, in fact,  
11 substantial SVRX rights. And, in a sense, I think, in  
12 this trial, we will be eliding or finessing the question  
13 of incidentalness that was raised in the wake of the  
14 Court's summary judgment ruling. We will prove that  
15 these licenses were not incidental we will be proving  
16 that they were substantial SVRX rights, and in a sense,  
17 our claim to this amount of recovery turns to that  
18 finding, that the SVRX rights granted in these SCOSource  
19 licenses were substantial.

20           Third. Contrary to SCO's review of the history  
21 of UNIX licensing, the practice of UNIX licensing over  
22 time does not help it. We will show that, in fact, you  
23 can learn from the history of UNIX licensing what an  
24 incidental or unimportant or not very much value SVRX  
25 license looks like, and we will show that these -- that

1 that isn't what these licenses look like. That isn't  
2 what the SCOSource licenses look like.

3           And then, finally, a mix of a legal and a  
4 factual point. The factual point is: SCO has not  
5 offered any apportionment. We actually have, as you will  
6 see when we go through the Microsoft license, we have  
7 done our best to work with that agreement and come up  
8 with an apportionment. SCO has not. That's factually  
9 indisputable. The legal point on which our claim to this  
10 entire amount rests is that as our fiduciary, having met  
11 our initial burden, it was their burden to develop an  
12 apportionment and approve that apportionment if there was  
13 any deduction from the amounts they recovered on account  
14 of these SVRX SCOSource licenses.

15           With that in mind, let's proceed to what the  
16 evidence will show at trial. First. The focus of  
17 SCOSource was SVRX. Reading SCO's trial brief, it  
18 appears that SCO will try to rewrite history. It will  
19 try to argue that, contrary to what it said over and over  
20 again about the importance of the SVRX code base that it  
21 believed it had acquired through this chain of  
22 transactions, including the Asset Purchase Agreement, SCO  
23 is now arguing: No, no, no, that wasn't what was so  
24 important. What was important was UnixWare, and what  
25 these licenses are all about is UnixWare and not the SVRX

1 code base.

2           As I have foreshadowed, that was not what SCO  
3 said at the time. So let's set the stage. It's the  
4 second half of -- or the last quarter of 2002, early  
5 2003. By this time, Caldera has bought the UNIX business  
6 from Santa Cruz, that Santa Cruz had acquired from Novell  
7 pursuant to the Asset Purchase Agreement, acquiring no  
8 more than Santa Cruz had acquired from Novell.

9           New management has come into Caldera. The  
10 company is renaming itself SCO, and it's developing its  
11 business strategy, and it has concluded that the  
12 licensing revenue from UnixWare and from OpenServer, the  
13 two flagship products of Santa Cruz and then Caldera SCO,  
14 those two products did not generate enough licensing  
15 revenue for a viable business strategy. In fact, it was  
16 a declining revenue base.

17           So, instead, SCO decided to set out to, mixing  
18 the metaphor a bit, to mine the trunk of the tree. And  
19 this metaphor that SCO used to describe its strategy,  
20 which we will introduce as Novell Exhibit 421, is a  
21 powerful metaphor, and it really tells us a lot about  
22 what was going on at the time.

23           What SCO was saying is that there are  
24 these various branches representing various flavors of  
25 UNIX, and some of these the Court has become quite

1 familiar with from earlier rulings. So there's IBM AIX  
2 over on the upper left. That's IBM's flavor of UNIX.  
3 That was the subject of SCO's claims against IBM. There  
4 is Sequent. You'll remember there was also a Sequent  
5 dispute between the parties. And then up at the top is  
6 Sun Solaris, another flavor of UNIX. And then, down at  
7 the bottom on the lower right-hand corner, there is SCO  
8 UnixWare. These are all branches SCO explained, based on  
9 the trunk, which was the UNIX core System V code base.

10 All those branches were based on that code  
11 base, and what SCO's strategy -- since SCO's strategy of  
12 licensing branches, SCO OpenServer and SCO UnixWare was  
13 not a viable business strategy, SCO was going to develop  
14 revenue from the trunk. And that trunk, SCO made clear,  
15 was the legacy code base that SCO had acquired from Santa  
16 Cruz and, in turn, from Novell, it contended, by virtue  
17 of the Asset Purchase Agreement.

18 Now SCO would like to claim that it's all in  
19 the branches, that the value in these SCOSource licenses  
20 was in the branches. But, at the time, SCO said: No.  
21 The value was in the intellectual property in the trunk.  
22 And SCO, the strategy was explained, was going to mine  
23 the trunk.

24 One of the key moments in the history of  
25 SCOSource was the May 12, 2003 letter to Fortune 1,000

1 companies that SCO sent out seeking to mine the trunk,  
2 seeking to frighten, scare the many users of Linux into  
3 signing SCOsource intellectual property licenses. And  
4 there was a very simple contention that SCO advanced.  
5 That contention was that UNIX source code distributed by  
6 AT&T has found its way into Linux.

7           Remember, the basic proposition that SCO was  
8 advancing during this the time was that this UNIX code  
9 base in the trunk had proliferated through these various  
10 derivatives such as IBM's AIX. And through the wide  
11 access to these derivatives and, SCO claimed, the  
12 carelessness of the developer community, the code from  
13 the trunk had leaked out through the derivatives and, in  
14 fact, had leaked out into Linux.

15           Now, at no time in the ramp up of SCOsource,  
16 did SCO claim: Oh, by the by, there is also some SCO  
17 UnixWare code in Linux. There is some code that we wrote  
18 that's in Linux.

19           And, as we'll see, at no time that has SCO  
20 articulated a theory of the case that rests on  
21 SCO-written, SCO-copyrighted code. And SCO -- in this  
22 connection, I am using SCO and Santa Cruz interchangeably.

23           After years of litigation and the investment of  
24 tens of millions of dollars, in the IBM case, SCO was put  
25 to its proof and that that proof that SCO was put to was:

1 All right, this is it. After all these rulings that I  
2 have issued and that my magistrate judge has issued, I'm  
3 telling you, SCO, you have really got to lay it out for  
4 us. What exactly are you contending was misappropriated  
5 in Linux?

6           And this is -- this demonstrative reflects the  
7 final expert report from Mr. Cargill, SCO's expert, who  
8 undertook to lay all that out. With all the incentive in  
9 the world to show that there was something in SCO  
10 UnixWare that had found its way into Linux, Mr. Cargill  
11 found only UNIX System V, Release 4 code as infringing  
12 Linux. And, of course, UNIX System V, Release 4 releases  
13 are SVRX under the Asset Purchase Agreement.

14           At Novell, we know very well what SCOSource was  
15 all about because, of course, we got in the middle of it,  
16 I think it's fair to say, when we said: No, SCO, you  
17 don't own the UNIX System V code base copyrights. We own  
18 those.

19           And so, of course, SCO sued Novell for slander  
20 of title and claimed that that contention by Novell had  
21 caused hundreds of millions of damage to SCO and, more  
22 particularly, frustrated it's SCOSource licensing  
23 campaign. Now, at no time in that whole process, did SCO  
24 say to the SCOSource licensees or potential licensees:  
25 Oh, don't mind the Novell claim to own the SVRX

1 copyrights. Pay no attention. We have a theory. We  
2 have a claim. We have value in SCO UnixWare. We have  
3 value in the branch of the tree.

4           They never said that, and they claimed that our  
5 contention to own the UNIX System V copyrights had  
6 crushed SCOsource.

7           The Court's summary judgment order left open  
8 the possibility that maybe there was a copyright claim in  
9 SCO UnixWare and SCO- or Santa Cruz-written code and the  
10 copyrights that had not transferred -- in the copyrights  
11 as to which Novell's claim of ownership was immaterial;  
12 that is, copyrights that, indisputably, SCO owned by  
13 virtue of its acquisition of the UNIX business from Santa  
14 Cruz. The Court's summary judgment ruling left that  
15 possibility open.

16           At no time has SCO articulated a theory under  
17 that opening. And, in particular, in the SUSE  
18 arbitration, which is still stayed pending the  
19 bankruptcy, when SCO was arguing to the bankruptcy  
20 panel -- I'm sorry -- arguing to the arbitral panel:  
21 Don't go forward with this arbitration. There is no  
22 need. The Court -- the District Court in Utah, Judge  
23 Kimball, has already ruled on all the important issues  
24 here.

25           SCO said it was pointless for the arbitration

1 to continue because the ownership decisions that the  
2 Court made here addressed all of SCO's claims relating to  
3 Linux. So, having been given the opportunity to  
4 articulate a claim, an opportunity very evident on the  
5 Court's summary judgment ruling, a claim based on SCO  
6 UnixWare, SCO has failed to do so.

7           So, what's the point of all this? We're  
8 looking at litigation pleadings. We're looking at  
9 letters that SCO sent out. You will hear much more in  
10 the scope of the trial. The point of all this is that  
11 SCOSource was about System V, Release X. It was about  
12 the releases on the exhibit to the Asset Purchase  
13 Agreement. The whole SCOSource campaign was premised on  
14 mining the trunk. And the trunk was not what SCO was  
15 saying -- is now saying where the value lies, the trunk  
16 was the UNIX System V code base.

17           Point number 2. When you look at the SCOSource  
18 licenses, particularly in light of the SCOSource  
19 campaign, the SCOSource licenses convey substantial SVRX  
20 rights, or at least attempt to convey. Our proposition,  
21 of course, is that SCO had no power to convey that, but  
22 the licenses on their face and the licenses in the wake  
23 of SCOSource indicate the party's intentions; that is,  
24 that substantial SVRX rights would be conveyed by the  
25 SCOSource licenses.

1           Let's briefly -- let me briefly walk the Court  
2 through the Microsoft and the Sun agreements. We'll  
3 leave the other SCOSource licenses to the proceedings at  
4 trial. I'll just briefly refer to them. As the court is  
5 probably by now aware from the pretrial briefing, there  
6 are three relevant sections of the Microsoft/SCOSource  
7 agreement, and we are seeking a recovery of what SCO  
8 received from Sections 2 and Section 4, and we're leaving  
9 Section 3 out of our claim. We have apportioned, Your  
10 Honor, because that, as you'll see, Section 3 appears to  
11 relate specifically to UnixWare.

12           Now, Section 2 and its two subsections grant  
13 Microsoft broad licenses and releases to SCO intellectual  
14 property. Our view is that in light of the SCOSource  
15 campaign and in light of the intellectual property that  
16 SCO claimed to own, this release -- the value in this  
17 release lies in SVRX. And we will introduce testimony in  
18 the course of the trial that confirms that that was SCO's  
19 view, that while there may be some value from this  
20 release in UnixWare, there is substantial SVRX value.  
21 And there's no way, looking at Section 2, to parse the  
22 SVRX value from anything else. And so our contention is,  
23 we're entitled to the Section 2 amounts.

24           Section 3 is the section that, as I indicated,  
25 we are apportioning to SCO. Section 3 is explicitly an

1 option to purchase a UnixWare license and a UnixWare  
2 license only. And it's \$7 million the amount that SCO  
3 received.

4           Now, if we had wanted to, it seems we could  
5 have taken a run at this in two ways. We could have  
6 said: Well, this is all artificial. It can't be that  
7 there's \$7 million worth of UnixWare value here. The  
8 other thing we could have pointed out is that this  
9 option, this Section 3 amount is a gateway to Section 4.  
10 Microsoft had to exercise its option under Section 3 in  
11 order to receive the Section 4 grants, and as you'll see,  
12 the Section 4 grants are heavily laden with SVRX.

13           But we're asking for, on Section 2 and Section  
14 4, for the uncertainties to go our way, and so while  
15 there is arguably uncertainty about Section 3 and how the  
16 total value of that might fall, we're allocating that,  
17 we're apportioning that to SCO.

18           It looks like the copy that I handed the Court  
19 may be missing some slides, so we will get those to Your  
20 Honor.

21           So, this is Section 4. And Section 4, when you  
22 look at it, compared to the exhibits of the Microsoft  
23 license, there are at least 28 versions of SVRX that are  
24 licensed to Microsoft in Section 4. There are some  
25 non-APA SVRX releases as well that are the subject of

1 Section 4, but the grant of rights is really tremendous.  
2 In Section 4, it's a fire sale. SCO, for \$8 million,  
3 gave Microsoft virtually unlimited rights to SVRX and to  
4 use it in a wide variety of ways. Yes, there is some  
5 UnixWare -- there are some UnixWare rights in there, but  
6 because there is so much SVRX in Section 4, we believe we  
7 are entitled to the entire 8.25 million of Section 4  
8 revenue.

9           Well, that's Microsoft. As you can see from  
10 the face of the Microsoft agreement, it actually was  
11 possible to do an apportionment because SCO broke out a  
12 portion that was particular to UnixWare. And, again,  
13 while there are some uncertainties about that  
14 apportionment, and we are asking for the uncertainties to  
15 go our way on Section 2 and Section 4, we are leaving the  
16 uncertainties associated with Section 3 with SCO.

17           Let's look at the Sun agreement. And to  
18 understand the Sun agreement, which of course is a 2003  
19 agreement, we need to first look at the 1994 Novell/Sun  
20 agreement. Now, you will recall from the tree metaphor  
21 that Sun Solaris is a flavor of UNIX System V. It is a  
22 variant and derivative of UNIX System V..

23           And the 1994 Novell/Sun agreement was an  
24 agreement by which Sun bought out its obligations to pay  
25 ongoing revenues to then Novell for -- in effect for the

1 distribution of the Solaris proprietary Sun operating  
2 system. So, it was a buyout of its royalty obligations  
3 under the traditional UNIX licensing model that Sun had  
4 inherited up to that time.

5           Now, importantly, all it really did is buy out  
6 the royalty obligation. It left the confidentiality  
7 obligations largely intact. And all that the 1994  
8 agreement did was allow Sun to distribute Solaris, a  
9 non-Open source, proprietary operating system and not pay  
10 ongoing per-unit royalties. They bought out the royalty  
11 obligation. But there was nothing -- in terms of the  
12 structure of the license, other than the royalty buyout,  
13 there is nothing extraordinary about the Novell/Sun  
14 agreement form 1994.

15           Now let's look at the 2003 SCO/Sun agreement.  
16 Now, as we pointed out to the Court, on its face this  
17 agreement purports to amend the 1994 agreement and, in  
18 doing so runs flat into the language of Section 4.16B  
19 which says to SCO: Thou shalt not amend an SVRX license  
20 without Novell's approval.

21           And, of course, again on its face, it relates  
22 to a buyout agreement, and it is, itself, a buyout in the  
23 sense that there is a one-time payment rather than  
24 ongoing payments to SCO that are contemplated by this  
25 agreement. So, that's our amendment number 2 argument.

1 The parties agreed on a program for buy-outs for  
2 agreements relating to buy-outs, agreements relating to  
3 buyouts, and that's exactly what the 2003 agreement is.

4           But the real significance of the 2003 agreement  
5 between SCO and Sun was that it relaxed the licensing  
6 restrictions that had been imposed over time by the AT&T  
7 licensing model on Sun and that were carried forward  
8 largely in tact the 1994 agreement. The license grant in  
9 the 2003 SCO/Sun agreement is, once again,  
10 extraordinarily broad, imposing virtually no limitations  
11 on Sun's ability to license the licensed products.

12           And, in particular, and this is quite  
13 remarkable language, in Section 8.1 in which Sun is  
14 allowed, if it reproduced, distributes, etc., the  
15 technology, which is the licensed code, under any  
16 licensing model now known or developed hereafter in Sun's  
17 sole discretion, pursuant to the license granted by SCO  
18 herein, then the technology is not confidential  
19 information.

20           So, this is a clause that essentially says to  
21 Sun: Not only are your payments -- do you not have any  
22 pavement obligations; those have been taken care of by  
23 the 1994 agreement, and we are not imposing any per unit  
24 royalties under the 2003 agreement, but now you can do  
25 virtually whatever you want with the code that's licensed

1 under the 2003 agreement. You can -- you can use any  
2 licensing model now known or developed hereafter in Sun's  
3 sole discretion. That's what the 2003 agreement allows  
4 Sun to do. And, once that happens, it's not  
5 confidential.

6           So, in a variety of different ways, this  
7 agreement allowed Sun to do something that it couldn't  
8 have done under the 1994 agreement. Most importantly, it  
9 allowed it to open source Solaris. Solaris, earlier a  
10 proprietary derivative, another branch of the tree, just  
11 like the rest of them, could now be open sourced and made  
12 available pursuant to open source licenses.

13           Is this really de minimus, trivial, unimportant  
14 SVRX licensing? Well, if you look at the exhibit, you'll  
15 see -- to the Sun agreement, you'll see all the SVRX  
16 releases listed there. But really the core point is  
17 this. And it's essentially undisputed. Many of -- much  
18 of what we will be pointing out to the Court in the  
19 course of this trial would be, to people in the  
20 technology community, proof of the stunningly obvious,  
21 and one of the elements of our proof is that open Solaris  
22 is in fact derived from a System V release code base.

23           And this is an example -- on the left-hand  
24 side, you can see -- you can see the so-called CDDL  
25 header. CDDL is the name of the open source license

1 under which open source under which OpenSolaris is  
2 licensed. You have heard about the GPL in the course of  
3 the case today. This is a different license, the CDDL.  
4 And you will see in OpenSolaris, if you just download the  
5 code over the internet, it's littered with AT&T copyright  
6 notices from '84 to '89. That is System V. That is  
7 System V, Release X. That is SVRX within the meaning of  
8 the asset purchase agreement.

9           So, again, what the 2003 agreement allowed Sun  
10 to do is illustrated precisely by this demonstrative.  
11 Any one of us can now go to the Sun web site, download  
12 OpenSolaris and look at OpenSolaris code, which happens  
13 to be AT&T code, SVRX code, Novell's code, the code that  
14 SCO was restricted from licensing, restricted from  
15 amending licenses to in the Asset Purchase Agreement

16           The other SCOSource licenses, as we will see,  
17 they purport to license SVRX and UnixWare. They purport  
18 to license System V and UnixWare. The other SCOSource  
19 licensees, of course, the people who received the Fortune  
20 1000 letter or who heard about the Fortune 1000 letter  
21 and, trying to mitigate the legal threat from SCO,  
22 decided to take the SCO intellectual property license for  
23 Linux. And, again, that was all driven by SCO's claim  
24 that System V code was in Linux, not UnixWare, not SCO  
25 UnixWare code.

1           UNIX licensing practices. The practices over  
2 time do not help SCO in this case. SCO apparently has  
3 concluded, from its review of the history of UNIX  
4 licensing, that it knows what incidental is, number 1,  
5 what incidental licensing is; and, number 2, that those  
6 examples or the practice of incidental SVRX licensing is  
7 exactly what happened in the SCOSource licenses.

8           And, essentially, what their point is, is this:  
9 Look, we can look at some of the licenses that the  
10 parties entered into over time, whether it was AT&T or  
11 AT&T/USL or Novell or Santa Cruz in which, if you look at  
12 the attachments, there's SVRX code licensed pursuant to  
13 an attachment or a supplement, but the main license, if  
14 you will, is to UnixWare. And they say that's incidental  
15 SVRX licensing. And, so, look, look, look. Look at the  
16 Microsoft agreement. There's UnixWare and then there's a  
17 list of SVRX. It must mean that that SVRX is incidental,  
18 too.

19           We will show the Court that the analogy part of  
20 this fails, but we actually kind of agree with SCO about  
21 the first part of this; that is, that you can see  
22 examples of incidental SVRX licensing through the UNIX  
23 licenses or the UnixWare licenses that were entered into  
24 and that are on their exhibit list.

25           So, to get into this a little bit, let's just

1 review the timeline here and try and standardize, at  
2 least on our side, the vocabulary that we're going to try  
3 to use to keep things clear. So, right in the middle of  
4 this timeline is the APA, the last SVRX release, System  
5 V, Release 4.2 MP that is under Novell's auspices, is  
6 also the last SVRX release that's on the Asset Purchase  
7 Agreement or attachment.

8           And then SCO takes over, and they start  
9 releasing UnixWare releases, and you can see the history  
10 of UnixWare up through the latest -- I believe the latest  
11 release. Now, recall that pre-1995, first AT&T is the  
12 owner of UNIX. Then they set it up in the sub, USL, and  
13 then USL is bought by Novell, and so Novell is doing  
14 these licenses. And, indeed, the practice was that a  
15 customer would get the latest release.

16           But recall that what's going on here is that  
17 the customer is licensed in turn. These are OEM's.  
18 These are computer companies that are, in turn, licensing  
19 UNIX out to their end users. And so they need to retain  
20 the rights to the previous versions because they have end  
21 users who are still using the previous versions, who  
22 still haven't updated to the latest release. So the  
23 practice in UNIX licensing was to execute a supplement  
24 for the latest release and then have on the supplement  
25 all the previous releases as well.

1           So let's take a look at one of the -- so this  
2 is the NCR supplement on SCO's exhibit list. And recall  
3 the basic structure from our earlier briefing leading up  
4 to the summary judgment motion. There would be a  
5 software agreement that would define the basic rights of  
6 the parties and obligations, and then there would be the  
7 supplements that would provide the fee and the exact  
8 software being licensed pursuant to the software  
9 agreement.

10           So this is a supplement. It's a supplement to  
11 NCR. It's from Santa Cruz. You can see that it was  
12 executed by the Santa Cruz operation in 1997. And it  
13 includes a license to UnixWare 2.1 Source at an extended  
14 price of \$250,000. And then, if you go to the next  
15 slide, you'll see all the prior products are licensed.  
16 So, here are all the SVRX releases, for example, that  
17 predated this UnixWare release, and you can see 4.2 MP on  
18 there as an SVRX release.

19           And SCO says: Look, incidental licensing.  
20 You've got a UnixWare license and you've got all this  
21 SVRX code being licensed as well. That is what  
22 incidental licensing meant. And I think we've actually  
23 got a pretty good example of incidental licensing here  
24 because note what supplement number this is. This is  
25 supplement number 112. Over this timeline, NCR executed

1 112 supplements, each time adding a new release or a new  
2 variant of a release to the licensed code that it had,  
3 and each time, just as in this case, paying \$250,000  
4 for the latest refresh, if you will; each time, paying  
5 the amount for that SVRX code. And so each of these  
6 listed releases, if you go back through the history of  
7 NCR's licensing, was the subject of its own supplements  
8 by which the licensee, in this case NCR, paid the owner  
9 of its UNIX business the amount for that licensed code.

10           Why is this incidental? Why this is an example  
11 of incidental licensing of SVRX? Because the licensee,  
12 NCR, had already paid for each of these releases. It  
13 already had the rights to each of these releases. In  
14 fact, its rights to those releases were not in any way  
15 expanded because software agreement -- remember, that's  
16 the stable document through all on this -- and the  
17 software agreement is what defines the rights and  
18 obligations of the parties as to each of these releases.

19           So, I think we're comfortable with this being  
20 an example of incidental licensing; software you've  
21 already paid for as to which you get no expanded rights.  
22 But, as you've seen from Microsoft and Sun, that's  
23 exactly not what happened in those two cases, and it's  
24 certainly not what happened in the other SCOsource  
25 licenses. In the case of Microsoft, to the best of our

1 knowledge, no previous UNIX license at all. This was the  
2 license that gave them all the rights to SVRX that they  
3 ever got and greatly -- and wide rights, broad rights,  
4 expansive rights.

5           And, in the case of Sun, while it's true that  
6 they had previously paid for SVRX releases, their new  
7 SVRX releases on the 2003 Sun agreement, new and still on  
8 the asset purchase exhibit, and then these incredibly  
9 broad rights to take a proprietary operating system and  
10 make it open source, the opposite of incidental;  
11 substantial, significant, major, predominant.

12           SCO, Novell's fiduciary, has failed to  
13 apportion. So I haven't harped on this, but let me just  
14 spend a moment on it. The Court has already found that  
15 SCO is in breach. They breached fiduciary duties.  
16 Fiduciary duties are duties to place the interests here  
17 of Novell above SCO's interests. They are the duty to  
18 avoid precisely this situation in which the amounts of  
19 money are commingled. And so we start out with a heavy  
20 thumb on the side of the scale of Novell in looking at  
21 these revenues that SCO has retained from the SCOSource  
22 licenses.

23           We have done our best, looking at the face of  
24 the licenses themselves, to apportion by allocating a  
25 substantial portion of the Microsoft agreement to SCO.

1 SCO has not done anything like that. They have not come  
2 forward with an apportionment.

3           Now, the software aspect of this can add a  
4 technology overlay to what, in some senses, is a very  
5 straightforward and simple dispute. So, let's take a  
6 real property analogy. Let's imagine that SCO was a real  
7 estate agent for Novell and that they sold a property  
8 that Novell had the right -- as to the land, Novell had  
9 the rights to get the revenues, and as to the house,  
10 maybe SCO built the house and SCO gets the rights to the  
11 revenues of the house. But they sell the property for a  
12 single amount, and they commingle, if you will, the value  
13 of the land and the value of the house.

14           And Novell, the principal, goes to SCO and  
15 says: Wait a minute. We are entitled to the revenues,  
16 and you commingled them, and there is no separate --  
17 there is no way to separate them out. And SCO doesn't  
18 come forward with what you'd expect it to come forward  
19 with. You'd expect it to do an appraisal. You'd expect  
20 it to appraise the value of the land. You'd expect it to  
21 appraise the value of the house, and do its best,  
22 notwithstanding the heavy burden it bears, as a  
23 fiduciary, to apportion the amounts that it retained.

24           Maybe it would even bring in the buyer to  
25 testify before the Court and say that that apportionment

1 actually makes sense to me because I went out and I got  
2 valuations of land, and I got valuations of the house. I  
3 knew what I was doing, and the valuation that SCO has  
4 presented to the Court is consistent with my, the  
5 buyer's, personal view of the value of the respective  
6 components of this acquisition.

7           SCO has done nothing like that. They would  
8 like the Court to believe that the land here, SVRX, the  
9 trunk of the tree, is valueless in the SCOsource  
10 licenses, that all the value is in the house that SCO  
11 built, that nothing should be awarded to Novell and that  
12 it cannot and should not be acquired to apportion.

13           In the face of the overwhelming evidence about  
14 what SCOsource was all about, the documents themselves,  
15 the agreements themselves and their substantial licensing  
16 of SVRX, the history of UNIX licensing, which we think  
17 favors us, not SCO, and that the legal duties imposed on  
18 SCO, as Novell's fiduciary, we think there really  
19 can't -- there can be no other outcome here than to award  
20 Novell the amount Novell seeks; again, a little over \$19  
21 million.

22           Thank you very much, Your Honor.

23           THE COURT: Thank you, Mr. Jacobs.

24           Mr. Singer, you may make your opening  
25 statement.

1           MR. SINGER: Thank you, Your Honor. If I might  
2 approach?

3           THE COURT: Yes.

4           MR. SINGER: The book. Good morning, Your  
5 Honor.

6           THE COURT: Good morning.

7           MR. SINGER: I'd like to start with three  
8 observations based on what Mr. Jacobs has said. The  
9 first thing he said this morning was that the amount of  
10 damages that they will be looking for is exactly  
11 \$19,979,561, which I thought was an interesting  
12 development since, just that few days ago, in their trial  
13 brief, Novell stated that, as the Court may have surmised  
14 from the motion in limine briefing, neither Novell nor  
15 SCO intends to come into the Court and argue, e.g., the  
16 evidence definitely establishes Novell is entitled to  
17 precisely 98 percent of this license's revenue, 88  
18 percent from this license, etc.

19           It seems now they have a to a dollar figure  
20 which they believe the evidence will sustain. It is our  
21 position in this case that there is a de minimus value to  
22 the SVRX rights, and I'm using that term in the sense in  
23 which the Court used it in the summary judgment order  
24 with respect to meaning just those amounts which, under  
25 that order, Novell is entitled to as a royalty.

1           The second point I'd like to turn to, which, if  
2 we turn to slide 19 in the binder of materials -- and  
3 hopefully we'll put it on the screen momentarily here.  
4 And it is a follow-up of a statement Mr. Jacobs made here  
5 today, where he said the focus of SCOsource is SVRX. And  
6 that's really similar to a statement which was filed in  
7 Novell's memorandum in support of its motion for summary  
8 judgment on its fourth claim, which is, from start to  
9 finish, Novell said, SCO never claimed SCOsource had  
10 anything to do with SCO's UNIX derivative rights and any  
11 attempt by SCO to recast SCOsource now should fail.

12           So they are feeling the Court in its papers and  
13 now in open court, that SCOsource had nothing to do with  
14 UnixWare. That is simply not so. If one turns to what  
15 the documents the Court will see during this week of  
16 trial will show, and the very next slide -- it's the  
17 December 2002 press release. SCO's shared libraries --  
18 and it talks about UnixWare and OpenServer licensing  
19 agreements did not allow those UNIX libraries to be  
20 separated from the operating systems.

21           The January 2003 announcement, which talks  
22 about SCO's UnixWare and OpenServer license agreements,  
23 the February 2003 sales guide, which says precisely that  
24 with respect to the shared library, the document  
25 repeatedly refers to SCO's concern that UnixWare and

1 OpenServer technology have been improperly used in Linux.  
2 In the July 2003 press release, where it says the company  
3 also announced it will offer UnixWare licenses to support  
4 one-time binary use of Linux for all commercial users of  
5 Linux based upon certain terms.

6           So the evidence will show that in fact  
7 SCOsource, at its inception and throughout remained  
8 concerned with technology that was in UnixWare and  
9 OpenServer.

10           And the third point I'd like to observe comes  
11 off of a chart which Mr. Jacobs used which tries to draw  
12 this distinction. It's the chart that was the timeline  
13 where on the left-hand side you had SVRX and, on the  
14 right-hand side, you had SCO UnixWare. And it suggests  
15 that these are two different universes, that SVRX and SCO  
16 UnixWare are somehow distinct and, if you're referring to  
17 SVRX, you're not including UnixWare, and vice-versa.

18           The reality is, is that there is not a  
19 dichotomy in terms of the technology between UnixWare and  
20 System V. UnixWare is System V technology. It is the  
21 latest evolution of that. It is UnixWare -- UNIX System  
22 V, 4.2 MP. And this dichotomy that Novell seeks to draw  
23 between UnixWare and System V, with respect to the  
24 technology, is simply not the case. And that's shown,  
25 for example, by documents such as Novell's own sales

1 binders for UnixWare, which says that this is the latest  
2 implementation of UNIX System V, Release 4.2 MP  
3 technology and repeats that many times as being the  
4 latest generation of that use, that this is powerful,  
5 scalable, reliable UNIX System V, Release 5.

6           Thus, when we talk about our UnixWare rights,  
7 when we talk about the System V license in the context of  
8 SCOSource, that doesn't mean something other than  
9 UnixWare, that includes UnixWare. And that will be  
10 important as we look at the fact that UnixWare has within  
11 it the critical System V technology, and SCO obtained the  
12 right to license that technology and do other things with  
13 that technology with third parties through the Sun  
14 agreement, the Microsoft agreement and the SCOSource  
15 agreement.

16           The question is valuation of -- for the  
17 purposes of the APA, what is the value on the SVRX  
18 rights, as defined in the APA, for that portion on which  
19 that has to flow through to Novell.

20           Now, if I can put that -- and let me, before  
21 leaving that issue, refer to a couple of the documents  
22 that Mr. Jacobs referred to. He refers to a letter that  
23 was sent out to a lot of people with respect to SCOSource  
24 licensing and it talked about are UNIX System V, but that  
25 does not exclude UnixWare, which is part of System V

1 technology. It refers to the IBM disclosures and expert  
2 reports in that case, and it was important in the IBM  
3 case to link back those technology disclosures as early  
4 as possible in the chain of development to show how it  
5 was in breach of those contract rights.

6           Nothing in either Mr. Cargill's report --  
7 Mr. Cargill will testify this week -- or in the  
8 disclosures submitted to the court in the IBM case  
9 indicates that those technologies are not also in  
10 UnixWare. They may have originated in earlier versions  
11 of System V, but they were carried forth into UnixWare.

12           Now, with respect to the issues before the  
13 Court, we don't think there is any strong disagreement --  
14 we don't think there's any disagreement on what the three  
15 issues are that the Court has to decide this week.

16           First. Which components of the Microsoft and  
17 Sun agreements are SVRX licenses and what value to  
18 attribute to them.

19           Second. Whether parts of the SCOSource  
20 agreements are SVRX licenses and, if so, what value to  
21 attribute to them because when they moved for summary  
22 judgment, they didn't even move that the SCOSource  
23 licenses, outside of Microsoft and Sun, were SVRX  
24 licenses within the meaning of the APA.

25           And, third, whether SCO had the authority to

1 enter into the Microsoft, Sun and SCOSource agreements.  
2 And tomorrow there's a summary judgment argument on the  
3 inconsistencies between the first two issues, which is a  
4 royalty that Novell wants to collect, and the third issue  
5 where they are seeking to say that the agreements are  
6 unauthorized.

7           Now, if we turn to, first of all, the  
8 Microsoft agreement, Section 2 of the Microsoft agreement  
9 is a release of claims not having anything to do with  
10 Linux, because this is Microsoft, but claims regarding  
11 Microsoft's products. There is nothing in the record  
12 which shows Microsoft had the concerns with respect to  
13 the SCOSource program and Linux that Mr. Jacobs is  
14 talking about, but, in any event, that release only  
15 releases SCO's claims, not, by its terms, Novell's  
16 claims.

17           So a release that only releases SCO's claims  
18 cannot, we submit, be viewed as a license of Novell's  
19 copyrights or technology. At most, it may mean that  
20 Microsoft did not get as much protection as it otherwise  
21 would have gotten. It only releases the claims that SCO  
22 has.

23           Section 3 was a UnixWare license. Now,  
24 Mr. Jacobs makes a great deal this morning about saying  
25 that, well, this is what we have apportioned to SCO.

1 Well, I submit to Your Honor that if there was any  
2 credible basis that Novell could have held out for that  
3 revenue, they would have been arguing for it here today.  
4 It has not been apportioned to SCO. There was nothing to  
5 apportion. The only thing in that section of the  
6 agreement is a UnixWare license, so it clearly belongs to  
7 us, and there is no issue concerning it.

8           Section 4 is where the issue arises. When they  
9 moved for summary judgment, Your Honor, that part of the  
10 Microsoft agreement was an SVRX license, it was because  
11 you had a list of older SVRX technology in Section 4,  
12 along with licenses to UnixWare and OpenServer source  
13 code. That's really the only section that is implicated  
14 in the issues this week, and it is that section where you  
15 had basically 8.25 million dollars at issue.

16           Now, on the Sun agreement, also only a minor  
17 part of that agreement is an SVRX license within the  
18 meaning of this Court's ruling. Section 4 was the  
19 license that's at issue, and the Sun agreement, that's a  
20 license to UnixWare and previous releases of System V and  
21 to a number of drivers which allow these UnixWare and  
22 OpenServer products to operate on different platforms.  
23 You will hear testimony this week about the importance of  
24 those drivers.

25           Only a minor part of Section 4 constitutes an

1 SVRX license. The other parts of the Sun agreement  
2 do not. Section 10 is an indemnification of Sun's  
3 activities by SCO. No implication of Novell. Section 12  
4 is a release of claims by SCO. Doesn't implicate Novell.  
5 In section 13 is basically a most favorable nation  
6 clause. They won't give more favorable rights of  
7 redistribution to anyone that SCO has given to anyone  
8 else, and that's never been granted to anyone and is not  
9 applicable. Now, the key thing which supports our  
10 position, Your Honor, is that the System V prior products  
11 licensed with UnixWare have no significant independent  
12 value.

13           Mr. Jacobs said that they agree that the  
14 licensing of prior products is what incidental licensing  
15 means. We'd like to you hold Mr. Jacobs and Novell to  
16 that statement because we believe the testimony will  
17 show, this week, that that licensing of prior products  
18 supports SCO's position, that you had a single price paid  
19 for the most recent release, and there was no incremental  
20 amount charged to customers for the prior product  
21 releases that were built in. And that was true when  
22 Novell ran this product. It was true when Santa Cruz ran  
23 this product, and it was true when SCO licensed this  
24 product with respect to Microsoft and Sun.

25           Now, this is reflected in the history of

1 licensing of these older versions. You have a series of  
2 versions, pre-System V, Release 1, 2, 3, System V release  
3 4, UnixWare. And, as you can see, when there is the  
4 announcement of a new release, you have a precipitous  
5 decline in the sales or licenses for value of the older  
6 releases, and within a few years, that older release  
7 drops away to nothing at all, nothing at all.

8           So, when you get out here to the UnixWare  
9 licensing, in the period in which you had the Microsoft  
10 and Sun agreements, these older versions have no  
11 commercial value whatsoever. They haven't been licensed  
12 for years, and there's no way to believe that anyone  
13 would pay more for them being tacked on to a license  
14 agreement for current version UnixWare, which we agree,  
15 there is a trunk to UNIX, and UnixWare is the living  
16 trunk. That is the most recent version. And if there is  
17 source code in that trunk, it continues all the way up  
18 here to UnixWare. You're getting that source code in  
19 UnixWare, and no one is going to pay more for the older  
20 versions they have a right to. And that is true not only  
21 from looking at the historical licensing, but looking at  
22 certain agreements.

23           For example. If the Court looks at licenses to  
24 his UNISYS, you'll see that there was an amount of  
25 \$375,000, and you had prior products that were all

1 included. That \$375,000 is the same amount when you had  
2 a source code right-to-use fee for ALFs, where you didn't  
3 have any prior products listed. There wasn't anything  
4 extra charged to UNISYS because you got the prior  
5 outdated products along with it. We think the evidence  
6 will show that Novell's own practices showed that they  
7 recognized there was no value to be apportioned out of  
8 the UnixWare licenses due to these prior products.

9           There was a period of time, and the Court will  
10 hear testimony about this, where Novell granted its  
11 licenses to UNISYS. It audited those books. They knew  
12 UNISYS paid millions in binary royalties, and they never  
13 asked for any of those payments to be apportioned with  
14 part of it going to these earlier releases. And, in  
15 fact, beyond UNISYS, the testimony will show that for  
16 years, after the sale of the APA, when Novell looked at  
17 the royalties being remitted by Santa Cruz, they knew  
18 there was all these UnixWare licenses out there that had  
19 these prior products listed, and never once did Novell  
20 come in and say: You owe us some percentage on those  
21 royalties because you have these prior products and those  
22 prior products have a value.

23           Not once. And that is the strongest evidence  
24 that Novell knew there was no separate value to the older  
25 products that went along with the current version of

1 UnixWare.

2           So, what does that mean in the context of the  
3 Microsoft and Sun agreements where the Court has found  
4 there is some element of SVRX? We submit it means that  
5 there is no value beyond a de minimus amount for that  
6 SVRX prior products licensing. In the UnixWare Section  
7 -- in Section 4 of the Microsoft agreement it is the  
8 UnixWare and OpenServer rights which are the current  
9 products that are very valuable.

10           And OpenServer, by the way, is a product which  
11 Novell has no rights to whatsoever. It was developed by  
12 Santa Cruz, and that's part of these products. We think  
13 that that, in itself, was a strong basis for the  
14 licensing value that Microsoft got because that is  
15 two-thirds of SCO's annual revenue, and it was the first  
16 time that SCO had offered a source code license to the  
17 OpenServer source code.

18           That's what happened in the Microsoft agreement  
19 in 2003. In fact, in that agreement itself, in an  
20 amendment, paragraph B reflected that Microsoft was  
21 concerned that components in SCO's UnixWare 7, a UnixWare  
22 release, might be present in Windows. So, because the  
23 UnixWare license gave Microsoft the right to use the  
24 prior products and there was no significant value to  
25 those, we think that there's only a de minimus royalty or

1 an amount which -- of the Microsoft rights which are  
2 under Section 4 which should be apportioned to Novell.

3           Now, with respect to Sun, again, it is the  
4 UnixWare license that is valuable because that permitted  
5 Sun to develop compatibility for Solaris using the latest  
6 release of System V, the UnixWare release which was out  
7 there on the market. As I mentioned, there's these  
8 drivers that allowed Sun to use UnixWare for various  
9 actual purposes, to run applications, and they got that  
10 in the 2003 agreement, not the '94 agreement.

11           Your Honor, I would also note, because Novell  
12 did not do so, in the '94 agreement, where they got these  
13 binary rights for what was System V binary products, that  
14 was over \$80,000,000, and Novell got that \$80,000,000.  
15 That is where Novell got and kept the value, the economic  
16 value for the older technology, in the '94 agreement, and  
17 it was over \$80,000,000. The \$10,000,000 here for the  
18 latest UnixWare rights, the UNIX OpenServer drivers, and  
19 we believe that the changes with respect to the  
20 confidentiality provisions are a very minor, de minimus  
21 aspect of that because, under the earlier agreement, Sun  
22 had the right to license to any number of distributors  
23 and subdistributors, this code.

24           So, we don't think there's any significant  
25 value that can be shown for the changes with respect to

1 that in 2003.

2           Now, we then turn to the second issue, the  
3 SCOSource licenses with other parties. Are they even  
4 SVRX agreements in the meaning of the APA? Remember  
5 that's not an issue the Court determined in summary  
6 judgment. And, if so, what value does that aspect of the  
7 SVRX contain? I'd like to start with the fact that in  
8 the APA, SCO owns claims. For example, among the assets  
9 Novell transferred to Santa Cruz are all of seller's  
10 claims arising after the closing date against any parties  
11 relating to any right, property or asset included in the  
12 business.

13           The SCOSource agreements only release the  
14 claims that SCO has. Therefore, if SCO, because of UNIX  
15 copyrights being owned by Novell, has less to release,  
16 that means the buyer got less. It doesn't mean that SCO  
17 was releasing something that Novell controlled because it  
18 didn't have the right to do that. That's the meaning of  
19 the Court's ruling that the UNIX copyrights, the older  
20 UNIX copyrights, remains with Novell. Those releases  
21 released only claims that SCO had the right to release.

22           Now, we believe that the release of claims by  
23 SCO, which owns the UnixWare systems and has the rights  
24 to license UnixWare are fully broad enough to give  
25 protection to those people because UnixWare contained

1 this earlier technology, and the right to use the UNIX  
2 technology in UnixWare included the right to use the  
3 older SV -- System V technology that carried through to  
4 UnixWare, and there won't be any showing in this case, by  
5 Novell, that there was any System V technology that  
6 didn't go forward into UnixWare, which somehow was  
7 important to the outside world and is something which  
8 only Novell could give these people.

9           The last issue is the issue of whether SCO  
10 exceeded its authority to execute SVRX licenses. The  
11 Court did not term, in its ruling last year, that there  
12 was any exceeding of authority. That was not a motion  
13 which was brought by Novell at that time. They have  
14 subsequently brought a summary judgment motion on that,  
15 which is to be argued tomorrow. Novell recognizes that  
16 if these agreements involve only incidental licensing of  
17 SVRX in the meaning of the APA, those products, that that  
18 was something SCO was authorized to do, even without  
19 Novell's permission.

20           And we believe, under the dictionary  
21 definitions of the word "incidentally," as well as the  
22 custom and practice of how Novell and its successors  
23 operated the licensing of prior products, that this is  
24 the very meaning of why you had that incidental licensing  
25 language in the APA, to allow for the licensing of these

1 earlier, prior products.

2           Now, there's one more argument that Novell has  
3 raised. They have said that, with respect to the Sun  
4 agreement, that also was unauthorized because of  
5 amendment number 2, to the APA, because that was a  
6 buyout. We believe that the testimony will show that the  
7 '94 agreement, which bought out all of the binary  
8 licenses that were out there was a buyout. That's what  
9 gave rise, in fact, to this type of issue. That buyout  
10 is not what happened in 2003. The fact that the 2003  
11 agreement references the '94 agreement does not make the  
12 2004 agreement a buyout.

13           Moreover, there's a paragraph in amendment  
14 number 2 that says that Novell may not prevent SCO from  
15 exercising its rights with respect to SVRX source code as  
16 a result of that amendment. And, overwhelmingly, what  
17 we're talking about in the 2003 Sun agreement are rights  
18 to source code. So, even if amendment number 2 applied,  
19 the B5 exclusion would mean that, with respect to the  
20 2003 amendments dealing with source code, we didn't have  
21 to go to Novell.

22           Your Honor, the testimony in this case, I  
23 believe, will show that these agreements included prior  
24 products because that was the custom and practice of  
25 UnixWare licensing, but there was nothing extra charged

1 for those products, therefore Novell is entitled only to  
2 a de minimus royalty with respect to its residual rights.

3 THE COURT: Thank you, Mr. Singer.

4 You may call your first witness.

5 MR. JACOBS: We do, Your Honor. We call  
6 Mr. Joe LaSala.

7 THE COURT: Come forward and be sworn, please  
8 right up here in front of the clerk of the Court.

9 JOSEPH LA SALA,

10 the witness hereinbefore named, being first  
11 duly cautioned and sworn or affirmed to tell the truth,  
12 the whole truth, and nothing but the truth, was examined  
13 and testified as follows:

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

16 THE WITNESS: My name is Joseph A. LaSala, Jr.  
17 My last name is spelled L-a, capital S-a-l-a.

18 THE CLERK: Thank you.

19 THE COURT: Go ahead, Mr. Jacobs.

20 DIRECT EXAMINATION

21 BY MR. JACOBS:

22 Q. Good morning, Mr. LaSala. Could you briefly  
23 introduce yourself and your background to the Court.

24 A. Yes. Good morning. My name is Joe LaSala. I  
25 was the general counsel at Novell from July of 2001

1 through mid-January, 2008. Today I am, and since that  
2 time, I have been the general counsel of Discovery  
3 Communications.

4 Q. Were you involved in the dispute and the  
5 relationship between SCO and Novell as the SCOSource  
6 campaign unfolded?

7 A. Yes, I was.

8 Q. Can you characterize the level of your  
9 involvement, please?

10 A. Well, as general counsel of the company, I was  
11 made aware of virtually all of the important activities  
12 in connection with the litigation and in connection with  
13 SCO's launch of the SCOSource campaign, our company's  
14 reaction to that, the various public and private  
15 communications that occurred between the companies at the  
16 time and the engagement of counsel and overall the  
17 strategy with respect to our company's response to those  
18 activities.

19 Q. Could you look at the first exhibit in your  
20 binder, please, Novell Exhibit 215?

21 A. Yes.

22 Q. What is that?

23 A. This is a June 24, 2003 letter from me to  
24 Mr. McBride, and I think it constitutes one of the first  
25 letters that Novell sent to SCO, and the principal

1 purpose of this letter was to request that SCO provide us  
2 with copies of two SCOSource licenses that it had  
3 recently announced that it had entered into; one with  
4 Microsoft and one with an unnamed party.

5 MR. JACOBS: Your Honor, offer Exhibit 215 into  
6 evidence.

7 THE COURT: I thought we were going to put all  
8 these in by stipulation.

9 MR. JACOBS: This one, I believe SCO has  
10 objected to, Your Honor.

11 MR. SINGER: We have no objection, Your  
12 Honor.

13 THE COURT: 215 is received.

14 (Novell Exhibit 215 received in evidence.)

15 Q. Mr. LaSala, could you explain to the Court,  
16 please, what led up to the sending of -- or to the  
17 transmittal of this letter?

18 A. Well, the precipitating event was a securities  
19 filing SCO had recently made just prior to this letter  
20 being sent, parts of which are quoted in this letter,  
21 where it became apparent to us that SCO had entered into  
22 these two SCOSource licenses.

23 But, really, the letter was a combination of  
24 events of the past or previous six months or so, where we  
25 had come to a -- we had concerns that what SCO was doing

1 with its SCOSource campaign may implicate rights that  
2 Novell had under the Asset Purchase Agreement, and  
3 through their public statements, their press releases,  
4 their securities filings, some private communication, a  
5 May 12 letter that they had sent to, I think, the Fortune  
6 1000 companies in the United States, all of those things  
7 led us to believe that things that SCO was doing with the  
8 SCOSource campaign may implicate certain rights that  
9 Novell had under the Asset Purchase Agreement.

10 Q. Could you look at the bottom of page 2 of the  
11 letter, the second half of page 2, please?

12 A. Yes.

13 Q. And what, exactly, was Novell asking SCO to do?

14 A. Well, here Novell was specifically asking SCO  
15 to provide it with copies of the two agreements in  
16 question and any other agreements that SCO may have  
17 entered into which purported to amend any SVRX  
18 licenses.

19 Q. And in paragraph B?

20 A. In paragraph B, we were asking SCO that they  
21 not enter into any further agreements in which SCO  
22 purports to amend these licenses or to enter into any new  
23 SVRX licenses.

24 Q. And in paragraph C?

25 A. In paragraph C, we were requesting that SCO

1 comply with its obligations under amendment number 2 to  
2 the Asset Purchase Agreement with respect to the  
3 management of potential buyouts of a licensee's royalty  
4 obligation.

5 Q. Could you please turn to Novell Exhibit 220,  
6 the second tab in your binder?

7 A. Yes.

8 Q. What is Novell Exhibit 220?

9 A. Well, Novell Exhibit 220 is a letter dated July  
10 11, 2003, from Mr. Mike Brady, who is an employee at  
11 Novell who, at the time, ran the contract management  
12 group, to the CFO of SCO, Mr. Robert Bench, advising  
13 Mr. Bench of two things. First, that it had been more  
14 than six months since Novell had received its -- any  
15 royalty reports or royalty payments from SCO and that we  
16 were demanding that we receive those payments and reports  
17 in a manner consistent with the Asset Purchase Agreement  
18 which, I think, required that they be provided quarterly.

19 And the second thing that the letter does is it  
20 notifies SCO that Novell intended to conduct an audit of  
21 SCO concerning the royalties and other payments due under  
22 the SVRX licenses and the Asset Purchase Agreement.

23 So the letters served those two purposes.

24 Q. Did you work with with Mr. Brady on the  
25 transmittal of this letter?

1           A.    I don't recall specifically, but I'm quite sure  
2 that I did.

3           MR. JACOBS:  Your Honor, we offer Novell  
4 Exhibit 220 in evidence.

5           MR. SINGER:  No objection.

6           THE COURT:  220 is received.

7           (Novell Exhibit 220 received in evidence.)

8           Q.    Now 220, Mr. LaSala, is dated July 11, 2003.

9           A.    Yes.

10          Q.    And 215 is dated June 24, 2003.  Between the  
11 June 24 letter and the July 11 letter, had you received a  
12 response to 215, your letter to Darl McBride?

13          A.    No.

14          Q.    And why did Novell decide to audit SCO's  
15 compliance with the the Asset Purchase Agreement?

16          A.    Well, again, Novell had concerns that SCO's  
17 activity with respect to its SCOSource campaign may be  
18 resulting in monies being paid to SCO that rightfully  
19 belonged to Novell.  So the right to audit is very clear  
20 in the Asset Purchase Agreement, and we thought, given  
21 this body of evidence that had been accumulating over the  
22 previous six months or so, we thought the wise course of  
23 action would be to notify SCO of our intention to conduct  
24 an audit.

25          Q.    Would you turn to the next tab, please, Novell

1 Exhibit 222?

2 A. Yes.

3 Q. 222 is a letter dated July 17, from Mr. Bench  
4 at SCO to Mr. Bready at Novell?

5 A. Yes, it is.

6 Q. And what did you understand Mr. Bench to be  
7 responding to?

8 A. Well, Mr. Bench, in his letter, notes that he's  
9 responding to Mr. Bready's July 11 letter, where we made  
10 the request -- the demand for an audit, and in this  
11 letter, he notifies Novell that payment, current payment  
12 due to Novell, has been or is being made. He references  
13 that Novell was withholding its payments to -- or excuse  
14 me -- SCO was withholding payments to Novell based upon a  
15 review that SCO was conducting on Novell's activities  
16 with respect to our Linux announcements and that they  
17 were evaluating the scope of Novell's Linux-related  
18 activities for compliance.

19 And they also notified -- the letter also  
20 notifies Mr. Bready that SCO reserves the right to  
21 further withhold royalty payments owed to Novell in its  
22 discretion if it believes that Novell is violating its  
23 obligations under the Asset Purchase Agreement.

24 Q. What was your reaction when you read this  
25 letter?

1       A.    Well, somewhere between furious and bemused.  I  
2 guess I would say it that way.

3       Q.    Why?

4       A.    Well, furious because, in our view, SCO was a  
5 fiduciary to Novell and had a duty and an obligation to  
6 collect those royalty payments and to pass them through  
7 to Novell.  Plain and simple.  It didn't have any right  
8 in the an Asset Purchase Agreement or anywhere else,  
9 under any rule or law that I'm familiar with, to offset  
10 or withhold payments due to Novell, for any reason, and  
11 so the assertion that SCO was withholding payments,  
12 pending its review of Novell's Linux-related activities  
13 was absurd on its face, as far as we were concerned.

14           And it was somewhat frustrating but, as I say  
15 somewhat amusing as well because we thought it was  
16 totally without foundation.

17       Q.    Could you turn to the next exhibit, 234?

18       A.    Yes.

19       Q.    What is Novell Exhibit 234?

20       A.    This is a letter from me to Mr. McBride dated  
21 August 7, 2003, where I essentially conveyed to  
22 Mr. McBride, Novell's position with regard to Mr. Bench's  
23 assertion in the previous letter, those that I just  
24 outlined for you, and pointed out to Mr. McBride that,  
25 you know, SCO was without any right or foundation to

1 withhold any royalty obligations that were owed to  
2 Novell.

3 MR. JACOBS: We offer 234 into evidence, Your  
4 Honor.

5 MR. SINGER: No objection, Your Honor.

6 THE COURT: 234 is received.

7 (Novell Exhibit 234 received in evidence.)

8 Q. Now, this letter is dated August 7, 2003, this  
9 being 234. And your initial letter to SCO about the  
10 Microsoft and unnamed third-party license, the other  
11 license, is dated June 24. By this time have you  
12 received a response to your June 24 letter?

13 A. No. No, we have not.

14 Q. Could you turn, please, to Novell Exhibit 267?

15 A. Yes.

16 Q. What is 267?

17 A. Well, 267 is a November 21, 2003 letter from  
18 Mr. Bready to Mr. Bench, again, and pretty much most of  
19 the fall has passed by this time. And, in this letter,  
20 Mr. Bready points out to Mr. Bench that there are certain  
21 requests that Novell has made with respect to the audit  
22 that have not been fulfilled, and he lays out in some  
23 detail the basis of those requests and asks, again,  
24 specifically for copies of the two agreements in  
25 question.

1 Q. So, had the audit been conducted by this time?

2 A. Well, I'm really not clear -- the audit  
3 certainly had not been conducted and completed. Whether  
4 or not it had commenced, I think it had, and Mr. Bready  
5 references in his letter that, you know, the purpose of  
6 the letter is to request further information and  
7 information that had previously been requested to assist  
8 Novell with the conduct of the audit.

9 Q. If you look at paragraph 1.4 or 1.5 of this  
10 letter, what, exactly, are -- was Novell requesting of  
11 SCO in this letter?

12 A. Well, again, quite specifically, Novell was  
13 requesting that SCO provide Novell with copies of the  
14 Sun -- by this time we knew that this second agreement  
15 was the Sun agreement -- copies of the Sun and Microsoft  
16 agreements to verify SCO's compliance with 4.16B of the  
17 Asset Purchase Agreement. In addition, Novell was  
18 requesting copies of any similar agreements that SCO may  
19 have entered into. Of course, we had not known whether  
20 they had or not.

21 And, finally, Novell was requesting that SCO  
22 identify any potential buyout transactions that it might  
23 be aware of, so that Novell could be properly put on  
24 notice if any such types of transactions existed.

25 Q. If you look at paragraph 2.2 and 2.3?

1 A. Yes.

2 Q. What was Novell asking for there?

3 A. In 2.2 and 2.3, Novell references a new license  
4 called SCO Intellectual Property License for Linux and  
5 requested copies of any licenses for Linux that SCO may  
6 have entered into under that new license regime that it  
7 had established.

8 MR. JACOBS: Your Honor, offer 267 into  
9 evidence.

10 MR. SINGER: No objection.

11 THE COURT: 267 is received.

12 (Novell Exhibit received 267 in evidence.)

13 Q. Let's turn to the next tab, Mr. LaSala, of  
14 Exhibit 280, Novell Exhibit 280. What is 280?

15 A. 280 is a December 29, 2003 letter from  
16 Mr. Bready to Mr. Bench, essentially reminding Mr. Bench  
17 of Novell's repeated requests for the information that  
18 Novell needed to conduct its audit and expressing a view  
19 that it would like to have a response no later than  
20 January 12, 2004.

21 MR. JACOBS: Your Honor, offer Novell Exhibit  
22 280 into evidence, Your Honor.

23 MR. SINGER: No objection.

24 THE COURT: 280 is received.

25 (Novell Exhibit 280 received in evidence.)

1 Q. Let's turn to the next tab, 293. What is 293?

2 A. 293 is yet another letter from Mr. Bready to  
3 Mr. Bench which reiterates or references the November 21  
4 letter for information that Novell thought it needed to  
5 conduct its audit and reiterates the request for the  
6 information contained in that November 21 letter. And  
7 again, it -- and in the second paragraph of that letter,  
8 it makes note that, you know, Novell had sent you the  
9 November 21 letter and sent you a second letter on  
10 December 29 asking that you comply with the request.

11 Q. Let's turn to 294.

12 A. Okay.

13 Q. Novell Exhibit 294, which has been  
14 pre-admitted.

15 THE COURT: Are you going to offer 293?

16 MR. JACOBS: I'm sorry. Thank you, Your Honor.  
17 Offer 293 into evidence.

18 THE COURT: Are you going object?

19 MR. SINGER: No.

20 THE COURT: 293 is received.

21 MR. JACOBS: Thank you, Your Honor.

22 (Novell Exhibit 293 received in evidence.)

23 Q. Let's look at 294, Mr. LaSala.

24 A. Yes.

25 Q. 294, now, is the letter from Mr. Tibbitts at

1 the general counsel of SCO to you?

2       A.    Yes, it is.  It's dated February 5, the next  
3 day after the February 4 letter from Mr. Bready.  And  
4 this letter outlines various -- makes several points to  
5 Novell from SCO.  The first was that it expresses SCO's  
6 view that many of the questions that were asked in the  
7 November 21 letter were outside the scope of Novell's  
8 audit rights.  It asserts that the scope of the other  
9 points and questions raised in the body of the November  
10 21 letter were the result of cooperation that we  
11 allegedly had entered into with IBM in the course of this  
12 litigation with SCO and then proceeds to respond, with  
13 some specificity, to a couple of the points that were  
14 raised in Mr. Bready's November 21 letter.

15           Essentially, Mr. Tibbitts is telling us that  
16 whatever rights Novell may have under Section 4.16 of the  
17 Asset Purchase Agreement, with respect to the revenue  
18 stream from the SVRX licenses that were in existence at  
19 the time of the APA, those rights do not extend, he says,  
20 to either the Sun or the Microsoft agreements.  And he  
21 calls the Sun agreement a new contract, and he calls the  
22 Microsoft agreement a new agreement not covered by the  
23 APA in this letter.

24       Q.    And then, what was his response on intellectual  
25 property licenses for Linux?

1           A.    With respect to our request that SCO identify  
2 potential intellectual property licenses entered into  
3 under the new SCO IP license for Linux, he says that --  
4 he says that that was not a new SVRX license.

5           Q.    Did -- at any point, in your back and forth  
6 with SCO leading up to this letter, did SCO ever, first  
7 of all, give you copies of the Microsoft and Sun  
8 agreements?

9           A.    No.

10          Q.    And did SCO ever say to you that those  
11 agreements are not the subject of your rights under the  
12 Asset Purchase Agreement because they only incidentally  
13 license SVRX?

14          A.    No.

15          Q.    Let's turn to 297.  What is 297, Novell Exhibit  
16 297?

17          A.    297 is a March 1, 2004 letter from me to  
18 Mr. Tibbitts where I write, in response to the February 5  
19 letter that we just talked about, and I point out what I  
20 think is the blindingly -- I make the blindingly obvious  
21 point that it appears that the question at issue here is  
22 whether or not the Sun and Microsoft agreements are SVRX  
23 licenses.

24                   And I refer Mr. Tibbitts to the fact that  
25 Novell has reviewed SCO's intellectual property license

1 from its web site and made a conclusion that licenses  
2 taken under that agreement would be SVRX licenses because  
3 of the definition of SCO IP that's included in that  
4 license, and then I make the point that we would expect  
5 the same to be true for the Sun and Microsoft agreements  
6 but, of course, we could not be sure of that because they  
7 hadn't yet been shown to us, and I reiterate Novell's  
8 desire that SCO provide those agreements and any other  
9 intellectual property licenses for Linux agreements that  
10 SCO may have entered into.

11 Q. And did you -- and what kind of time frame did  
12 you put on that request?

13 A. Well, I asked that they be provided  
14 immediately.

15 MR. JACOBS: I offer 297 into evidence.

16 THE COURT: Any objection?

17 MR. SINGER: No objection.

18 THE COURT: 297 is received.

19 (Novell Exhibit 297 received in evidence.)

20 Q. Let's turn to the next tab in the binder,  
21 Mr. LaSala, Novell Exhibit 303.

22 A. Yes. Novell Exhibit 303 is another letter from  
23 me to Mr. Tibbitts, this one dated April 2 or roughly  
24 about one month later, and in it I simply point out to  
25 Mr. Tibbitts that Novell has received no response to the

1 March 1 letter regarding the agreements which SCO has  
2 entered into and express to him the view that Novell  
3 believes that we are deserving of a response and we would  
4 urge that he provide one promptly.

5 Q. And then, at the end of the letter, you say:  
6 If we do not hear from you shortly, we will infer that  
7 SCO has nothing to say in response.

8 Do you see that?

9 A. I do.

10 Q. What were you inferring at that point from  
11 SCO's non-response about whether the Sun and Microsoft  
12 agreements represented SVRX licenses under the Asset  
13 Purchase Agreement?

14 A. Well, we were beginning to try, in an  
15 appropriate way, to put SCO on notice that, you know, we  
16 were of the firm conclusion -- that we were trying to  
17 verify that these licenses were SVRX licenses, and we  
18 were essentially saying that, if you're not going to  
19 respond, you know, further, you don't really have  
20 anything to say about that.

21 MR. JACOBS: I offer 303 into evidence.

22 THE COURT: 303 is received.

23 MR. SINGER: No objection.

24 (Novell Exhibit 303 received in evidence.)

25 Q. Let's turn to the last exhibit in your binder,

1 Mr. LaSala, Novell Exhibit 317.

2 A. Yes.

3 Q. What is 317?

4 A. So, 317 is a November 17, 2004 letter to  
5 Mr. Tibbitts from me. By this time, many months have  
6 gone by, and I point out to Mr. Tibbitts that we have had  
7 numerous communications with SCO regarding their handling  
8 of UNIX licenses and point out that we think that our  
9 audit rights under the Asset Purchase Agreement entitle  
10 us to these agreements and remind him that we sent him  
11 letters about this.

12 And I point out to him, really for the first  
13 time, that we had noted recently that Sun had confirmed  
14 its plans to open source its Solaris operating system,  
15 and we knew, of course, that its Sun Solaris operating  
16 system was based on SVRX, the code, and we took note of  
17 the fact of Sun's announcement to open source its Solaris  
18 operating system.

19 And we outlined for Mr. Tibbitts, again, the  
20 rights that we believed that we had with respect to UNIX  
21 licenses in Section 4.16 and that, you know, SCO had no  
22 authority to amend the license that existed with Sun,  
23 which was a 1994, I believe it was, buyout of Sun's  
24 royalty obligations to Novell at the time. And we wanted  
25 to make SCO aware of that.

1           And then, finally, we asked, yet again, that  
2 SCO provide us with copies of any of the agreements,  
3 particularly the Sun agreement in this case, and somewhat  
4 fruitlessly, I included a deadline of Friday, December 3,  
5 2004.

6           Q.   Now, in this letter you also cc'd the Senior  
7 Vice President and General Counsel at Sun Microsystems?

8           A.   I did.  And in the last paragraph of the  
9 letter, I notified Mr. Tibbitts that we would be doing  
10 that, and, of course, on its face, we have done that.  
11 And we also separately corresponded with Sun, advising  
12 them of our point of view on these matters and requesting  
13 that Sun might be able to cooperate with us and provide  
14 us a copy of the Sun/SCO agreement.

15          Q.   And then, in the last paragraph of this letter,  
16 you say -- you refer to putting Sun on notice of  
17 potential issues?

18          A.   Yes.

19          Q.   What were you driving at?

20          A.   We wanted to to make sure that Sun was aware of  
21 what Novell's rights were with respect to the Asset  
22 Purchase Agreement and our view that SCO lacked the  
23 authority to enter into an amendment to the buyout  
24 agreement, and we thought it was important, since Sun had  
25 undertaken this initiative to open source its Solaris

1 operating system that they be aware of Novell's  
2 position.

3 Q. Did you have -- aside from the legal concerns  
4 that you have referred to, did Novell have a business  
5 concern about Sun's open sourcing plans?

6 A. Very much so. By this time, Novell's  
7 intentions to enter into the Linux marketplace were well  
8 known, and Novell's business was up and running, and we  
9 had completed a major acquisition of an open source  
10 company. We had established ourselves, we think, in the  
11 marketplace as one of the leading providers of Linux and  
12 open source technology.

13 And the fact that Sun would take upon itself to  
14 open source its Solaris operating system caused us some  
15 business concerns, sure.

16 Q. Did you ever receive a response to your  
17 November 17, 2004 letter to Novell, Exhibit 317?

18 A. No.

19 Q. So, over the -- and then, at some point, the  
20 Sun and Microsoft agreements are produced in discovery.  
21 That happens. I'll just set the chronology. That  
22 happens in the winter of 2006. So, up until that point,  
23 did SCO ever comply with your request under these letters  
24 that it supply Novell with the Sun and Microsoft  
25 agreements?

1 A. No.

2 Q. Did it ever comply with the request pursuant to  
3 the audit provisions of the Asset Purchase Agreement that  
4 Novell be allowed to audit SCO's compliance with the  
5 Asset Purchase Agreement as it related to the Sun and  
6 Microsoft agreements?

7 A. No.

8 Q. Did SCO ever tell you in any communications  
9 outside litigation pleadings in the last year and a half  
10 or so, that its theory was: These agreements were not  
11 SVRX licenses as to which it owed you a payment  
12 obligation because the SVRX was only incidental?

13 A. No.

14 MR. JACOBS: Thank you very much, Mr. LaSala.

15 THE COURT: Are you going to offer 317?

16 MR. JACOBS: Yes, Your Honor, 317, please.

17 THE COURT: Any objection?

18 MR. SINGER: No, Your Honor.

19 THE COURT: 317 is received.

20 (Plaintiff's Exhibit 317 received in evidence.)

21 THE COURT: Thank you.

22 Mr. Singer, you may cross examine.

23 CROSS EXAMINATION

24 BY MR. SINGER:

25 Q. Good morning, Mr. LaSala.

1 A. Good morning,.

2 Q. You had testified about the June 24, 2007  
3 letter that you wrote Mr. McBride which has been  
4 introduced as Exhibit 215, the first exhibit you were  
5 asked about this morning. Do you recall that?

6 A. Yes.

7 Q. Is it true, though, that you were aware of  
8 SCO's plans to engage in what we have referred to as  
9 SCOSource licensing going back into late 2002?

10 A. I don't think my awareness went back quite that  
11 far. Certainly not by the name of SCOSource.

12 Q. Well, maybe not by the name of SCOSource, but  
13 do you recall that, in late 2002, there were  
14 conversations between representatives of SCO and  
15 representatives of Novell that -- where SCO indicated its  
16 interest in licensing UNIX technology for use in Linux?

17 A. Yes. I'm aware of those conversations.

18 Q. Okay. And, at any time between those  
19 conversations and late 2002, and June 24, 2003, did you,  
20 as general counsel, ever directly or by directing others,  
21 tell SCO that it could not engage in SCOSource  
22 licensing?

23 A. No. I don't believe we did because we weren't  
24 sure exactly what the nature of the the SCOSource  
25 licensing program was, and we were trying to get a

1 complete understanding of it before we would make such a  
2 request.

3 Q. There were public announcements in the early  
4 part of 2003 about SCOSource licensing, was there not?

5 A. I think there was one in January of 2003.

6 Q. Now, at any time prior to and even as of June  
7 24, 2003, did you demand -- well, let me rephrase that  
8 question. Prior to June 24, 2003, did you ever tell SCO  
9 that Novell would be asking for the revenue that SCO  
10 obtained through those SCOSource licenses?

11 A. I don't believe we did.

12 Q. You testified in the latter part of your direct  
13 examination about Sun. Are you aware of whether Sun open  
14 sourced Solaris under what's referred to as the GPL, the  
15 general public license?

16 A. I'm not aware that they have.

17 Q. That is the license under which Linux operates,  
18 correct?

19 A. It's one of them.

20 Q. One of them. Now, have you ever told Sun that  
21 its agreement, its 2003 agreement with SCO, is  
22 unauthorized by Novell and Novell will seek to repudiate  
23 it?

24 A. I sent a letter to the general counsel of Sun,  
25 subsequent to the last letter that we referred to in the

1 back and forth with myself and Mr. Tibbitts, and I can't  
2 recall in that letter whether I used the words that you  
3 used, but I think essentially what I did in that letter  
4 was have Novell put Sun on notice of the rights that  
5 Novell had with respect to the agreement that SCO and Sun  
6 had entered into.

7 Q. But did you tell Sun that you are repudiating  
8 that agreement as unauthorized?

9 A. I don't believe we did, but I can't recall  
10 precisely whether or not we did.

11 Q. So, as of today, you have never told Sun that  
12 Novell repudiates that agreement; is that correct?

13 A. I think that's correct.

14 Q. And would the same be true of the agreement in  
15 2003 between SCO and Microsoft?

16 A. Yes.

17 Q. Now, with respect to the aspect of the letter  
18 that you were asked about on direct examination of the  
19 agreement with Sun releasing confidentiality rights, do  
20 you recall giving a declaration in the IBM case on behalf  
21 of IBM?

22 A. I recall that.

23 Q. Do you recall saying in that declaration that  
24 Novell understands that neither AT&T nor USL intended to  
25 assert ownership or control over licensee's own

1 modifications to and derivative works of UNIX software  
2 exclusive of any UNIX software included in those  
3 modifications or derivative works?

4 A. I don't recall that, but I'm sure that's what  
5 the declaration says because I suspect you're reading  
6 from it.

7 Q. I am.

8 A. Yes.

9 Q. And you acknowledge that Solaris is a  
10 derivative work of UNIX software?

11 A. Yes.

12 Q. So the position that you took in the  
13 declaration in the IBM case was that there were no rights  
14 to restrict what a licensee did with its derivative works  
15 that it might create, correct?

16 A. If that's what the declaration says, I think  
17 that's correct.

18 Q. Now, with respect to the audits that were  
19 conducted at Novell -- and you were general counsel  
20 through -- was it November of 2007?

21 A. Mid-January of 2008.

22 Q. Mid-January of 2008. Are you aware that there  
23 was a separate provision of the Asset Purchase Agreement  
24 which provided for UnixWare royalty?

25 A. Generally, yes.

1 Q. And that was a royalty which would only be  
2 triggered if the sales of UnixWare reached a certain  
3 threshold, correct?

4 A. I'm -- I can't verify that right now as we sit  
5 here.

6 Q. Does that -- it's not something which you took  
7 any particular interest in?

8 A. I really can't recall at this point in time.  
9 I'm sorry.

10 Q. Okay. Do you recall whether you --

11 MR. JACOBS: Your Honor, I object to this line  
12 of questioning as beyond the scope of the direct.

13 THE COURT: Mr. Singer?

14 MR. SINGER: Your Honor, we think it's -- first  
15 of all, we think that with respect to witnesses being  
16 called, rather than having to recall the witness in our  
17 case for this, we should be allowed to exceed the scope,  
18 but that this does relate to the issue of the audits and  
19 what they were looking at in the audits.

20 THE COURT: I agree with you on both counts.  
21 It would be better to get the witness done, even if you  
22 have to exceed the scope of direct. And, arguably, it  
23 does relate to the audit, so the objection is overruled,  
24 and you may continue.

25 Q. Did you ever seek any royalties from SCO with

1 respect to the UnixWare royalty provisions of the APA?

2 A. I don't know.

3 Q. You had audits of SCO which would reflect that  
4 it was receiving royalties on UnixWare, correct?

5 A. I don't know.

6 Q. You don't know that SCO was generating revenue  
7 by licensing UnixWare to the public?

8 A. I don't think that's what you asked me.

9 Q. Well, let me rephrase the question. Are you  
10 aware of the fact that SCO was in the business of  
11 licensing UnixWare for money?

12 A. Yes.

13 Q. Did you ever tell SCO that Novell had an  
14 interest in receiving part of that money?

15 A. I just don't know at this point in time. I'm  
16 sorry.

17 Q. You're not aware of that happening, though, are  
18 you?

19 A. I'm not.

20 Q. Now, are you aware of, at any time during the  
21 audits which were conducted of SCO, whether any issue was  
22 ever raised that SCO had to remit a part of the UnixWare  
23 royalty to Novell because some of the prior products that  
24 were listed in those licenses were products that were  
25 referenced in the APA as System V products in which

1 Novell retained the royalty right?

2       A.    So, just to be clear, are you talking about the  
3 most recent audit or audits done prior to that?

4       Q.    Earlier audits.

5       A.    Earlier audits? I'm not familiar with the  
6 results of the earlier audits.

7       Q.    Now, you've mentioned that you did not receive,  
8 until the litigation, copies of the Sun and Microsoft and  
9 SCOSource agreements. You now have those, correct?

10      A.    Yes.

11      Q.    And since the litigation has begun, has Novell  
12 taken any further steps to continue the audit process  
13 outside of the litigation?

14      A.    Well, I'm not aware that it has. And my  
15 recollection is that, at the time shortly after this last  
16 letter exchanged between myself and Mr. Tibbitts, my  
17 recollection is that the litigation itself began to get  
18 more active, and I can't tell you today what the ultimate  
19 outcome of the audit was, although it's my view, my  
20 belief, that it has not been completed.

21      Q.    Well, Novell didn't take any steps to continue  
22 the audit after the litigation began, correct?

23      A.    I don't know that that's -- I don't know.

24      Q.    Well, do you recall in your deposition -- and  
25 this is as a 30(b)(6) witness. It's at page 169 in your

1 deposition that was taken May 16, 2007, page 169, line 5.

2 Has Novell --

3 THE COURT: You want the deposition published,  
4 then, right, the deposition of the witness published?

5 MR. SINGER: I was going to ask the witness if  
6 he gave testimony and publish his question and answer.

7 THE COURT: Well, to do that, we need to  
8 publish it first. The deposition of the witness is  
9 published. And now you can ask him whatever you want  
10 about it.

11 MR. SINGER: Yes.

12 Q. Mr. LaSala, do you recall being asked at line  
13 5:

14 Has Novell undertaken to continue the audit at  
15 any time since the litigation began or whenever it was  
16 that the audit petered out, in your view?

17 Answer: No.

18 Did you give that testimony?

19 A. I don't recall that I did, but I'm certain  
20 those are my words, since they were from the deposition  
21 transcript.

22 MR. SINGER: Now, through the discovery  
23 process.

24 MR. JACOBS: Could the witness have a copy  
25 of his transcript if he's going to be asked about it?

1 THE COURT: Sure.

2 Do you have one for him? Mr. Singer, go ahead  
3 and hand him at least that part. Are you going to ask  
4 him more about the deposition?

5 MR. SINGER: That's the part, a discrete  
6 question and answer. That's the only part.

7 MR. JACOBS: I withdraw my objection. Sorry.

8 MR. SINGER: It was just the part that was  
9 being used for that purpose.

10 Q. During the litigation process you have  
11 acknowledged, Mr. LaSala, that Novell has received copies  
12 of the Novell agreements -- excuse me -- the Microsoft  
13 agreement, the Sun agreement and the other SCOSource  
14 agreements, correct?

15 A. Yes.

16 Q. And you have received information as to  
17 whatever amounts were paid by Microsoft and Sun for other  
18 SCOSource licensees under those agreements, correct?

19 A. Yes.

20 Q. If Novell had wanted to do so, it would have  
21 had the right to take deposition discovery of Sun and  
22 Microsoft itself, correct?

23 A. I presume that's correct.

24 Q. Which is a right that you wouldn't even have in  
25 connection with an audit, but you would have in

1 litigation?

2       A.    That makes sense.

3       Q.    So, as we sit here today, trying to figure out  
4 how much of a royalty Novell should receive with respect  
5 to those agreements, can you point to any way in which  
6 Novell has been prejudiced, at the present time, by not  
7 receiving the agreements until discovery has occurred?

8       A.    Well, had Novell -- I mean, it's all somewhat  
9 speculative, because had we received them in a timely  
10 fashion consistent with the requests that were being  
11 made, presumably we would have known their contents at an  
12 earlier point in time, and I don't know what course of  
13 action that may have led to, but it may have changed our  
14 course of behavior had we been able to get our eyes on  
15 those agreements when they were requested.

16       Q.    Well, in terms of calculating the amount of the  
17 royalty received in 2003 by SCO, you're not prejudiced in  
18 any way now in your ability to argue what part of that  
19 belongs to Novell, correct?

20       A.    I think that's probably correct.

21           MR. SINGER:  Nothing further, Your Honor.

22           THE COURT:  Thank you.

23           Any redirect, Mr. Jacobs?

24

25

1

REDIRECT EXAMINATION

2 BY MR. JACOBS:

3 Q. Mr. LaSala, Mr. Singer asked you about a  
4 declaration you supplied in the IBM case, and to  
5 paraphrase what he asked you about, he asked you about  
6 the -- he asked you about testimony you gave in that  
7 declaration about whether AT&T and its successors had the  
8 rights over code that IBM had written and added to the  
9 IBM code base. Do you recall that question?

10 A. Yes.

11 Q. What's the issue with respect to the Sun  
12 agreement? Is it with respect to code that Sun wrote or  
13 code that Sun has in Solaris that is SVRX code?

14 A. It's the latter. It's code that Sun has in  
15 Solaris with respect to the SVRX license.

16 Q. In the intervening years between your letter of  
17 July, 2003 and this trial, what is your understanding of  
18 what has happened to SCO's financial condition?

19 A. My understanding is that SCO's financial  
20 condition has deteriorated precipitously since that  
21 time.

22 Q. And had you had access to the Sun and Microsoft  
23 agreements in 2003, what would have been different about  
24 your potential ability to recover from SCO?

25 A. Well, they would more likely have -- they would

1 have more money than they do today.

2 MR. JACOBS: No further questions.

3 THE COURT: Thank you.

4 Any recross, Mr. Singer?

5 MR. SINGER: No, Your Honor.

6 THE COURT: You may step down, Mr. LaSala.

7 I assume that this witness may be excused?

8 MR. JACOBS: Yes.

9 MR. SINGER: We have nothing further for him.

10 THE COURT: You may be excused.

11 Let's take our first break. We'll be in recess for 15

12 minutes. Thank you.

13

14

15

16

17

18

19

20

21

22

23

24

25 (Short break)

1 THE COURT: You may call your next witness.

2 MR. ACKER: Thank you, Your Honor. Novell  
3 will call Chris Sontag.

4 For the Court's convenience, there are exhibits  
5 that I may refer to in binders that I left with your clerk  
6 there.

7 THE COURT: Okay.

8 THE CLERK: And you're the witness. Okay. Please  
9 raise right hand.

10 CHRISTOPHER S. SONTAG,  
11 called as a witness at the request of Novell,  
12 having been first duly sworn, was examined  
13 and testified as follows:

14 THE WITNESS: I do.

15 THE CLERK: Thank you. Please take the witness  
16 stand.

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

18 THE WITNESS: Christopher S. Sontag.

19 C-H-R-I-S-T-O-P-H-E-R. Sontag, S-O-N-T-A-G.

20 DIRECT EXAMINATION

21 BY MR. ACKER:

22 Q. Good morning, Mr. Sontag.

23 A. Good morning.

24 Q. You were formally employed at SCO; right?

25 A. That is correct.

1 Q. And you joined SCO in 2002; right?

2 A. That's correct.

3 Q. Now, when you joined the company in 2002, the  
4 company was not profitable; is that right?

5 A. No, it was not.

6 Q. In fact, SCO had a net loss for the fiscal year  
7 ending October 31, 2002, of more than \$24 million; is that  
8 right?

9 A. Sounds about right.

10 Q. And the company told the investing public at the  
11 end of fiscal -- of that year ending October 31st, 2002, that  
12 if SCO did not achieve positive cash flow from operation it  
13 would not be able to implement its business plan without  
14 additional funding; isn't that true?

15 A. I suspect that's the case.

16 Q. And the SCOSource program was just getting started  
17 when you joined; right?

18 A. I don't know if it really had been started. I  
19 think some initial thoughts of looking at all the assets  
20 across SCO were being considered. Among them were the UNIX  
21 assets the company had. But anything and any form related to  
22 a SCOSource program had not been initiated when I started.

23 Q. That review was being done about the time you  
24 started; is that right?

25 A. It was just started.

1 Q. And after you joined the company in October of  
2 2002, you were placed at the head of what was then called  
3 SCO Tech; correct?

4 A. Yes.

5 Q. And SCO Tech eventually became SCOSource; right?

6 A. I had a number of roles that I was responsible for.  
7 I mean, I was responsible as the senior vice-president over  
8 the operating system division, and I also had responsibility  
9 for some elements of strategy as well as looking at what could  
10 be done with the UNIX assets within the company.

11 Q. But you were ahead of SCOSource from its inception;  
12 right?

13 A. Yes.

14 Q. And you and others hoped that the SCOSource  
15 campaign would become an important revenue generator for the  
16 company; correct?

17 A. Of course.

18 Q. In fact, you thought it would generate billions;  
19 right?

20 A. We viewed the UNIX assets held by SCO to be a very  
21 valuable asset and had potential to generate significant  
22 revenues.

23 Q. That included billions; right?

24 A. Potentially, yes.

25 Q. Now, let me show you what we have marked as and has

1       been admitted as Exhibit 147.

2                    If I may approach, Your Honor?

3                    THE COURT:  You may.

4                    MR. ACKER:  Bring that up, please.

5                    Q.  BY MR. ACKER:  I'm going to hand you what we've  
6       marked, Mr. Sontag, as Exhibit 147.

7                    Have you had a chance to look at that, sir?

8                    A.  I have.

9                    Q.  And Exhibit 147 is a draft press release prepared  
10       on or about October 22nd of 2002 regarding what was then  
11       referred to as the SCO Tech program; correct?

12                   A.  Yes.

13                   Q.  And you're quoted in the press release; right?

14                   A.  Yes.

15                   Q.  And you had a chance to read that quote just now?

16                   A.  Yes.

17                   Q.  Is it accurate?

18                   A.  Yes.

19                   Q.  Okay.  And what you said back in October of 2002  
20       about SCO Tech was, this is your quote:

21                    As one of the earlier developers of the UNIX  
22       operating system, SCO owns several patents,  
23       copyrights and much of the intellectual property  
24       around UNIX including the SVR4 and OSR5 software  
25       libraries.

1                   Correct?

2                   A.    Yes.

3                   Q.    So the only -- in this quote when you're talking  
4                   about SCO Tech in October of 2002, the only version of SVRX  
5                   you referred to was Version 4; right?

6                   A.    Well, UnixWare is an SVR4 version of the UNIX  
7                   operating system.

8                   Q.    But it's not a version created by SCO; right?

9                   A.    That would be a hard thing to pars.  The creation  
10                  of UnixWare was derived out of previous versions of UNIX.  And  
11                  so, you know, it's a constant development process that's  
12                  occurred.

13                  Q.    But SVR4 Version 4 was in existence before the APA;  
14                  correct?

15                  A.    I think 4.0 was in existence before the APA.  
16                  4.2 was the basis of UnixWare 1.

17                  Q.    And was in existence before the APA; correct?

18                  A.    I don't know the exact time frame.  All I know is,  
19                  I remember the first version of UnixWare was based on  
20                  SVR4.2.

21                  Q.    And isn't it true that both Version 4.0 and 4.2 are  
22                  listed in the assets for which royalties have to flow back to  
23                  Novell in the APA?

24                  A.    I don't know that I can characterize it that way  
25                  because a significant portion of UnixWare is based on, you

1 know, SVR4 and predecessors. And it is a significant basis  
2 for what was licensed with UnixWare going forward in the  
3 future.

4 Q. And my question was very simple.

5 Isn't it true that SVR4.0 and SVR4.2 are listed in  
6 the assets in the APA for which royalties must flow back to  
7 Novell?

8 A. That's not exactly my understanding. My  
9 understanding was there was royalties for specific licensees  
10 called the SVRX licensees that needed to be paid to Novell.

11 MR. ACKER: Can we bring up Exhibit 1, please.

12 Q. BY MR. ACKER: Let me hand you a copy of that,  
13 Mr. Sontag. Let me hand you a copy of the APA, Mr. Sontag.  
14 And I want to direct your attention to Schedule 1.1(a)  
15 Section VI. If you would bring that up. It's SCO 85952.

16 A. 952?

17 Q. Yes. If we could highlight the section of the  
18 bottom, please.

19 A. Schedule 1.1(a)?

20 Q. Yes, sir.

21 A. Okay.

22 Q. Do you have that?

23 A. I do.

24 Q. And you understand, don't you, that Schedule 1.1(a)  
25 in the APA lists:

1 All contracts relating to SVRX licenses  
2 listed below for which royalties must flow back  
3 to the Novell in the APA.

4 Correct?

5 A. These are listed in the contracts that are part of  
6 the assets that are transferred to SCO.

7 Q. Well, you know, don't you, that this Court has  
8 determined that all royalties flowing from these contracts  
9 flow back to Novell? You know that; correct?

10 A. My understanding is that the contracts specified by  
11 the agreement the royalties went back to SCO. I don't know if  
12 it's necessarily this listing or if it's another listing that  
13 specifies the SVRX contracts specifically have royalties that  
14 flow back to Novell. But we honored those obligations.

15 Q. But you see in Schedule 1.1(a)VI that UNIX System  
16 Release 4.2 MP is listed; correct?

17 A. As an asset that was transferred.

18 Q. And System 4.2 MP International Edition was also  
19 listed; correct?

20 A. Again, as an asset transferred to SCO.

21 Q. And also 4.1; correct?

22 A. Again, yes.

23 Q. And if you turn to the next page, you see the  
24 UNIX System V Release 4.0 also listed; correct?

25 A. You're on Page 4 now?

1 Q. The following page.

2 A. Yes.

3 Q. And you see on the following page of  
4 Schedule 1.1(a) of the APA, UNIX System V Release 4.0 is  
5 listed; correct?

6 A. Again, as an asset that was transferred to SCO.

7 Q. And that was the release that you are referring to  
8 that is SVR4 when you drafted your press release in October of  
9 2002; correct?

10 A. Again, going back to that press release, it was a  
11 draft press release. And we often use different labels to  
12 mean the same thing. We'd often use System V to refer to all  
13 of our UNIX intellectual property. We would use SVR4 to  
14 describe UnixWare in some cases. I mean, we were considering  
15 renaming UnixWare and renaming it System V or possibly  
16 System VI.

17 And so at different times different labels apply to  
18 things in draft documents or in press releases that were put  
19 out. But in the end, what we were talking about is SCO's UNIX  
20 intellectual property assets.

21 MR. ACKER: Go back to 147, Mr. Sontag's quote.

22 Q. BY MR. ACKER: You say it's a draft press release.  
23 Do you now think that the press release was inaccurate or  
24 something is inaccurate in it?

25 A. No. All I'm saying is that I don't know if this is

1 the press release that was released or if we actually ended up  
2 releasing this press release.

3 Q. When you prepared it in October of 2002, you were  
4 talking about the SCO Tech program; correct?

5 A. We were talking about the SCO Tech program that we  
6 actually changed the name of or just barely starting to  
7 initiate at this time frame.

8 Q. And when you were talking about the SCO Tech  
9 program, you were talking about the SVRX releases you were  
10 planning to release under the SCO Tech program; correct?

11 A. To me, SVR4 could be easily replaced with UnixWare,  
12 and it means the same thing to me.

13 Q. But you didn't say UnixWare; right?

14 A. It means the same thing.

15 Q. And you didn't say SVR5; correct?

16 A. No. In this case, we said SVR4.

17 Q. Okay. Let me show you what has been admitted as  
18 Exhibit 143. If you could take a look at that, sir.

19 A. Okay.

20 Q. Exhibit 143 is an analyst briefing that was  
21 prepared for Mr. McBride on or about October 22nd, 2002;  
22 correct?

23 A. Yes.

24 Q. And it was an analyst briefing regarding the  
25 announcement of the SCO Tech program; correct?

1 A. Yes.

2 Q. If we could take a look at the third page in. It  
3 announces you, Chris Sontag, joins the executive team;  
4 correct?

5 A. Yes.

6 Q. It announces that you will be the senior VP of  
7 operating systems with responsibilities for operating systems,  
8 SCO Tech and corporate marketing; correct?

9 A. Yes.

10 Q. And that was all true; right?

11 A. Yes.

12 Q. You go to the next page, I believe it's 4. On the  
13 bottom of that page, there's a slide "Why SCO Tech?" Correct?

14 A. Yes.

15 Q. And what SCO said back in October of 2002 when  
16 SCO Tech was starting is:

17 Partners and customers wish to license our  
18 technology.

19 Correct?

20 A. Yes.

21 Q. And then you referred to specific technology;  
22 right?

23 A. Yes.

24 Q. And the only release of SVRX that you referred to  
25 was SVR4?

1           A.    Again, this is the same thing as saying UnixWare.  
2    UnixWare was basically SVR4 operating system.

3           Q.    SVR4 was not UnixWare that was created by SCO;  
4    correct?

5           A.    You have dot releases.  It basically would be  
6    considered SVR4.3 or 4.  -- I mean 4.3 or 4.4 or 4.5.  I mean,  
7    it was an SVR4-based operating system.  It is the latest  
8    version of UNIX System V.

9           Q.    SVR 4 --

10          A.    It is the referenced version that has had many  
11    precedents.

12          Q.    And SVR4, that version of UnixWare was created  
13    before the APA; correct?

14          A.    The first version of SVR4 was created before the  
15    APA.  Subsequent versions of SVR4 including UnixWare 1, 2, you  
16    know, up to 7.1.4 are all versions of SVR4.

17          Q.    But each of those versions of UnixWare created  
18    after the APA don't carry the SVRX Version 4 monitor; correct?

19          A.    No.  A lot of times we've used SVR4 to refer to the  
20    UnixWare code.

21          Q.    Let me show you what we've marked as Exhibit 159.  
22    Bring up 159.

23                    This has also been admitted, Your Honor.

24                    THE COURT:  Yes.

25          Q.    BY MR. ACKER:  This is another draft press release

1 that was prepared regarding SCOSource on December 11th, 2002;  
2 correct?

3 A. Yes.

4 Q. And if we could bring up the next highlight.

5 Down at the bottom, there's a description of what  
6 SCOSource is; correct?

7 A. Yes.

8 Q. And what SCO wrote in December of 2002 was that:

9 SCO's patents, copyrights and core technology  
10 date back to 1969 when Bell Laboratories created  
11 the original UNIX source code.

12 Correct?

13 A. Yes.

14 Q. SCOSource, a new division within SCO, will  
15 address the licensing of this software technology.

16 Correct?

17 A. Yes. Now, a couple things I would say on this.

18 SCO had a number of patents that are referred to in this that  
19 could be licensed by SCOSource that were not related to the  
20 core UNIX technology.

21 Q. Well, when you said, this software technology that  
22 you're going to license under SCOSource, you were talking  
23 about technology that dated back to 1969 when  
24 Bell Laboratories created the original source code; correct?

25 A. That was part of the UNIX tree that SCO had

1 purchased and acquired and was responsible for continuing and  
2 continuing to license and to enforce the contracts with the  
3 licensees.

4 Q. And this UNIX tree that SCO had purchased, that was  
5 what SCOSource sought to license; correct?

6 A. In part.

7 Q. And that tree dated back to technology back to  
8 Bell Laboratories; right?

9 A. Yes.

10 Q. Let me show you what we've marked and has been  
11 admitted as 173.

12 Mr. Sontag, let me show you what we've marked and  
13 had been admitted as Exhibit 173. If you could read that,  
14 please.

15 A. I don't know if you want me to read the whole  
16 thing.

17 Q. Well, I'm going to direct you to a certain portion.  
18 I'm sure you're familiar with this document; correct?

19 A. Most likely. Okay.

20 Q. And this is the announcement in January of 2002 of  
21 the SCO, you've written the first portion or first version of  
22 SCO Tech; correct?

23 A. I think we made some level of an announcement that  
24 we're further announcing, you know, what we're doing with  
25 SCOSource program in January of 2003.

1           Q.    And unlike the prior releases, this press release,  
2 Exhibit 173, was actually released to the public; right?

3           A.    I don't recall if the previous one had also been  
4 released or not. I know we briefed analysts and so on about  
5 the concepts in the previous release, but I know that this  
6 press release was released.

7           Q.    And we can take a look at the highlighted portion  
8 in the middle under the highlighted SCOSource.

9                    Again, when SCO announced the SCOSource program to  
10 the public in January of 2002, you again told the public what  
11 it was; right?

12          A.    January of 2003?

13          Q.    Excuse me. January 2003. You told the public what  
14 it was; right?

15          A.    Yes.

16          Q.    And what you said was, again:

17                   SCO's patents, copyrights and core technology  
18 date back to 1969 when Bell Laboratories created  
19 the original UNIX source code. SCOSource  
20 will manage the licensing of this software  
21 technology.

22                   Correct?

23          A.    Yes. And basically we're saying we're providing  
24 licenses of SCO's intellectual property including our UNIX  
25 intellectual property as well as other patents that SCO had

1 related to other technologies within the company.

2 Q. And that technology dates back to Bell Laboratories  
3 in 1969; correct?

4 A. Not all of the technology.

5 Q. But some of it does; correct?

6 A. Yes.

7 Q. And that was with SCOSource?

8 A. Yes.

9 Q. And that's what SCOSource sought to license in  
10 SCOSource program; correct?

11 A. Well, in general we were licensing the most recent  
12 versions of SCO's intellectual property mostly in the form of  
13 UnixWare licenses, source code UnixWare licenses as well as  
14 developing an intellectual property licensing program related  
15 to customers who were concerned about intellectual property  
16 issues with their use of Linux, such as the runtime libraries  
17 and OpenServer UNIX.

18 Q. But you wanted to mine this entire body of  
19 intellectual property; right? That was the plan.

20 A. That was my understanding of the intellectual  
21 property body that we had rights to license.

22 Q. Going back to 1969; right?

23 A. Correct.

24 Q. And this was what you hoped you would make millions  
25 of dollars licensing; correct?

1           A.    Well, mostly around the latest versions of the  
2    intellectual property.  But the whole body at work is part of  
3    the buildup and legacy of that intellectual property and  
4    library.

5           Q.    Now, if you take a look -- let me go back, I'm  
6    sorry, to Exhibit 173.

7                    Take a look down at the bottom, if you would, sir,  
8    173.  Under the SCO System V for Linux.  Do you see that?

9           A.    Yes.

10          Q.    And we have it up on the screen now.

11                    SCO told the public you were announcing this in  
12    January of 2003:

13                    In the past SCO's UnixWare and OpenServer  
14    license agreements did not allow these UNIX  
15    libraries to be used outside of SCO's operating  
16    systems.

17                    Correct?

18          A.    Yes.

19          Q.    With this announcement, customers can now run  
20    these libraries from SCO for use with Linux without  
21    having to license the entire SCO operating system.

22                    Correct?

23          A.    Yes.

24          Q.    So that means you get access to this core UNIX  
25    technology that SCO believed it owned without having to

1 license the latest version in the entire operating system;  
2 correct?

3 A. Let me say that a different way.

4 Q. Well, could you answer that question? Isn't that  
5 right?

6 A. Well, to best answer your question I can't just  
7 answer yes or no. We were licensing the libraries to the  
8 latest versions of OpenServer and UnixWare to these customers  
9 who wanted to apply them to a version of Linux to allow them  
10 to run OpenServer or UnixWare applications on top of Linux.  
11 That is what we were licensing.

12 Q. But as you said in your press release in 2003, it  
13 didn't require the licensee to license the entire operating  
14 system; correct?

15 A. Right. They were licensing a portion of the  
16 operating system, which were the runtime libraries.

17 Q. And that was the core UNIX technology that was a  
18 part of the SCOSource program; correct?

19 A. I wouldn't call that the core. I would call it a  
20 part of the UNIX operating system technology. The libraries  
21 are just one piece of an entire operating system.

22 Q. But in the SCOSource program, like if they didn't  
23 have to license the entire operating system, they could simply  
24 license the libraries; right?

25 A. If they needed to be able to run UnixWare or

1 OpenServer application on top of Linux, they would need to be  
2 able to gain access to the runtime libraries to install them  
3 into their Linux product to allow them to run those  
4 applications.

5 Part of that license was also a license to all of  
6 SCO's intellectual property or a release from issues within  
7 any of SCO's overall IP rights. So we were giving them rights  
8 to any IP that SCO had ownership of. And if they needed the  
9 runtime libraries, they could obtain those, as well. That was  
10 the basis for the SCOSource, you know, licensing program at  
11 this time.

12 Q. Any IP that SCO had or believed it owned dating  
13 back to AT&T; right?

14 A. Any of SCO's intellectual property was provided to  
15 any of those customers in a release or in a license.

16 Q. That was SCOSource; right?

17 A. That was SCOSource. The runtime or right to use  
18 license that was part of SCOSource.

19 Q. Now, after the initial announcement of these  
20 library licenses under SCO Tech or SCOSource, there was a  
21 second phase to the program; correct?

22 A. No. It was continuously evolving. It was -- the  
23 names were even changing as we, you know, continued with the  
24 program.

25 Q. And the second phase or the evolution or the

1 evolution of this program was this right to license or right  
2 to use program that you just mentioned; correct?

3 A. Could you repeat the question?

4 Q. Sure. Let me show you an exhibit. Exhibit 194.

5 Let me show you what's been marked and admitted as  
6 Exhibit 194. If you could take a look at that, Mr. Sontag.

7 A. Okay.

8 Q. And Exhibit 194 is a letter that Mr. McBride sent  
9 on May 12th, 2003, to the Fortune 1000 companies regarding  
10 this SCOSource program; correct?

11 A. Yes.

12 Q. And if we could take a look at the first sentence  
13 of the letter that Mr. McBride wrote, he wrote:

14 SCO holds the rights to the UNIX operating  
15 system originally licensed by AT&T to  
16 approximately 6,000 companies and institutions  
17 worldwide, the UNIX licensees.

18 Correct?

19 A. Yes.

20 Q. And that was the core technology that was at the  
21 heart of SCOSource; right?

22 A. No. That was just a portion of what was under  
23 SCOSource. Those licenses were contracts for which we had the  
24 responsibility of enforcing. In addition to that, there was  
25 all the source code and the latest versions of source code for

1 UnixWare and OpenServer and other SCO products.

2 Q. And it's your testimony that all of that was the  
3 core technology that SCO sought to monetize in the SCOSource  
4 program?

5 A. Yes. Any intellectual property inside of the SCO  
6 was potentially licensable IP within the SCOSource program.

7 Q. And if we could take a look at Paragraph 5 of the  
8 letter Mr. McBride wrote:

9 Many Linux contributors were originally UNIX  
10 developers who had access to UNIX source code  
11 distributed to AT&T and were subject to  
12 confidentiality agreements, including  
13 confidentiality of the methods and concepts  
14 involved in software design.

15 Correct?

16 A. Yes.

17 Q. And what SCO says is:

18 We have evidence that portions of UNIX  
19 System V software code have been copied into  
20 Linux.

21 Right?

22 A. We claimed that we had, you know, different  
23 intellectual property violations that we felt had been applied  
24 into Linux, some in the form of, you know, literally  
25 copyrighted code; others in the form of methods and concepts;

1 others in the form of derivative works; and other IP issues  
2 that we felt may be at issue with Linux.

3 Q. But in the letter that Mr. McBride wrote on  
4 May 12th of 2003, he's talking about software IP that dates  
5 back to AT&T and the developers of AT&T; correct?

6 A. I think he was -- you know, we're not trying to be  
7 specific about every last area of intellectual property or  
8 methods of intellectual property from patents to copyrights to  
9 contracts to derivative works and otherwise. It was simply us  
10 just trying to say that we have a broad base of intellectual  
11 property that we believe is valuable that we are making  
12 available and licensing. The specifics of -- you know, if we  
13 say, UNIX System V and not also saying OpenServer or UnixWare,  
14 it doesn't mean when we say UNIX System V or we are talking  
15 about UNIX, we're not also referring to them.

16 It's just like, I'll give an analogy to ice cream.  
17 I may say ice cream to my kids. Would you like some ice  
18 cream? I don't have to be specific every time and say, would  
19 you like chocolate ice cream or vanilla ice cream? I might  
20 just ask them first, would you like ice cream? And I'm  
21 referring to any possible choice that might reside under that.

22 Q. What Mr. McBride referred to specifically in his  
23 letter in May of 2003 was source code distributed by AT&T;  
24 right?

25 A. Again, I believe what is really being referred to

1 in this letter is SCO's broad intellectual property portfolio,  
2 not just specific versions of early UNIX originally developed  
3 by AT&T. But I view that as part of that portfolio.

4 Q. The only specific reference that Mr. McBride makes  
5 in the letter is to source code distributed by AT&T; correct?

6 A. In this particular paragraph, that's what he is  
7 referring to. But, again, the intent was to talk about the  
8 entire portfolio of SCO's intellectual property.

9 Q. And Mr. McBride sent this letter to 1,000 different  
10 companies asking them to take a license under the SCOSource  
11 program; correct?

12 A. Yes. Or at least consider it, get themselves  
13 educated, find out if they should have concerns or issues or  
14 not.

15 Q. Take a look at the first paragraph on the next  
16 page.

17 Mr. McBride also wrote:

18 We believe that Linux infringes our UNIX  
19 intellectual property and other rights. We intend  
20 to aggressively protect and enforce these rights.  
21 Consistent with this effort, on March 7, we  
22 initiated legal action against IBM for alleged  
23 unfair competition and breach of contract with  
24 respect to our UNIX rights.

25 Correct?

1           A.    Yes.

2           Q.    And you understood, didn't you, that the basis for  
3   this letter going out to these 1,0000 different companies  
4   across the United States was the same basis for which SCO  
5   brought action against IBM; correct?

6           A.    And again, when we're talking about SCO's UNIX  
7   rights, I view that we're referring to all of SCO's  
8   intellectual property portfolio related to UNIX.

9           Q.    All of it from time to memorial; correct?

10          A.    All that is under the purview of SCO, yes.  Why  
11   would you only enforce a portion of your rights if you have a  
12   broader portfolio of rights?

13          Q.    But it was the same basis that there was some  
14   portion of SCO's intellectual property that was in Linux that  
15   caused Mr. McBride to write this letter.  It was also for the  
16   basis for the action against IBM; correct?

17          A.    We believe in part some of the actions that we  
18   undertook against IBM were a significant portion of the IP  
19   that we were concerned about within Linux.

20          Q.    Okay.  And it's true, isn't it, that the only UNIX  
21   code that SCO's experts in the IBM case found in IBM's version  
22   of Linux was UNIX System V Version 4.2?  Isn't that true?

23          A.    I couldn't characterize what specifically was found  
24   by our experts.  That would have to be presented by them.

25          Q.    Let me show you what we've marked as Exhibit 428.

1           A.    I assume you don't want me to read all of this  
2 right now.

3           Q.    No, I don't.

4                    If you could take a look at -- first of all,  
5 Exhibit 428 is a report of Dr. Thomas Cargill of The  
6 Infringement of Unix System V Release 4 Operating System By  
7 the Linux Operating System.

8                    Do you see that title?

9           A.    Right.  And I believe this is just one of many  
10 reports.

11           Q.    Well, I'm going to ask you about that.  But take a  
12 look at Page 3, if you would, the summary of opinions.

13                    You see in Paragraph A, summary of opinions,  
14 Dr. Cargill wrote:

15                            It is my opinion that Linux 2.4 and Linux 2.6  
16 are substantially similar to the UNIX System V  
17 Release 4 operating system in satisfaction of that  
18 element of copyright infringement.

19                    Do you see that?

20           A.    Okay.

21           Q.    And then if you go down, you see, he wrote:

22                            Overall, Linux is a substantial copy of the  
23 UNIX System V Version 4 operating system.

24                    Do you see that?

25           A.    Yes.

1 Q. And if you take a look at the next page --

2 A. For which I would view UnixWare is the latest  
3 version of that.

4 Q. I understand that's your position. But take a look  
5 at the next page. You'll see the last part of Dr. Cargill's  
6 opinion. He writes:

7 Instead, it is my opinion that significant  
8 design choices and code incorporated in Linux were  
9 copied from UNIX System V Version 4.

10 Correct?

11 A. Yes.

12 Q. And it's true, isn't it, that no other expert in  
13 the IBM case ever came to the conclusion that anything else  
14 other than SVR4 was allegedly in IBM's version of Linux?  
15 Isn't that true?

16 A. I can't characterize specifically what the rest of  
17 the expert testimony and reports -- I don't -- I did not read  
18 them, so I can't characterize that one way or another.

19 Q. Are you ware -- are you aware of any expert in the  
20 IBM case retained by SCO finding any code in IBM's version of  
21 the Linux other than System V Version 4?

22 A. Again, since I did not read any of the expert  
23 reports I couldn't characterize it one way or another.

24 Q. Well, you made some public disclosures with respect  
25 to what code SCO believed was in IBM's version of Linux;

1 correct?

2 A. Yes.

3 Q. And you made those disclosures both publicly and  
4 under nondisclosure agreements; correct?

5 A. Yes.

6 Q. And let me show you what we've marked as  
7 Exhibit -- SCO Exhibit 379.

8 Now, SCO Exhibit 379 is a PowerPoint presentation  
9 that you gave at a SCO forum in 2003; correct?

10 A. Yes.

11 Q. And you gave it along with your lawyers; right?

12 A. Yes.

13 Q. And the purpose of it was to tell the public what  
14 portions of SCO's core intellectual property SCO believed was  
15 in IBM's version of Linux; right?

16 A. I don't know if I characterize it that way. I  
17 viewed it as a presentation intended to provide a high-level  
18 education as to SCO's position.

19 Q. And if you could take a look at Novell document --  
20 Novell Bate Number 12733, this is part of the presentation  
21 where you and your lawyers actually laid out what you believed  
22 was the infringing code; correct?

23 A. No. Not laid out the infringing code. We laid out  
24 one example, one very small example.

25 Q. And this example is the Malloc example; right?

1           A.    I don't have a file name on here, so I can't be  
2           sure if this happens to be the Malloc code.  But certainly  
3           that was one example that we did show.

4           Q.    And it's true, isn't it, that this forum when you  
5           told the public what it is that you believe was in IBM's  
6           version of Linux that infringed your core IP, all of the  
7           examples you gave and the only examples you provided were for  
8           System V Release 4; correct?

9           A.    No.  The most important point that I tried to  
10          stress in this presentation would be actually the slide on  
11          Page 8, which would be Novell 12731.  And this is the slide  
12          where I would present -- show that there's different forms of  
13          intellectual property protection.  Literal copying; literal  
14          copyright infringement, which is word by word the same, being  
15          copied by somebody; nonliteral, which would be some amount of  
16          munging and changing the code or obfuscating the code;  
17          derivative works, which the point I was trying to make was the  
18          most important area, which was to contractually protect any  
19          areas specifically around derivative works code being  
20          contributed into Linux from UNIX by companies such as IBM.

21                  That was the most important point.  And if you had  
22          been sitting in on this presentation, that was the big point  
23          that I tried to make of this whole presentation was that right  
24          there.

25          Q.    But the only examples of literal copying that you

1 showed was of System V Version 4; correct?

2 A. I could have put up a version showing an example of  
3 UnixWare 7.1.3 in the Malloc code versus Linux, you know, the  
4 latest release of Linux, and you would receive substantially  
5 the same copied code, because that same code in Malloc was  
6 substantially similar between UnixWare 7.1.3 and previous  
7 versions of UNIX, such as UNIX, you know, 4.2 DS.

8 Q. But the only versions of the literal copying that  
9 you showed at the SCOSource -- or SCO forum of 2003 was the  
10 Malloc example; correct?

11 A. It was the only example that we intended to show.

12 Q. And that example was a System V Release 4 code;  
13 correct?

14 A. I believe it was System V Release 4.2 DS.

15 Q. And isn't it true that you are not aware of any  
16 other expert at any point ever coming to the determination  
17 that there was literal copying of any code beyond System V  
18 Version 4.2; correct?

19 A. Again, I have not read any of the expert reports,  
20 so I'm not aware of if there are examples or not.

21 Q. Let me show you what we marked as Exhibit 274.

22 Exhibit 274 is a letter written to the chairman of  
23 Lehman Brothers by general counsel SCO Mr. Ryan Tibbits on  
24 December 19, 2003; correct?

25 A. Yes.

1 Q. And in it he is essentially accusing  
2 Lehman Brothers of violating SCO's core intellectual property;  
3 correct?

4 A. I don't know if I would characterize it that way.

5 Q. Well, in the first sentence he wrote:

6 In May 2003, SCO warned about enterprise use  
7 of the Linux operating system in violation of its  
8 intellectual property rights in UNIX technology.  
9 Without exhausting or explaining all potential  
10 claims, this letter addresses one specific area in  
11 which certain versions of Linux violate SCO's  
12 rights in UNIX.

13 Right?

14 A. Yes.

15 Q. And in the second page of the letter, he gives,  
16 provides Mr. Fuld with a list of code; correct?

17 A. Yes.

18 Q. And down below that Mr. Tibbits wrote:

19 The only code identified -- the code  
20 identified above was also part of a settlement  
21 agreement entered between the University of  
22 California at Berkeley and Berkeley Systems  
23 Development, collectively BSDI, regarding alleged  
24 violations by BSDI and USL's right to UNIX system  
25 technology.

1 Right?

2 A. Yes.

3 Q. And it's true that that settlement was reached  
4 between Berkeley and BSDI in February in 1994; right?

5 A. Yes.

6 Q. And so the code that we're talking about here is  
7 code that existed long before the APA; correct?

8 A. The one example that is given here. Again, I'd go  
9 back to the first paragraph, though, as one of potentially  
10 many is this example.

11 Q. Isn't it true, Mr. Sontag, that neither you or  
12 anyone at SCO ever said that there has been taking of code  
13 from UnixWare intellectual property by Linux users? Isn't  
14 that right?

15 A. Again, I think we also referred to SCO's  
16 intellectual property which is all inclusive of all of SCO's  
17 intellectual property portfolio including UnixWare, including  
18 OpenServer, including preceding versions of UNIX, as well.

19 Q. Isn't it true that neither you or anyone at SCO  
20 ever said that there has been a taking of code from UnixWare  
21 intellectual property by Linux users? Isn't that an accurate  
22 statement?

23 A. Again, I think it's a mischaracterization.

24 Q. You testified under oath in deposition on  
25 March 17th -- excuse me -- April 30th of 2007; correct?

1           A.    I had several depositions.

2           MR. ACKER:  And, counsel, this is at Line 45 --  
3           Page 45 Line 21, Page 46 Line 9.  If we could play that clip,  
4           please.

5           THE COURT:  You want that deposition published, I  
6           believe.

7           MR. ACKER:  Yes, sir.

8           THE COURT:  The deposition is published.

9           (A portion of the deposition was played.)

10          Q.    BY MR. ACKER:  So it's true, isn't it, sir, that  
11          either you or as far as you know anyone at SCO has never said  
12          that there has been a taking of code from UnixWare  
13          intellectual property by Linux users; right?

14          A.    Again, whenever we're referring to UNIX  
15          intellectual property, as far as when I was saying that, I was  
16          speaking of all of SCO's UNIX intellectual property, UnixWare,  
17          OpenServer and otherwise.  So specifically mentioning UnixWare  
18          or OpenServer I didn't feel was necessary if I was talking  
19          about SCO's UNIX intellectual property because those were  
20          included as part of that.

21          Q.    But neither you nor anyone at SCO has ever said to  
22          a Linux user, you're infringing UnixWare; right?

23          A.    Simply because -- I think you're splitting semantic  
24          hairs.  We're saying, you've been, you know, violating SCO's  
25          UNIX intellectual property rights which include UnixWare and

1 OpenServer. We didn't necessarily have to list out all of our  
2 products every time we were talking to somebody.

3 Q. But never at any point have you listed out UnixWare  
4 and said, Linux user, you're violating UnixWare; right?

5 A. Again, if we were saying SCO's intellectual  
6 property rights, that includes UnixWare, that includes  
7 OpenServer, that includes all of SCO's intellectual property  
8 rights.

9 Q. But you never told the Linux community, you're  
10 violating UnixWare; right?

11 A. Don't know why that would be necessary if we're  
12 saying, you're violating our UNIX intellectual property  
13 rights. That includes all of our UNIX intellectual property  
14 rights.

15 Q. But we can agree, can't we, that you or no one at  
16 SCO has said that, that you, Linux user, are violating  
17 UnixWare; right?

18 A. I'm not aware that I specifically said UnixWare. I  
19 know I often said UNIX intellectual property rights.

20 Q. And you're not aware of anyone at SCO saying, Linux  
21 users, you're violating UnixWare; right?

22 A. I'm not aware one way or the other.

23 Q. Let me show you the Sun license agreement what's  
24 been admitted as Exhibit 187.

25 You're familiar with that document, I assume, sir?

1 A. Yes, I am.

2 Q. And Exhibit 187 is the license that was entered  
3 into between SCO and Sun on February 25th of 2003; correct?

4 A. Yes.

5 Q. You were one of the principal negotiators for SCO;  
6 is that right?

7 A. Yes.

8 Q. You actually signed this document for SCO?

9 A. Yes.

10 Q. And you would agree that the Sun license is a  
11 SCOSource license; correct?

12 A. It's a SCO intellectual property license executed  
13 by the SCOSource division.

14 Q. Part of the SCOSource program; correct?

15 A. The overall SCOSource program.

16 Q. And if we take a look at the first three clauses,  
17 the "whereas" clauses of the document, please.

18 The recitals of the document are accurate; correct?

19 A. I'm not an attorney, but I assume those are  
20 accurate.

21 Q. And what those say is that:

22 Whereas, Sun and UNIX System Laboratories or  
23 Novell are parties to a software license and  
24 distribution agreement dated January 1st, 1994,  
25 the original agreement.

1                   And then, whereas, Novell has transferred  
2                   and assigned the original agreement to SCO.

3                   And, whereas, Sun and SCO desire to amend  
4                   and restate the original agreement by the  
5                   execution of this agreement.

6                   Correct?

7                   A.    That's what it says.

8                   Q.    And that was what this agreement did, is it amended  
9                   and restated the original 1994 agreement between Novell and  
10                  Sun; correct?

11                  A.    Well, I don't know if I necessarily characterize it  
12                  that way. I view that the majority of the document was  
13                  dealing with a UnixWare license. It was only portions that  
14                  dealt with I think anything related to the older agreement.

15                  Q.    But you would agree, wouldn't you, that the  
16                  statement is accurate, that this agreement, 187, the 2003 Sun  
17                  agreement, amended and restated the earlier agreement between  
18                  Novell and Sun?

19                  A.    In part.

20                  Q.    No doubt about that; right?

21                  A.    Again, in part.

22                  Q.    Let me show you Exhibit 5, which was the original  
23                  agreement. Novell Exhibit 5, which has been admitted into  
24                  evidence, is the original 1994 agreement between Novell and  
25                  Sun; correct?

1           A.    Yes, I believe so.

2           Q.    And you're familiar with this document; correct?

3           A.    To a certain extent.

4           Q.    And in the original agreement Sun paid 82.5 million  
5 in order to obtain a license that included UNIX System 5  
6 software; right?

7           A.    Yes.

8           Q.    And Attachment 1 of the original agreement lists  
9 that UNIX System V software that Sun licensed in 1994;  
10 correct?

11          A.    Yes.

12          Q.    And we have that up on the screen. Do you see  
13 that?

14          A.    I do.

15          Q.    And then if we go back to 187, Attachment 1 of the  
16 2003 Sun license lists the software licensed to Sun in the  
17 amended and restated 2003 license; correct?

18          A.    Did it have a listing?

19          Q.    Sure. It's SCO 1287218. It's the Attachment 1 to  
20 the 2003 agreement.

21          A.    Okay.

22          Q.    Now, if we take a look at Attachment 1 to the 1994  
23 agreement here on the left and we compare it to the first page  
24 of Attachment 1 -- there we go, and we compare it to the first  
25 page of Attachment 1 of the later agreement, you'd agree with

1 me that those listing of 30 items of software, 30 pieces of  
2 code are identical.

3 A. They appear to be very similar. I would take much  
4 longer to be able to say that definitively they were  
5 identical. But they look very similar.

6 Q. So other than this asterisk and "not currently  
7 licensed by Sun but considered to be by the parties as a  
8 licensed product," other than that language they are  
9 photocopies, aren't they?

10 A. Again, they are substantially similar.

11 Q. They're identical, aren't they?

12 A. If you want me to look letter by letter to say  
13 they're absolutely identical, I can do that.

14 Q. Well, you negotiated the 2003 deal; right?

15 A. Yes.

16 Q. And you know what happened was in the 2003 deal for  
17 the first page of Attachment 1, you simply took the old  
18 Attachment 1 from the earlier deal and made a copy of it;  
19 right?

20 A. I suspect that's the case. I wasn't involved in  
21 drafting that page of the contract.

22 Q. And what's on the left is a list of what was  
23 licensed in 1994 by Novell to Sun; correct?

24 A. Yes.

25 Q. And what is on the right, with an exception that

1 we're going to get to on the second page of this attachment in  
2 a second, is what was licensed to Sun by SCO in 2003; right?

3 A. Well, it's a listing of technologies much of which  
4 Sun had already licensed. So I view that as belt and  
5 suspenders.

6 Q. You view that as belt and suspenders.

7 Now, the 2003 Sun license also granted license to  
8 seven additional versions of software; correct?

9 A. Yes. I believe that to be the case.

10 Q. This is Page 2 of the attachment to the 2003 Sun  
11 license. This is what in addition to the 30 identical pieces  
12 of software that had been part of the earlier agreement, these  
13 seven pieces of software that we have on the board now are  
14 what the additional software was that Sun got in the later  
15 agreement in 2003; correct?

16 A. Yes.

17 Q. And of those seven pieces of software, five of them  
18 are System V Release 4.2 or earlier; correct?

19 A. Yes.

20 Q. And the only two pieces of software that came into  
21 existence after the APA that were licensed to Sun in 2003 are  
22 these last two, System V Release 5 and Open UNIX 8; correct?

23 A. Yes. And the primary license product was the  
24 UnixWare 7.1.3 product.

25 Q. So just to be clear for the Court, if we drew a

1 line right here above System V Release 5, that's -- from a  
2 time standpoint, that's when the APA was executed; right?

3 A. I believe that to be the case.

4 Q. And these UNIX 4, the UNIX 4.1 grant that SCO  
5 provided to Sun in 2003, that was expressly omitted from the  
6 earlier license to Sun; correct?

7 A. Well, my understanding was those weren't yet in  
8 existence at the time of the prior Sun agreement.

9 Q. Why don't we take a look at the earlier agreement,  
10 Exhibit 5. If we could go to Attachment 2.

11 System V -- are you there, sir?

12 A. Attachment 2?

13 Q. Yes.

14 A. Yes.

15 Q. So you see there's a section there in the early  
16 agreement that refers to deliberately omitted software; right?

17 A. Yes.

18 Q. So back in 1994 when Novell and Sun entered into an  
19 agreement, Novell expressly did not license to Sun  
20 System V Release 4.1; right?

21 A. Yes.

22 Q. But SCO granted a license to that software to Sun  
23 in 2003; correct?

24 A. Yes. For the purpose of them having a complete set  
25 of all the versions. And again, that was primarily -- those

1 prior versions were all intended to just be used for source  
2 comparison. The latest version we provided to them,  
3 UnixWare 7.1.3, was the version that was primarily intended  
4 and licensed to them for development.

5 Q. Now, Section 3 of the original Sun license of  
6 Exhibit 5 sets out what rights were granted to Sun in 1994 for  
7 the technology; correct? If you turn to Section 3 of the  
8 earlier license.

9 A. Section 3?

10 Q. Yes.

11 A. Okay.

12 Q. And it was a worldwide, royalty-free, paid-up  
13 license to the UNIX System V software in the Attachment 1 that  
14 we looked at; right?

15 A. Yes.

16 Q. And what those rights granted in the original 1994  
17 agreement do not grant to Sun the right to publicly display  
18 the source code and object code of the license UNIX 5  
19 software; right?

20 A. Where are you reading that?

21 Q. Well, you know, don't you, that the early agreement  
22 did not allow Sun to publicly display the software that was  
23 licensed in 1993?

24 A. I know that they had -- the whole agreement allowed  
25 them to broadly distribute the source code to their licensees

1 who in turn could distribute the, you know, Solaris source  
2 code to sublicensees. So Sun had very broad rights with this,  
3 you know, '94 agreement to effectively license the source code  
4 extremely broadly to a large customer base.

5 Q. Isn't it true that they couldn't open source that,  
6 Sun could not open source that software code under the early  
7 agreement?

8 A. It depends on what your definition of open source  
9 is.

10 Q. Well, why don't we take a look at  
11 paragraph 3.2 (A)(b) of the earlier license.

12 A. 3.2?

13 Q. Yes, sir. Do you see that? And what that required  
14 was:

15 The Sun source sublicensees will protect the  
16 licensed products contained in their derivative  
17 works, and Novell's trade secrets and other  
18 intellectual property embodied in such licensed  
19 products, to at least the degree to which Sun  
20 protect its own most valuable proprietary source  
21 code.

22 Correct?

23 A. Yes.

24 Q. And if we take a look at 3.2(B), this was another  
25 requirement in the earlier license.

1           In the event that Sun becomes aware, whether  
2           through notification by Novell or otherwise, that  
3           a Sun source sublicensee is not complying with its  
4           obligations under the applicable Sun source code  
5           license agreement, including obligations to  
6           protect the confidentiality of the source code of  
7           licensed products, to the extent that such  
8           obligation impacts licensed products contained in  
9           derivative works, Sun agrees to take appropriate  
10          steps to rectify such noncompliance.

11                         Correct?

12           A.    Yes.

13           Q.    And Sun made it clear during the negotiations that  
14           they wanted a broader license so Sun could open source  
15           Solaris; correct?

16           A.    Actually, Sun believed that they had almost all the  
17           rights they needed or had all the rights they needed. Now,  
18           that was their posturing and positioning going into the  
19           negotiations, that they did not need anymore rights to be able  
20           to do a form of open sourcing and be in compliance with this  
21           agreement. Now, that was their position coming into the  
22           negotiations.

23           Q.    Isn't it true that Sun made it clear during  
24           negotiations that they wanted a broader license so Sun could  
25           open source Solaris? Isn't that accurate?

1           A.    I don't know that I necessarily would say that it  
2           was -- you know, it was a part of what they asked for.  But  
3           the most important thing they were asking for was the ability  
4           to quickly take the Solaris product and make it available on  
5           an Intel compatible platform, which they would be able to do  
6           with the UnixWare 7.1.3 source code license and the software  
7           drivers for UnixWare.

8           Q.    Now, you gave a number of depositions in this case  
9           and in the IBM litigation including a deposition on  
10          December 21st, 2005; correct?

11          A.    Yes.

12          MR. ACKER:  And, counsel, I'm going to publish  
13          Page 144 Lines 13 to 22 from that testimony.

14          Q.    BY MR. ACKER:  It's true, sir, that when you  
15          testified on December 21st of 2005, you wrote:

16                  When did SCO become aware of the facts that  
17                  Sun had open sourced -- or the Solaris system.

18                  As part of the negotiations related to the  
19                  latest IP license from -- we entered into with  
20                  Sun, one of their desires of that license was the  
21                  ability to have a broader IP license where they  
22                  could to an extent open source Solaris with  
23                  restrictions that it could not be open sourced  
24                  into Linux or other open source licenses that did  
25                  not protect copyright ownership.

1                                   Is the testimony accurate?

2                   A.    Yes.  I would also add to that they basically had  
3   the rights necessary to do that, anyways.

4                   Q.    But that's what they wanted in the negotiations,  
5   broader confidentiality provisions; correct?

6                   A.    Yes.  I don't believe that was an important part to  
7   them.

8                   Q.    But it's part of what they wanted and part of what  
9   they paid for; correct?

10                  A.    Yes.

11                  Q.    And Sun Solaris operating system is a derivative  
12   work of UNIX System V; right?

13                  A.    Yes.

14                  Q.    Why don't we take a look at Exhibit 187.

15                                But it's also true, isn't it, that it's SCO's  
16   position that Sun was entitled to open source Solaris as a  
17   result of the 2003 agreement with SCO?  Correct?

18                  A.    I would view that -- well, open source as in --  
19   with the limitations set forth in the agreement.

20                  Q.    So you would agree with me that as a result of the  
21   2003 agreement, Sun was able to open source open Solaris?

22                  A.    Again, with the caveat that I just mentioned.

23                  Q.    Yes.  They were able to do that as a result of the  
24   agreement?

25                  A.    Yes.

1 Q. Now, if we could take a look at Exhibit 187 and  
2 specifically Paragraph 3.1.

3 Now, in addition to being able to having broader  
4 confidentiality rights with respect to that software, you  
5 actually delivered copies of the software to Sun; right?

6 A. Yes. Primarily UnixWare 7.1.3.

7 Q. But you didn't just deliver that version. You  
8 delivered all of it; right?

9 A. We delivered at least a number of other source  
10 takes or previous versions. But the primary one that was of  
11 importance to Sun was the 7.1.3 source and the source for the  
12 hardware drivers for UnixWare.

13 Q. But Sun didn't say to you, we're not interested in  
14 that other code. Don't bother delivering it to us. Just give  
15 us the latest version and the drivers; right? Sun didn't say  
16 that to you?

17 A. No, I don't believe they did; nor did we ask them.  
18 We were just delivering on our obligations under the contract.

19 Q. And the obligations under the contract were to  
20 provide copies of all of the software; right?

21 A. Yes.

22 Q. And that's what SCO did; correct?

23 A. Yes.

24 Q. And SCO was paid just under \$10 million by Sun for  
25 this license; right?

1 A. Yes.

2 Q. And not a single penny of that was paid to Novell;  
3 correct?

4 A. No.

5 Q. And before entering into the 2003 Sun license, SCO  
6 did not obtain permission from Novell to do the deal; right?

7 A. We did not believe we needed their permission.

8 Q. In fact, you didn't even inform them about the deal  
9 before it was done; correct?

10 A. No. Again, this was primarily a UnixWare license.

11 Q. But it's true, isn't it, that SCO understood that  
12 the APA requires prior written approval from Novell for all  
13 new agreements or changes to current agreements relating to  
14 UNIX System V? Correct?

15 A. Again, this agreement was primarily about -- and  
16 the value of this agreement was primarily about UnixWare. And  
17 since Sun already had a buyout to, you know, the previous  
18 System V technologies, there was no need to have Novell  
19 involved in a primarily UnixWare license.

20 Q. But isn't it true that SCO understood that the APA  
21 requires prior written approval from Novell for any new  
22 agreements or changes to current agreements relating to UNIX  
23 System V that you understood that at the time you did the deal  
24 with Sun?

25 A. Yes. And again this was not a System V license.

1 This was a UnixWare license.

2 Q. There's over 35 versions of System V software that  
3 was licensed to Sun; correct?

4 A. Those were ancillary products. The primary product  
5 being licensed was UnixWare.

6 Q. Is there anywhere in the APA that says you only  
7 have to obtain permission for licensing the primary product  
8 and not the other 38 UNIX System V versions that you give --  
9 you license?

10 A. Since Sun had a buyout of any royalty obligations,  
11 I would not believe that would be necessary because there was  
12 no revenue impact for Novell.

13 Q. So that was just a unilateral decision that Sun  
14 made that, because we believe that the primary portion of this  
15 agreement is the latest version of the software even though it  
16 includes the earlier versions, we're not going to ask for  
17 Sun Novell's permission?

18 A. We did not believe we needed Novell's permission.

19 Q. Let me show you what we've marked as Exhibit 27.  
20 I show you Exhibit 27.

21 A. Okay.

22 Q. Exhibit 27 is a letter from senior contracts  
23 manager or John Luehs of SCO to Miss Cynthia Lamont of Novell  
24 dated May 20th, 1996; do you see that?

25 A. Yes.

1 Q. In the first paragraph of that letter, Mr. Luehs  
2 wrote to Novell on behalf of SCO:

3 The agreement between the Santa Cruz  
4 Operations, SCO, and Novell, Inc., Novell,  
5 requires prior written approval from Novell for  
6 all new agreements or changes to current  
7 agreements relating to UNIX System V.

8 Correct?

9 A. Yes.

10 Q. And you would agree with me, wouldn't you, that Sun  
11 2003 is an agreement relating to UNIX System V? Wouldn't you?

12 A. Yes and no. Yes, that UNIX System V was a portion  
13 of that and that UnixWare in my view, we would describe under  
14 UNIX System V. But --

15 Q. Because --

16 A. But the primary -- primarily that agreement was  
17 related to a UnixWare source code license.

18 Q. And because the 2003 agreement with Sun was an  
19 agreement relating to UNIX System V, SCO needed Novell's  
20 approval before they did the deal; isn't that true?

21 A. I do not agree with that statement.

22 Q. So you disagree with the senior contracts manager,  
23 what a senior contracts manager of SCO wrote in 1996; is that  
24 right?

25 A. If it was a SVRX older license, that's how I would

1 view that. This was a UnixWare license primarily with Sun,  
2 which is different.

3 Q. Let me show you what we've marked as Exhibit 30.

4 (Time lapse.)

5 Have you had a chance to read Exhibit 30, sir?

6 A. I scanned it.

7 Q. Exhibit 30 is a letter from the management, law and  
8 corporate affairs, Mr. Broderick of SCO on May 26, 1996, to  
9 Novell; correct?

10 A. Yes.

11 Q. And you know who Mr. Broderick is; correct?

12 A. Yes, I do.

13 Q. What his current position at SCO?

14 A. Very similar position. He's in the --

15 Q. Management, law and corporate affairs --

16 A. Yes.

17 Q. -- currently of the company?

18 A. Yes.

19 Q. And going to testify in this trial?

20 A. Yes.

21 Q. And let's take a look at what Mr. Broderick wrote  
22 on May 26, 1996, to Novell. Take a look at that first  
23 sentence. Again, he wrote:

24 The agreement between Santa Cruz Operations,  
25 Inc., SCO, and Novell, Inc., Novell, require prior

1 written approval from Novell for all new  
2 agreements or changes to current agreements  
3 relating to UNIX System V.

4 Correct?

5 A. Yes.

6 Q. And you don't have any reason to doubt  
7 Mr. Broderick's understanding of the APA; correct?

8 A. No.

9 Q. And you have no reason to doubt the statement that  
10 Mr. Broderick made back in May of 1996; correct?

11 A. No. And I would add that --

12 Q. Let me ask --

13 A. -- Mr. Broderick would view that UNIX System V in  
14 this context is referring to older System V licenses and  
15 source codes. And if we were doing a UnixWare code license,  
16 there was no permission required from Novell.

17 Q. And I'm sure Mr. Broderick can speak for himself,  
18 and I'm sure he will.

19 A. All right.

20 Q. Let me show you what we marked as Exhibit 189.

21 THE COURT: You didn't offer 27 or 30.

22 MR. ACKER: Yes. I move for their admission.

23 THE COURT: I don't know if they object.

24 MR. NORMAND: No objection, Your Honor.

25 THE COURT: 27 and 30 are received.

1 MR. ACKER: Thank you, Your Honor.

2 (Whereupon, Novel Exhibits 27 and 30 were received.)

3 Q. BY MR. ACKER: I show you what's been marked and  
4 admitted as Exhibit 189.

5 A. All right.

6 Q. Now, Exhibit 189 is the Microsoft license entered  
7 into between SCO and Microsoft in April of 2003; right?

8 A. Yes.

9 Q. And you were the principal or one of the  
10 negotiators in this agreement, as well?

11 A. Yes.

12 Q. And prior to the execution of the agreement, there  
13 were term sheets that were exchanged; correct?

14 A. Yes.

15 Q. And let me show you what we have marked and has  
16 been admitted at Exhibit 171.

17 Exhibit 171, you'll see there's an e-mail chain at  
18 the top where an e-mail was sent to you from a Mike Anderer on  
19 January 15th, 2003; correct?

20 A. Yes.

21 Q. And he wrote:

22 Mike, here is the first cut at the TS to MS.

23 Feel free to mark up. And we will see you in

24 Lindon tomorrow afternoon. Regards, Chris.

25 Do you see that?

1           A.    Yes.

2           Q.    And down below is a proposed term sheet of the  
3   Microsoft deal with SCO; right?

4           A.    Yes.

5           Q.    And in Paragraph 3 of that, you set out what the  
6   license code would be; correct?

7           A.    I view this as a kind of an al a carte list of  
8   various areas and things that we could discuss with Microsoft.

9           Q.    And on the top of the list is UNIX System V; right?

10          A.    Yes.

11          Q.    And in January of 2003 when you're going into these  
12   negotiations, you understood that UNIX System V was part of  
13   what was going to be licensed to Microsoft if the deal  
14   happens; right?

15          A.    It was an area that could be licensed.  Again, I'm  
16   almost being redundant in saying UNIX System V and UnixWare.  
17   But in order to have more items on the list to potentially  
18   discuss, that was -- those were all items placed on the list.

19          Q.    Well, you separately culled it out here, didn't  
20   you?

21          A.    Yes.  But in a lot of cases, we're referring to the  
22   same thing.  If they're taking a UNIX or a license they're  
23   gaining access to a majority of the System V source code that  
24   preceded it.

25          Q.    But in the same OU, you didn't just say UnixWare

1 and OpenServer; right?

2 A. No. We're trying to provide as many possible areas  
3 of discussion for deal points as we can.

4 Q. And one of those areas of discussions and deal  
5 points was UNIX System V; correct?

6 A. Yes.

7 Q. Take a look at the next page. Paragraph 5.

8 It's written:

9 SCO will recognize a retroactive license in  
10 favor of Microsoft against any present or previous  
11 violations of SCO's UNIX IP rights, as follows.

12 Correct?

13 A. Yes.

14 Q. And this is eventually what matured into Section 2  
15 of the Microsoft deal; right?

16 A. To an extent, that release.

17 Q. And that release is what you call the retroactive  
18 license in favor of Microsoft includes other System V UNIX  
19 technologies.

20 Right?

21 A. Yes. And to me in this case, that would refer to  
22 UnixWare, potentially OpenServer and prior releases.

23 Q. And prior releases; correct?

24 A. Yes.

25 Q. And so Microsoft was concerned that there might be

1 some of SCO's intellectual property in their products; right?

2 A. Yes, potentially.

3 Q. So in Section 2, they wanted a release that  
4 included releases for all of SCO's IP and all of Microsoft's  
5 products; right?

6 A. Yes.

7 Q. And during negotiations, they expressed concern  
8 that they may have inadvertently used SCO's IP in their  
9 products, including SVRX code; right?

10 A. Potentially yes.

11 Q. And Microsoft's concerns about having SCO's IP in  
12 its product would not have been assuaged if the license in  
13 Section 2 had granted rights merely to the current UnixWare  
14 technology; right?

15 A. I don't know if I would characterize it that way.  
16 This ended up not being an area that we discussed. But the  
17 vast majority of the active and important code, you know,  
18 significant percentage was available in the UnixWare product.

19 Q. Okay. You testified on March 14th, 2007, at your  
20 deposition --

21 And, counsel, this is Lines 162-24 to 163-5.

22 -- you were asked the following questions and gave  
23 the following answers.

24 (A portion of the deposition was played.)

25 Q. BY MR. ACKER: But Microsoft's --

1                   MR. NORMAND: Your Honor, to complete this, I would  
2 like to publish the remaining testimony from that portion of  
3 the deposition.

4                   MR. ACKER: Well, he certainly will have that  
5 opportunity.

6                   MR. NORMAND: I'm not sure of Your Honor's  
7 practice. On occasion to save time, we play it at the time of  
8 the playing of the deposition.

9                   THE COURT: You prefer that he do it when he does  
10 his examination?

11                   MR. ACKER: Yes. Absolutely.

12                   MR. NORMAND: Thank you, Your Honor.

13                   THE COURT: You can do it then.

14                   Q. BY MR. ACKER: But Microsoft's concerns about  
15 having SCO's IP in its products wouldn't have been taken care  
16 of, wouldn't have been assuaged in Section 2 had they only  
17 gotten rights to UnixWare; right?

18                   A. That's a hypothetical because we never had that  
19 discussion.

20                   Q. All right. Why don't we play your deposition at  
21 Page 163 Lines 16 to 20.

22                   (A portion of the deposition was played.)

23                   Q. BY MR. ACKER: So that was true; right?

24                   A. I don't know. I mean, possibly not. But I think  
25 if that had been an issue, we could have likely convinced

1 Microsoft that the, you know, the vast preponderance of the  
2 code of UnixWare was all they needed to provide the IP  
3 protection they needed. But we didn't at that time consider  
4 that an issue in view that we had the rights to license them  
5 the entire portfolio.

6 Q. But wasn't it your understanding that Microsoft  
7 also needed the rights to the older UNIX technology to address  
8 its concerns?

9 A. Again, we never specifically had a discussion of  
10 this. It was our standard practice and SCO's predecessor's  
11 when licensing UNIX technology to also always license the  
12 preceding versions of the UNIX code, as well. That's what we  
13 were doing in this case.

14 Q. Why don't we take a look at your deposition on  
15 March 14, 2007, at Page 64 Lines 10 to 14.

16 (A portion of the deposition was played.)

17 Q. BY MR. ACKER: That testimony was accurate, wasn't  
18 it?

19 A. Again, I don't view that in conflict with what I'm  
20 saying right now.

21 Q. So part of what Microsoft wanted in negotiation  
22 around Section 2 was a license that protected them against  
23 potential claims relating both to UnixWare and to older SVRX  
24 technology; right?

25 A. That was the license that was provided to them.

1           Q.    So the license that was provided to them included  
2 both protection against violation of UnixWare and also older  
3 UnixWare technology; right?

4           A.    Older UnixWare technology, yes.

5           Q.    And for this release in license, Microsoft paid  
6 \$1 1/2 million; right?

7           A.    Yes.

8           Q.    And none of that money was provided to Novell;  
9 correct?

10          A.    No, it was not.

11          Q.    And you never sought Novell's permission before  
12 entering into that portion of the deal; correct?

13          A.    No.  Again, this was a UnixWare license.  And the  
14 standard matter of course was to provide a license to all  
15 preceding versions of UNIX.  That was, you know, the standard  
16 practice that had always been performed.

17          Q.    Let me turn to Section 4 of the Microsoft  
18 agreement.

19                Now, in order to be entitled to take the license in  
20 Section 4 of the agreement, Microsoft first had to pay  
21 \$7 million for the license in Section 3; correct?

22          A.    Correct.

23          Q.    And Section 3 of the Microsoft agreement is titled,  
24 if we could bring that up, "Option to Purchase UnixWare  
25 License."  Correct?

1           A.    Yes.

2           Q.    So they have paid \$7 million in this section,  
3           Section 3 in order to both take an option to get the UnixWare  
4           license and to actually get the license; correct?

5           A.    That option for that UnixWare license had  
6           significant limitations to it.

7           Q.    And the Section 3 provides for licenses of software  
8           in Exhibits A and B of the agreement; right?

9           A.    Yes.

10          Q.    And the license in Section 4 licensed the software  
11          listed in Exhibits A, B and C; right?

12          A.    Now, the primary component of Section 4 was an  
13          expansion of that UnixWare license.

14          Q.    I didn't ask you that.  What I asked you was, in  
15          Section 4, isn't it true that the license that was granted was  
16          to Exhibits A, B and C of the agreement?

17          A.    Yes.

18          Q.    And Exhibit C of the agreement contains UNIX  
19          System V Versions 1 through 4.2; correct?

20          A.    Yes.

21          Q.    So if we look up on the screen, here's Exhibit C.  
22          Everything that is highlighted that was granted as part of the  
23          Section 4 license is UNIX System V Version 4.2 or earlier  
24          software; right?

25          A.    Yes.

1 Q. And not only did Microsoft purchase a license to  
2 all of this software, that is, the versions that we've  
3 highlighted, but you also delivered actual copies of the code  
4 to Microsoft; right?

5 A. As many as we possibly could.

6 Q. So they not only got a license to use it, but they  
7 also got physical possession of the software?

8 A. Yes. And those older versions, by the way, were,  
9 the sole intent for them was for a source analysis repository.

10 Q. And before this license was signed, the 2003 deal  
11 with Microsoft, Microsoft did not have a preexisting license  
12 for any of this code that we've highlighted that is UNIX  
13 System V code Versions 1 to 4.2; right?

14 A. They at a previous time had a license, but I think  
15 that license had been revoked or discontinued. So at this  
16 time, they did not have a license.

17 Q. So at this time when they entered in 2003, they  
18 didn't have a license to any of this code; correct?

19 A. Correct.

20 Q. And you gave them a license to this code; correct?

21 A. As part of a broader UnixWare source code license,  
22 yes.

23 Q. And that code includes UNIX System V Versions 1 to  
24 4.2; right?

25 A. Yes.

1 Q. And in order to obtain this license in Section 4,  
2 Microsoft paid, initially paid an option amount of \$250,000;  
3 right?

4 A. Yes.

5 Q. And then they paid another \$8 million; right?

6 A. Yes.

7 Q. So this license in Section 4 cost Microsoft  
8 \$8 1/4 million?

9 A. Yes. Now, again, the majority of the value of that  
10 \$8 million was for an expansion of the UnixWare distribution  
11 lines.

12 Q. And they already paid \$7 million in Section 3 for  
13 UnixWare license; right?

14 A. For UnixWare source code license that was limited  
15 to a very limited set of Microsoft products called Services  
16 for UNIX and Connectix. And with the Section 4, they were  
17 allowed to use the UnixWare source code across their entire  
18 product line, which is a significant increase in their rights.  
19 And that was where the value was.

20 Q. Do you know of Microsoft ever distributing copies  
21 of UnixWare with their products?

22 A. I don't know if they have or not.

23 Q. You don't know if they've ever done that; right?

24 A. (Witness indicates by shaking head side to side.)

25 Q. You have to answer yes or no.

1           A.    I do not know.

2           Q.    Let me show you a chart of -- a list of SCOSource  
3 revenue licenses.  It's Exhibit 383.

4                    What I've handed to you and what's been admitted  
5 into evidence is Exhibit 383, which is, SCO's Supplemental  
6 Responses and Objections to Novell's Second and Third Set of  
7 Interrogatories.  And I want to direct your attention to a  
8 chart that's at NOVTR, and the page is 4238.

9           A.    All right.

10          Q.    And can you make out that chart on your screen?

11          A.    I'll look at it on the screen as opposed to  
12 potentially having a big mess with a loose set of papers.

13          Q.    Now, this is a listing, is it not, provided by your  
14 lawyers of all of the licenses that were entered in the  
15 SCOSource program?  Correct?

16          A.    Yes.

17          Q.    And the total amount that Novell -- or SCO  
18 collected as a result of the SCOSource program and these  
19 licenses was \$26,956,260.14; correct?

20          A.    Yes.

21          Q.    And the largest portions of that were the Microsoft  
22 deal at \$16,680,000; correct?

23          A.    Yes.

24          Q.    And then the Sun deal at \$9,143,450.63; correct?

25          A.    Yes.

1 Q. And if my math is correct, what we have left is a  
2 series of licenses to smaller entities for 1.1 million -- or  
3 \$1,132,809.51; correct?

4 A. Yes.

5 Q. And those licenses that you entered into, those  
6 other licenses Sun and Microsoft that you entered into as part  
7 of the SCOSource program were done in a variety of ways; fair?

8 A. They were intended to be effectively the same  
9 license, but the license I think evolved over time.

10 Q. And sometimes the licenses were done by what was  
11 called a click-through on the SCO website; right?

12 A. Yes.

13 Q. Let me show you what we've marked as Exhibit 422.  
14 Again, this has been admitted, Your Honor.

15 (Time lapse.)

16 THE WITNESS: Okay.

17 Q. BY MR. ACKER: Exhibit 422, the second page that  
18 we'll bring up on the screen is a screen shot of the SCO  
19 website regarding this SCO intellectual property license;  
20 correct?

21 A. Yes.

22 Q. And if you take a look, there's definitions that  
23 are provided on the SCO website as to what is being licensed  
24 if one comes on line and enters into one of these agreements  
25 with SCO; right?

1 A. Yes.

2 Q. And the first line says:

3 The agreement is the agreement between you and

4 the SCO Group, Inc., relating to rights acquired

5 by you.

6 Correct?

7 A. Yes.

8 Q. And then there's a definition of SCO IP. It says:

9 SCO IP shall mean the SCO intellectual

10 property included in its UNIX based code in object

11 code format licensed by SCO under SCO's standard

12 commercial license.

13 Correct?

14 A. Yes.

15 Q. And then you define for potential licensees what

16 UNIX based code shall mean; right?

17 A. Yes.

18 Q. And you define it by saying:

19 It is both UNIX System V and UnixWare.

20 Correct?

21 A. It says UNIX System V or UnixWare.

22 Q. It's both of those things; correct?

23 A. Yes.

24 Q. So when someone comes on line and clicks through

25 and gets one of these license, they're obtaining a license to

1 UnixWare System V and UnixWare; right?

2 A. Yes.

3 Q. You know how many of these licenses you entered  
4 into, the online click method?

5 A. A handful. Less than 20 or 30.

6 Q. Let me show you -- I'm going to show you a series  
7 of documents.

8 (Time lapse.)

9 I'll hand you these as a group. But I'm going to  
10 hand you -- I'll put them upside down so you can flip them  
11 back over. But Exhibit 257, which has been admitted;  
12 Exhibit 237, also been admitted; Exhibit 426, also been  
13 admitted; Exhibit 301, which has also been admitted;  
14 Exhibit 310, which has also been admitted; Exhibit 312, which  
15 has also been admitted; Exhibit 322, also been admitted;  
16 Exhibit 286, also been admitted; Exhibit 423, which has also  
17 been admitted.

18 If we could start with Exhibit 257, sir.

19 A. Okay.

20 Q. Exhibit 257, if you could bring that up, if we  
21 could go to the next page, the invoice.

22 You see there on the second page of Exhibit 257  
23 there's an invoice where an entity CDM purchased one of these  
24 SCO source licenses and paid SCO a total of \$9,865.45;  
25 correct?

1           A.    Yes.

2           Q.    And this was done as part of the SCOSource  
3           licensing program?

4           A.    Yes.

5           Q.    The click-through program; right?

6           A.    Yes.

7           Q.    And you didn't ask permission of Novell before  
8           entering into that agreement; correct?

9           A.    No.

10          Q.    And you didn't remit any of those -- any of that  
11          \$9,865 to Novell; correct?

12          A.    No.

13          Q.    Take a look at Exhibit 237.

14                Exhibit 237 is a license agreement between Computer  
15          Associates International, Inc., and the SCO Group; correct?

16          A.    Yes.

17          Q.    And this one is a written agreement; correct?

18          A.    Yes.

19          Q.    Signed by you?

20          A.    I believe so.

21          Q.    And if you take a look at the definition section,  
22          Paragraph 1.11, you define that you're granting a license to  
23          software products commonly known as UNIX System V and/or,  
24          and/or UnixWare; right?

25          A.    Yes.

1 Q. That was the license that you were granting to  
2 Computer Associates; right?

3 A. Yes.

4 Q. And for that license, Computer Associates paid  
5 you -- paid SCO \$20,000; right?

6 A. Yes.

7 Q. And you didn't ask Novell's permission before  
8 entering into this license; correct?

9 A. No.

10 Q. And didn't remit any of those funds to Novell;  
11 correct?

12 A. No.

13 Q. Take a look at Exhibit 426. This is another  
14 written agreement that was entered into between SCO and an  
15 entity referred to as Cymphonix; correct?

16 A. Yes.

17 Q. And again, we have a written agreement; right?

18 A. Yes.

19 Q. And it looks like there was as part of a  
20 development agreement between Cymphonix and SCO, Cymphonix  
21 also entered into one of the SCO intellectual property  
22 agreements; right?

23 A. I believe that to be the case.

24 Q. And if you take a look at that Exhibit A of this  
25 license, which is the intellectual property agreement --

1           A.    Yes.

2           Q.    -- and specifically the next page and look at the  
3 definitions, what was licensed to SCO under the -- license to  
4 Cymphonix under the intellectual property agreement was  
5 SCO UNIX based code; right?

6           A.    Yes.

7           Q.    And the definition of SCO UNIX based code was  
8 UNIX System V or UnixWare; right?

9           A.    Yes.

10          Q.    And Cymphonix paid Novell \$8,112 for this license;  
11 right?

12          A.    I believe that would be the case.

13          Q.    And none of that money -- paid SCO \$8,112; correct?

14          A.    Yes.

15          Q.    And none of that money went to Novell; right?

16          A.    I believe that to be the case.

17          Q.    And you didn't ask Novell's permission before  
18 entering into that agreement; correct?

19          A.    No.

20          Q.    Take a look at Exhibit 301.

21                 301 is another intellectual property license under  
22 the SCOSource program between SCO and an entity called  
23 Everyones Internet; right?

24          A.    Yes.

25          Q.    And again, you signed the agreement on behalf of

1 SCO?

2 A. Yes.

3 Q. And if we go to the definitions, we can again see  
4 what it was that was licensed; correct?

5 A. Yes.

6 Q. And what was licensed was SCO UNIX based code;  
7 correct?

8 A. Well, UNIX System V or UnixWare.

9 Q. Okay. Well, SCO UNIX based code is the definition  
10 of what the license is being granted for, but the definition  
11 of UNIX based code is UNIX System V or UnixWare; correct?

12 A. Yes.

13 Q. And for getting this license, Everyones Internet  
14 paid SCO \$534,444; correct?

15 A. Yes.

16 Q. None of that money went to Novell; right?

17 A. No.

18 Q. And you didn't ask permission of Novell before  
19 entering into that agreement; correct?

20 A. No.

21 Q. Why don't we take a look at Exhibit 310.  
22 Exhibit 310 is another intellectual property  
23 agreement that you signed on behalf of SCO with an entity  
24 called HEB or HEB. HEB Grocery Company LP; right?

25 A. Yes.

1 Q. And this is a similar license. If we take a look  
2 at the definitions -- well, what was licensed was something  
3 called SCO IP; right?

4 A. Yes.

5 Q. And the definition of SCO IP is SCO UNIX based  
6 code; right?

7 A. Yes.

8 Q. And that means UNIX System V or UnixWare; right?

9 A. Yes.

10 Q. And HEB paid SCO a half million dollars, \$500,000  
11 for this license; correct?

12 A. Yes.

13 Q. And none of that money went to Novell?

14 A. No.

15 Q. And you didn't ask Novell's permission before  
16 entering that that agreement; correct?

17 A. No.

18 Q. Why don't we take a look at Exhibit 312.

19 THE COURT: Unless you're about done with this  
20 witness, let's take our second break.

21 MR. ACKER: Very well, Your Honor.

22 THE COURT: Are you about done?

23 MR. ACKER: 15 minutes.

24 THE COURT: Let's take our second break.

25 15 minutes.

1 STATE OF UTAH.)

2 ) ss.

3 COUNTY OF SALT LAKE )

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

6 That as such reporter, I attended the hearing of  
7 the foregoing matter on April 29, 2008, and thereat reported  
8 in Stenotype all of the testimony and proceedings had, and  
9 caused said notes to be transcribed into typewriting; and the  
10 foregoing pages number from 77 through 144 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.

16

17

18

19

20

\_\_\_\_\_  
KELLY BROWN HICKEN, CSR, RPR, RMR

21

22

23

24

25

1 (Short recess)

2 THE COURT: You may proceed.

3 MR. ACKER: Thank you, Your Honor.

4 Q. Mr. Sontag, before the break, I believe we left  
5 off with Exhibit 312. If you would look at that, please.  
6 This is another intellectual property agreement between  
7 the SCO Group and Lane Furniture, correct?

8 A. Yes.

9 Q. And, again, if you take a look at the  
10 definitions -- if you would go to the next one, please --  
11 what's being licensed here is SCO IP, and, again, the  
12 definition is SCO UNIX-based code in Section -- in  
13 paragraph 1.7, and then the definition of what that is is  
14 UNIX System V or UnixWare, correct?

15 A. Yes.

16 Q. Did Lane Furniture pay SCO any money for this  
17 license?

18 A. I believe so.

19 Q. Do you know how much?

20 A. I do not.

21 Q. Were any of those funds remitted to Novell?

22 A. No.

23 Q. Did you ask permission before entering into  
24 this agreement with Lane Furniture?

25 A. No.

1 Q. Would you take a look at Exhibit 332. This is  
2 another SCOSource IP license, this time between OCE  
3 printing and SCO, correct?

4 A. Yes.

5 Q. And if you would take a look at the  
6 definitions, if you go to the second page, please, again,  
7 it's the same definition. SCO IP means SCO UNIX-based  
8 code, correct?

9 A. Yes.

10 Q. And the definition of what that is, SCO  
11 UNIX-based code, is UNIX SCO System V or UnixWare,  
12 correct?

13 A. Yes.

14 Q. And you were paid -- or SCO was paid \$49,500  
15 actually by Siemens for this license, correct? Does that  
16 sound right?

17 A. I believe that to be the case.

18 Q. And, again, none of that money was remitted to  
19 Novell, correct?

20 A. No.

21 Q. And you didn't seek permission before entering  
22 into this agreement, correct?

23 A. No.

24 Q. Take a look at the Exhibit 286. This is  
25 another SCO group intellectual property license, correct?

1 A. Yes.

2 Q. And this time it's entered into with Questar,  
3 correct?

4 A. Yes.

5 Q. And why don't we take a look at the definition  
6 section of this agreement. Here the definition was a  
7 little different as to what SCO IP rights were, correct?

8 A. Yes.

9 Q. And what was licensed to Questar was SCO IP  
10 rights, which shall mean SCO's intellectual property  
11 rights in any and all past, current or future versions  
12 of -- or portions of SCO's software products commonly  
13 known as UNIX System V and/or UnixWare correct?

14 A. Yes.

15 Q. That's what the license grant was, correct?

16 A. Yes.

17 Q. And if you take a look at paragraph 114 -- I'm  
18 sorry, 2.1 -- well, let's go back to -- if we could  
19 highlight 114.

20 And, again, the definition of UNIX-based code  
21 there includes both UNIX System V or UnixWare, right?

22 A. Yes.

23 Q. And Questar paid SCO \$19,125 for this license,  
24 correct?

25 A. Yes.

1 Q. And none of that money was remitted to Novell,  
2 correct?

3 A. No.

4 Q. And you didn't seek Novell's permission before  
5 entering into that license, right?

6 A. No.

7 Q. One last exhibit to show you. Let me show you  
8 what we've marked as Exhibit 227, Novell 227. And,  
9 Mr. Sontag, please feel free to look at any part of the  
10 exhibit, but I'm going to ask you about the e-mail on the  
11 second page in the middle of the page.

12 A. Okay. Just a moment.

13 Q. Sure.

14 A. Okay.

15 Q. Now, if you could take a look at that e-mail on  
16 the second page, in the middle of the page, it's an  
17 e-mail from Jeff Hunsaker at SCO to yourself, Mr. McBride  
18 and others at SCO. And it's sent on July 31, 2003,  
19 correct?

20 A. Yes.

21 Q. And what was Mr. Hunsaker's position -- his  
22 position at SCO was Senior Vice President of Worldwide  
23 Sales and Marketing, right?

24 A. I believe that to be the case.

25 Q. And Mr. Hunsaker currently is the president and

1 CEO of SCO, right?

2 A. I think at least the president of SCO  
3 Operations or something like that. I'm not sure what his  
4 exact title is now.

5 Q. And what he said in the middle of 2003, this  
6 e-mail followed a conference call about this SCOSource  
7 licensing program, right?

8 A. Yes.

9 Q. And the subject line there is: SCOSource  
10 issues and buyoff, correct?

11 A. Yes.

12 Q. And he wrote Darl, Chris, Kim and Kevin,  
13 correct?

14 A. Yes.

15 Q. And then he wrote:

16 During our SCOSource con call today, we  
17 discussed and would like to propose the following. The  
18 official name of this program will be the SCO UNIX IP  
19 Compliance License Program.

20 Correct?

21 A. Yes.

22 Q. And that's the name that was eventually used  
23 for this program of these contracts that we have  
24 just been through, right?

25 A. Yes, at least for a period of time.

1 Q. And then he wrote:

2 This is not a Unixware 7.13 SKU, right?

3 A. Yes.

4 Q. And then he wrote:

5 The license is called a SCO UNIX IP license for  
6 Linux. The only rights that this license provide is for  
7 Linux binary runtime copies. When we are ready to issue  
8 a similar license for AIX, it will be called the SCO UNIX  
9 license for AIX.

10 Correct?

11 A. Yes.

12 Q. Then he followed up with these words:

13 There is no connection between UnixWare,  
14 OpenServer and the SCO UNIX IP license whatsoever.

15 Right?

16 A. Well, I wouldn't agree with that  
17 characterization. These licenses are based on the same  
18 underlying IP that is in UnixWare and OpenServer.

19 Q. He is the current president of SCO,  
20 Mr. Hunsaker, right?

21 A. Yes.

22 Q. And what he wrote, at the time this program was  
23 taking off, in July of 2003, is:

24 There is no connection between UnixWare,  
25 OpenServer and the SCO UNIX IP license whatsoever.

1 Right?

2 A. I disagree with that characterization.

3 Q. And then he continued:

4 They are independent.

5 Correct?

6 A. Yes. That's what he put.

7 Q. And in 2003, that's what the Senior V.P. of

8 Worldwide Sales and Marketing of SCO, how he

9 characterized the SCOSource program, right?

10 A. They are not the same product, but they are --

11 the SCOSource license is IP based upon the UnixWare and

12 OpenServer products.

13 MR. JACOBS: I don't have anything further,

14 Your Honor.

15 THE COURT: Thank you.

16 Mr. Normand, you may examine.

17 MR. NORMAND: Thank you, Your Honor.

18 CROSS EXAMINATION

19 BY MR. NORMAND:

20 Q. Good afternoon, Mr. Sontag.

21 A. Good afternoon.

22 Q. Is it fair to say that, during your tenure at

23 SCO, you used the terms UnixWare and System V

24 interchangeably from time to time?

25 A. Yes.

1 Q. Why did you do that?

2 A. One of the primary reasons is that we were  
3 thinking about possibly renaming UnixWare to be System V,  
4 and that was under serious consideration until we  
5 determined there would be a lot of certification and a  
6 substantial amount of costs in renaming UnixWare, and so  
7 we determined that that was not possible. But, in terms  
8 of describing UnixWare, OpenServer, all of that, we would  
9 often use UNIX System V as the overall umbrella name for  
10 all of SCO's UNIX technologies.

11 Q. What was the point of using the phrase System V  
12 as an umbrella or a short name for all that technology?

13 A. It was just short for saying UNIX System V.

14 Q. Were you always careful to draw distinctions  
15 between the UnixWare trade name for the latest release  
16 and other uses of System V?

17 A. No.

18 Q. I want to start, Mr. Sontag, where Mr. Acker  
19 started, with Novell Exhibit 147. This was a document  
20 that referred to SVR 4 software libraries. Do you recall  
21 looking at that document?

22 A. Yes.

23 Q. This was the draft press release that you went  
24 through. Do you recall that?

25 A. Yes.

1 Q. Now, do you know what libraries are?

2 A. Libraries are a portion of an operating system  
3 that are used for applications to communicate with  
4 operating system.

5 Q. Do you know whether there are SVR 4 libraries  
6 in UnixWare?

7 A. I suspect that may be very well what those  
8 libraries are called. I don't specifically remember, but  
9 those libraries are referring to the UnixWare runtime  
10 libraries.

11 Q. Are libraries the same as releases of a  
12 software product?

13 A. No. Libraries are just a portion of an  
14 operating system release.

15 Q. OSR 5 libraries you refer to in this document  
16 as well. Do you know what that's a reference to?

17 A. I believe that's referring to the OpenServer  
18 Version 5 runtime libraries.

19 Q. And what was OpenServer?

20 A. OpenServer was a version of UNIX developed by  
21 Santa Cruz that was based on UNIX System V, Release 3.

22 Q. Let me take a step back, Mr. Sontag. When did  
23 you join SCO?

24 A. October of 2002.

25 Q. And with whom did you deal in acquiring an

1 understanding of the subject matter that has been  
2 discussed?

3 A. Of a lot of individuals inside of SCO, Bill  
4 Broderick, John Maciaszek, the attorneys, Jeff Hunsaker,  
5 a whole host of people.

6 Q. Had you worked at Novell previously?

7 A. Yes, I have.

8 Q. Turn to Novell 159.

9 THE COURT: What number?

10 MR. NORMAND: 159.

11 Q. This is the document, Mr. Sontag, in which SCO  
12 makes the statement that it is the developer and owner of  
13 SCO UnixWare and SCO OpenServer, both based on UNIX  
14 System V technology. Do you recall reading the  
15 document?

16 A. Yes.

17 Q. And do you recall Mr. Acker referring to the  
18 tree of a software system?

19 A. Yes.

20 Q. And what did you understand him to mean?

21 A. Well, what I understand it to mean is: When  
22 software is developed, you build a version. You build a  
23 release and then usually, if you're going to create a  
24 subsequent release of that software, you create a new  
25 branch of software, start again, and make modifications

1 to that version of software and so on and so on, just  
2 like when you're developing a document, a legal document,  
3 maybe, in a legal environment with a number of  
4 colleagues, you may create a first version of a document,  
5 circulate that, make modifications, you know, get the  
6 responses back, publish a new revision of that document  
7 and so on and so on.

8 Q. Now, you testified earlier about your  
9 understanding of the relationship between SVR 4 and UNIX  
10 System V, Release 4 and Unixware. Do you recall that  
11 testimony?

12 A. UnixWare is based on SVR 4. It's developed out  
13 of SVR 4 and actually the first version of UnixWare is  
14 based on SVR, I think, 4.1.

15 Q. Mr. Sontag, this is attachment 1 to the Sun  
16 agreement. Do you recall viewing this earlier today?

17 A. Yes.

18 Q. And do you see Section 2, a description of  
19 technology, additional technology?

20 A. Yes.

21 Q. And do you see the fourth line there, System V,  
22 Release 4.2 and products?

23 A. Yes.

24 Q. And then do you see the parenthetical there?

25 A. Yes. UnixWare 1, UnixWare 1.1, UnixWare

1 1.1.1.

2 Q. You took part in negotiating this agreement,  
3 correct?

4 A. Correct.

5 Q. What did you understand that reference in  
6 attachment 1 to mean, that parenthetical reference?

7 A. Well, that was previous releases of UnixWare.

8 Q. What is your understanding of when UnixWare was  
9 developed?

10 A. UnixWare was developed in the early '90's,  
11 primarily when Novell was -- had ownership for the UNIX  
12 intellectual property.

13 Q. And do you see the next line in this  
14 attachment, System V, Release 4.2 MP and products?

15 A. Yes.

16 Q. I take it your intent was the same, by using  
17 that parenthetical?

18 A. Yes.

19 Q. Okay.

20 Will you pull up Novell Exhibit 173, and at the  
21 bottom of the third page.

22 This is the document, Mr. Sontag, that the  
23 first paragraph at the top in the blowup, it says:

24 In the past SCO's UnixWare and OpenServer  
25 license agreements did not allow these UNIX libraries to

1 be used outside of SCO's operating systems.

2           Q.    Do you see that language?

3           A.    Yes, I do.

4           Q.    Do you know whether a Unixware license relates  
5 to technology that goes back to the days of AT&T?

6           A.    Yes.

7           Q.    Do you know whether SCO ever paid Novell any  
8 money for the technology going back to AT&T that was part  
9 of the UnixWare license?

10          A.    No, I don't believe they did.

11          Q.    Do you have a view as to whether the UnixWare  
12 license allowed the licensee to use the SVR 4  
13 libraries?

14          A.    I believe they would.

15          Q.    And what's the basis for that understanding?

16          A.    That was the libraries that were included with  
17 UnixWare.

18          Q.    Now, at the time of the SCOSource agreements  
19 that you reviewed in some detail, were you concerned  
20 about the use of UnixWare and OpenServer technology with  
21 Linux?

22          A.    Yes.

23          Q.    In what way?

24          A.    That any of that IP had been misappropriated in  
25 any form or fashion into Linux.

1 Q. Okay.

2 Will you pull up SCO Exhibit 402.

3 Mr. Sontag, SCO Exhibit 402 is SCO System V for  
4 Linux sales guide, internal use only. Are you roughly  
5 familiar with this document?

6 A. Yes.

7 Q. Could we go to the first page. And this is the  
8 executive summary of the document. I take it you've seen  
9 this before?

10 A. Yes.

11 Q. Who is Jay Peterson?

12 A. Jay Peterson was an employee of the SCOsource  
13 division. He worked for me.

14 Q. Do you see in the middle of the paragraph, it  
15 says:

16 The first product is called SCO System V for  
17 Linux Release 1.0, SCO UNIX runtime libraries.

18 A. Yes.

19 Q. And the next sentence:

20 It licenses the SCO OpenServer COFF static  
21 shared libraries.

22 Do you see that?

23 A. Yes.

24 Q. What was your understanding of what that  
25 meant?

1           A.    That the primary product of that first release  
2 of the SCOSource runtime library was the OpenServer COFF  
3 runtime libraries.

4           Q.    And what is your basis for that understanding?

5           A.    Because that's what I understood it to be at  
6 the time.

7           MR. NORMAND:  Would you go to page 8 and blow  
8 up the top part of that.

9           Q.    This paragraph, the first one in the section  
10 called SCO UNIX Applications, has the following sentence:

11                  ELF is the newer and current System V format  
12 and is used in UnixWare.

13          A.    Yes.

14          Q.    What does that reference mean?

15          A.    That's referring to that the primary runtime  
16 libraries in UnixWare are also called ELF.

17          Q.    Now, if you look at page 11, the bottom  
18 paragraph.

19                  If you would pull that up.

20                  The following language appears:

21                  Some of our existing OpenServer UnixWare  
22 customers may be considering a migration to Linux.  If  
23 they are, the SSVL product may be attractive to them,  
24 since it can enable them to run existing OpenServer or  
25 UnixWare applications on Linux.

1           What does that language signify?

2           A.   It's just saying, you know, that kind of a  
3 basis for actually starting this program was that we had  
4 some of our existing customers that came to us and said:  
5 Hey, we would like to be able to run our UNIX  
6 applications either for OpenServer or UnixWare on Linux.  
7 Can you help us, you know, come up with a method to be  
8 able to do that?

9           And that was the basis for starting SCOSource.  
10 And the first product that was released was intended to  
11 provide that solution for those customers.

12          Q.   One more snippet from this document. The next  
13 page, second full paragraph, contains the following  
14 statement:

15           In some cases we believe they may be using our  
16 libraries already to run OpenServer or UnixWare  
17 applications.

18          Do you see that language?

19          A.   Yes.

20          Q.   Is this reflective of a view that at the  
21 beginning of the SCOSource program, you were concerned  
22 about the use of OpenServer in UnixWare technology?

23          A.   Well, we had customers that came to us and said  
24 that they were doing this very thing. They were using  
25 the runtime libraries on Linux, and their review of the

1 end user license agreement for OpenServer or UnixWare  
2 made them come to, I believe, the correct conclusion that  
3 that was not appropriate. They wanted to be able to  
4 accomplish that in an appropriate manner, and so they  
5 came to SCO asking for us to provide a method for them to  
6 license those libraries to use with Linux.

7 Q. And the date of this document is February,  
8 2003, right?

9 A. I believe so, yes.

10 Q. Is it fairly early in the SCO program process?

11 A. Yes, it is.

12 Q. Novell Exhibit 194. This is a document you  
13 were asked about earlier, a letter to Fortune 1000  
14 companies?

15 A. Yes.

16 Q. Do you recall going over this document? And  
17 this document contains a statement that there had been,  
18 in SCO's view, System V code copied into Linux. Do you  
19 recall that?

20 A. Yes.

21 Q. Was it your view, at the time, that the System  
22 V code that had been copied into Linux was part of  
23 UnixWare?

24 A. It very well could be. I mean, the vast  
25 majority of the code is, you know, identical to what is

1 in UnixWare, that we had concerns with.

2 Q. We have in the second paragraph from the  
3 bottom, the statement that we have evidence that portions  
4 of UNIX System V software code have been copied into  
5 Linux and that additional other portions of UNIX System V  
6 software code have been modified and copied into Linux.

7 Do you see that statement?

8 A. Yes.

9 Q. Are there methods and concepts, in your view,  
10 that were developed by AT&T that are in UnixWare?

11 A. Yes.

12 Q. In your view, is there code developed by AT&T  
13 that is in UnixWare?

14 A. Yes.

15 Q. And, in your view, did you have the right to  
16 license that material to customers without submitting any  
17 payment for those rights to Novell?

18 A. Yes.

19 Q. Next page, top. You say:

20 Consistent with this effort, on March 7 we  
21 initiated legal action against IBM for alleged unfair  
22 competition and breach of contract with respect to our  
23 UNIX rights.

24 Do you see that sentence?

25 A. Yes.

1 Q. In your agreements with Microsoft, Sun  
2 SCOSource agreements, did you ever purport to license  
3 anything other than SCO's IP rights?

4 A. No.

5 Q. You were asked about Mr. -- or Dr. Cargill's  
6 expert report. Do you recall that?

7 A. Yes.

8 Q. 428, page 3.

9 And if you would blow up that bottom paragraph.

10 Dr. Cargill states in this report:

11 Overall, Linux is a substantial copy of the  
12 UNIX SVR 4 operating system.

13 Do you see that language?

14 A. Yes.

15 MR. NORMAND: And can you side-by-side that  
16 with page 12 of the Sun agreement?

17 Q. We went over, Mr. Sontag, this language in the  
18 bottom of the divided documents. System V, Release 4.2  
19 and products, and then the parenthetical in UnixWare?

20 A. Yes.

21 Q. And Dr. Cargill is concluding that Linux is a  
22 substantial copy of the SVR 4 operating system. Do you  
23 see that?

24 A. Yes.

25 Q. You were told in your examination that

1 Dr. Cargill had concluded that Linux is substantially  
2 similar to SVR 4. Do you recall that?

3 A. Yes.

4 Q. Is it fair to say that one could equally  
5 accurately say that Linux is substantially similar to  
6 UnixWare?

7 A. Yes.

8 Q. Had you had occasion to read this report --

9 A. I had not.

10 Q. -- before it was presented or given to you  
11 today?

12 A. No, I had not.

13 Q. You're familiar with Malloc code?

14 A. Yes, I am.

15 Q. And how did your -- or SCO's reliance on Malloc  
16 code come to unfold?

17 A. I think it was in February or March or April of  
18 2003, that we became aware of the Malloc code example  
19 of -- you know, kind of some fairly obvious and  
20 easy-to-see literal copyright infringement that had  
21 occurred, was code that was in a Silicon Graphics set of  
22 open source software that was part of Linux that was  
23 substantially the same as the UNIX System V, Release 4.2  
24 ES code that it had licensed to Silicon Graphics.

25 And it was very plain and apparent to see that

1 there was a substantial amount of direct, literal copying  
2 that had occurred, which was actually surprising to me  
3 that it would be so obvious and not munged up more than  
4 it was.

5 Q. The Malloc code is from UNIX System V, Release  
6 3, is that correct?

7 A. The Malloc code is in many previous releases of  
8 UNIX and small modifications or additions made to that  
9 code with each additional release, but it's been  
10 substantially similar for many UNIX releases, and the  
11 code is substantially similar between UnixWare and many  
12 previous, you know, releases, at least through the last  
13 10 or 20 years and.

14 Q. And in your view, when you were with SCO, did a  
15 license to UnixWare permit the licensee to use the Malloc  
16 code?

17 A. Yes.

18 Q. Novell 274. You were shown this letter from  
19 Mr. McBride to Lehman Brothers. Do you recall briefly  
20 reviewing this document?

21 A. Yes.

22 Q. And in the document, Mr. McBride makes  
23 reference to, quote, SCO's rights in UNIX.

24 Do you recall that?

25 A. Yes.

1 Q. Again, in all these agreements we are talking  
2 about, did SCO purport to release or license any  
3 technology other than the ones that it thought it had  
4 rights to?

5 A. No.

6 Q. Page 2, towards the bottom. Do you recall  
7 looking at that long list of files and going through this  
8 language?

9 A. Yes.

10 Q. Is there ABI code in UnixWare?

11 A. Yes, there is.

12 Q. How do you know that?

13 A. I have been made aware of that through the  
14 course of our investigations, and so I was aware that  
15 there was ABI code in UnixWare.

16 Q. Let's look at Novell 57. Maybe SCO 57.

17 Do you recall going over the Sun agreement with  
18 Mr. Acker?

19 A. Yes, I do.

20 Q. Can you take a step back and tell me how it  
21 came to be that there was a 2003 Sun agreement?

22 A. Back in the late fall of 2002, we had a  
23 business and engineering meeting with Sun; some of Sun's  
24 executives, some of SCO's executives, some our engineers,  
25 their engineers, trying to determine if there was, you

1 know, business opportunities working together, and I  
2 think at that time, we had told them that we had, you  
3 know, additional SCO intellectual property that we would  
4 be willing to discuss with them and license; that we were  
5 also interested in potential joint marketing  
6 opportunities and otherwise.

7           And in early 2003, we started having  
8 discussions with Sun about licensing UnixWare into their  
9 products. Sun was -- had a substantial UNIX business in  
10 the form of Solaris that, at the time, only ran on a  
11 specialized version of a processor called a spark  
12 processor. They had a desire to be able to run their  
13 Solaris operating system software on a more general  
14 PC-type, Intel-compatible processors, which is the  
15 primary capability of SCO's UnixWare releases and all of  
16 the software drivers that we had available with UnixWare.

17           So they became interested in taking a license  
18 for the UnixWare source code and the drivers in order to  
19 develop an Intel-compatible version of Solaris, and that  
20 was the primary motivation for the discussions and the  
21 ultimate license agreement that was entered into in 2003.

22       Q. You referred to drivers. What are drivers?

23       A. Drivers are additional pieces of code that  
24 allow peripherals, a network card, a keyboard, different  
25 components or portions of the computer hardware to be

1 able to interact and operate with the operating system.  
2 They are an important piece that if you don't have a  
3 broad array of software drivers available, that operating  
4 system will not work with a wide variety of hardware  
5 that's available out there, limiting your potential  
6 customer base.

7 Q. And did Sun get drivers?

8 A. Yes, they did.

9 Q. In the 2003 agreement?

10 A. Yeah. It was very important for them.

11 Q. Drivers for what?

12 A. For UnixWare.

13 Q. Did they get drivers for the older System V  
14 technology?

15 A. No, they did not.

16 Q. Do you think they could use the older System V  
17 releases as a stand-alone product without the drivers for  
18 them?

19 MR. ACKER: Objection. Calls for  
20 speculation.

21 THE COURT: I'll let him testify as to his  
22 understanding of that.

23 THE WITNESS: It wouldn't make sense. If  
24 you're developing a software product, you want to use the  
25 latest version of the source code of that software to

1 develop that product because it would have the latest bug  
2 fixes and features and capabilities. Same with being  
3 necessarily compatible with the hardware drivers that  
4 would be associated with that operating system product.

5 Q. You went through a couple of attachments to the  
6 1994 Sun agreement and then the 2003 Sun agreement.

7 Could we pull those up side-by-side? It's  
8 Novell 187 and Novell 5. And at 187, go to page 11, and  
9 in 5, would you pull up page 19.

10 Do you recall going through these attachments,  
11 Mr. Sontag?

12 A. Yes, I do.

13 Q. And I think, although you haven't had time to  
14 pore over it, these are the same list of products,  
15 correct?

16 A. Yes. They appear to be basically the same.

17 Q. Now, as of 2003, Sun already had rights to all  
18 of these products, correct?

19 A. Yes. I believe so.

20 Q. And this will be a little bit redundant to what  
21 you've testified to, but in general, what did you  
22 understand those rights to be as of 2003?

23 A. As of 2003, Sun had the most substantial rights  
24 of any UNIX licensee. They had source code for, you  
25 know -- they had source sublicensing rights, very broad

1 source sublicensing rights that no other UNIX licensee  
2 had, which is why they had paid a substantial amount of  
3 money because they had the ability, without any  
4 involvement of Novell or SCO or whoever was in control of  
5 the UNIX contracts, to be able to license the Solaris  
6 source code to their customers who, in turn, could also  
7 sublicense the software. That was a substantial right.

8 Q. Sun had paid 82 1/2 million dollars for those  
9 rights, correct?

10 A. Correct.

11 Q. Could Sun, under that 1994 agreement,  
12 distribute its Solaris product to as many as a hundred  
13 licensees?

14 A. Yes.

15 Q. A thousand?

16 A. A thousand. A million. They, in turn, could  
17 sublicense that source code to their customers, so, it  
18 could -- Solaris could be very broadly distributed very  
19 easily, with the rights that Sun had in the 1994  
20 agreement.

21 Q. Now, what do you recall discussing with Sun  
22 about whether there were confidentiality restrictions in  
23 the 1994 agreement?

24 A. I had raised that there were confidentiality  
25 provisions. They, as part of the negotiating, tit for

1 tat, kind of strongly stated that they believed that most  
2 of those confidentiality provisions had been undermined  
3 or waived by disclosures of the UNIX code over the years.  
4 They gave examples of the Lion's Book and some other  
5 examples to make their point. I, in doing my job, tried  
6 to press back and emphasize that I thought it was  
7 important that they, you know, had confidentiality  
8 provisions.

9           Their position was that, with their broad  
10 licensing rights and what they were intending to do, they  
11 felt that they had the right to basically, in a, you  
12 know, Sun's sort of style, release an open source version  
13 of Solaris with the rights they had in 1994.

14       Q.    And do you think that position by Sun bore on  
15 the price that was negotiated for the agreement?

16       A.    For the 1994 agreement?

17       Q.    The 2003.

18           MR. ACKER:  Objection.  That calls for  
19 speculation.  He can't possibly know what's in Sun's  
20 mind.

21           MR. NORMAND:  Mr. Sontag negotiated the  
22 agreement.  He can recall parts of negotiations,  
23 inferences, and can make conclusions from what Sun was  
24 telling them how much they might be willing to pay.

25           THE COURT:  Overruled.  Go ahead.

1           THE WITNESS: Certainly Sun felt like they  
2 already had substantial rights and they had already paid  
3 a substantial amount of money for their -- you know, the  
4 UNIX rights that they already had in the 1994 agreement.  
5 Their primary interest was in being able to enable a  
6 Solaris-on-Intel version, and their primary interest was  
7 then the UnixWare rights that we would be licensing to  
8 them. And that was, I believe, where they viewed the  
9 preponderance of the value to lie.

10         Q.    Would it be fair to say that, as of the 2003  
11 agreement, Sun was already in the business of  
12 commercially licensing its derivative work, Solaris?

13         A.    Yes.

14         Q.    And the SVRX material therein?

15         A.    Yes.

16         Q.    Now, you mentioned, in response to one of  
17 Mr. Acker's questions, that there was an important  
18 restriction on what was described to you as open source  
19 rights in the 2003 agreement. Can you expand on that a  
20 little?

21         A.    Well, this was one area that they wanted to be  
22 able to make sure they -- you know, that the open  
23 sourcing that they intended to do, which they believed  
24 they already had rights to do, that they had complete  
25 coverage for. So this is another kind of

1 belt-and-suspenders sort of addition they wanted in the  
2 agreement was to broaden the confidentiality provision to  
3 allow them to, you know, under a -- you know, a specific  
4 version of an open source license that was not Linux,  
5 that valued the software, they could, you know, with the  
6 addition of the 2003 agreement, open source in a manner  
7 that was, you know, defined by the 2004 agreement.

8 Q. This is the for-value language that you're  
9 talking about?

10 A. The for-value language, that it was intended  
11 that they could not release Solaris under the Linux GPL  
12 open source license that would not pass muster with the  
13 for-value provision in the 2004 agreement.

14 Q. And, again, a little redundant, but why did  
15 that matter to you, that restriction?

16 A. Well, we wanted to make sure that Solaris was  
17 not just, wholesale, dumped into Linux, that that would  
18 be a problem, but we felt that Sun had substantial rights  
19 and that if they were doing another version of open  
20 source that met with the requirements in the agreement,  
21 that they had the rights to do so.

22 MR. NORMAND: Would you pull up Novell Exhibit  
23 5 at page 20 -- let's do Novell 187.

24 Q. This is, when we get to it, the second page of  
25 the attachment to the Sun agreement that goes over the

1 technology that was licensed to them.

2 Q. Do you recall going over that?

3 A. Yes.

4 Q. And there were various SVR 4.1 and 4.2 releases  
5 listed on that second page. Do you recall that?

6 A. Yes.

7 Q. And do you recall being asked about releases  
8 identified in a schedule to the APA?

9 A. Yes.

10 Q. I take it you had occasion to review the APA  
11 during your tenure at SCO?

12 A. I did review it a number of times.

13 Q. And you were asked about the schedule that  
14 identified what you called products. Do you recall that?

15 A. Yes.

16 Q. And I wanted to ask you some questions about  
17 the similarity between that list of products and this  
18 list of products in attachment 2, page 2 of the Sun  
19 agreement. Page 2 of the Sun agreement -- I'll just read  
20 to you until we get this up -- lists the following two  
21 products as -- may I approach, Your Honor?

22 THE COURT: You may.

23 Q. As the most recent two new releases to which  
24 Sun gained rights under the 2003 agreement. Do you see  
25 that?

1       A.    Yes.

2       Q.    And could you read what those two releases are?

3       A.    Open UNIX 8, also known as UnixWare 7.1.2, and

4 System V, Release 5 and, parenthetically, UnixWare 7.0,

5 7.01, 7.1, 7.11, 7.1.1 plus LKP.

6       Q.    At the top of the page are there SVR releases

7 listed?

8       A.    Yes.

9       Q.    And what are those releases?

10      A.    System V, Release 4.1 ES, 3B2; System V,

11 Release 4.1 C2, 3B2; System V, Release 4.1 ES; System V,

12 Release 4.2 and products; UnixWare 1.0, 1.1 and 1.1.1;

13 and System V, Release 4.2 MP and products; UnixWare 2.0,

14 2.1 and 2.12.

15      Q.    And what is the MP?

16      A.    Multiprocessor.

17      Q.    And what can you tell me about how that release

18 of System V came about?

19      A.    Different versions of UnixWare were released,

20 some that would support a single computer processor,

21 other versions that allowed for the software to be run

22 across multiple processors at the same time, to allow

23 more work to be accomplished at the same time, allowing

24 the processing to occur more quickly.

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

1           THE COURT:  You may.

2       Q.  I'm handing you, Mr. Sontag, a copy of the APA.

3 Turn to the schedule that you were asked about earlier.

4       A.  Schedule 1.1A?

5       Q.  Yes.

6       A.  Assets?

7       Q.  Yes.

8           And if you would blow up the bottom line, item

9 66.

10           Now, with reference to attachment 1 to the Sun

11 agreement that we were looking at earlier --

12       A.  Yes.

13       Q.  -- the most recent releases of System V that

14 were included in the attachment to the Sun agreement,

15 System V 4.1 ES/3B2, is that product included in the list

16 in the APA?

17       A.  Yes, it is.

18       Q.  4.1 C2/3B2, is that included in the list in the

19 APA?

20       A.  Yes.

21       Q.  Do you see an ES/3B2 product listed?

22       A.  I'm assuming that's it right there, but maybe

23 I'm reading it wrong.

24       Q.  Does that say ES/3B2?

25       A.  No, it does not.

1 Q. Does it say ES/C23B2?

2 A. No.

3 Q. So those two most recent System V releases in  
4 the Sun agreement aren't listed in the APA as products,  
5 are they?

6 A. No.

7 Q. What have you understood the term "open source"  
8 to mean during your tenure at SCO?

9 A. Well, it varies. There's different open source  
10 licenses, but, in general, the high level, it is making  
11 the source code available to various parties, your  
12 customers or others, that they can then view or modify  
13 that source code. In some cases, there are requirements  
14 on returning the modifications back or making the  
15 modifications available to others.

16 Q. And your understanding of the 2003 Sun  
17 agreement is that such rights, at least in full, were not  
18 given to Sun; is that correct?

19 A. Prior to the 2003 agreement?

20 Q. In the 2003 agreement.

21 A. The 2003 agreement gave them limited open  
22 source rights. There were restrictions to what they  
23 could do in terms of open sourcing in the 2003  
24 agreement.

25 Q. You were asked, Mr. Sontag, whether you knew

1 why two System V releases in the 1994 Sun agreement had  
2 been described as deliberately omitted. Do you recall  
3 those questions?

4 A. Yes.

5 Q. And do you recall what your answer was?

6 A. I do not.

7 Q. Do you know whether Sun had already had a  
8 license to those releases of System V before the 1994  
9 agreement?

10 A. I do not know.

11 Q. Do you know whether they had already had a  
12 license and terminated the license?

13 A. Sun?

14 Q. Yes.

15 A. I do not know.

16 Q. Who, at SCO, might know the answer to that?

17 A. I suspect Bill Broderick, John Maciaszek would  
18 be the ones that most likely would know that answer.

19 Q. Now, to state the obvious, at the time of the  
20 2003 Sun agreement, Sun was an existing licensee of UNIX;  
21 is that right?

22 A. Yes.

23 Q. And I think you testified earlier that part of  
24 what Sun obtained under the 2003 agreement was the right  
25 to obtain copies of the older versions of System V; is

1 that right?

2 A. Yes.

3 Q. This is from amendment number 1 to the APA. I  
4 take it you had occasion to review that amendment during  
5 your tenure at SCO?

6 A. Yes.

7 Q. This amends part of the APA to state as  
8 follows, paraphrasing of course: Buyer, Santa Cruz,  
9 shall be entitled to retain 100 percent of the following  
10 categories of SVRX royalties. And Rule 2 says that  
11 source code right-to-use fees under existing SVRX  
12 licenses and the licensing of additional CPU's, and from  
13 the distribution by buyer of additional source code  
14 copies.

15 Do you see that language?

16 A. Yes.

17 Q. As of the 2003 agreement, Sun already had  
18 source code copies to all of the System V releases that  
19 were listed in the 1994 agreement, correct?

20 A. Yes.

21 Q. And when you were shown earlier, by Mr. Acker  
22 and by myself, the similarity of System V releases  
23 between the 2003 agreement and the 1994 agreement, what  
24 Sun is obtaining is additional copies of those same  
25 releases, correct?

1           A.    Yes.

2           Q.    You were asked by Mr. Acker, paraphrasing,  
3 whether, to your understanding, SCO had the right to  
4 license the prior System V products with the UnixWare  
5 license. Do you recall that question?

6           A.    Yes.

7           Q.    Mr. Sontag, I want to show you language from,  
8 again, amendment 1 to the APA, which provides as follows:

9                   Buyer, Santa Cruz, shall have the right to  
10 enter into amendments of the SVRX licenses as may be  
11 incidentally involved through its rights to sell and  
12 license UnixWare software.

13                   Do you see that?

14          A.    Yes.

15          Q.    And then, at the bottom, it says:

16                   Buyer shall not enter into new SVRX licenses  
17 except in the situation specified in little "i."

18                   Do you recall reviewing this language during  
19 your tenure at SCO?

20          A.    Yes.

21          Q.    Do you recall forming a view as to what it  
22 meant for SCO to have the right to license SVRX material  
23 incidentally to licensing UnixWare?

24          A.    That was the basis of my belief that SCO had  
25 that right.

1 Q. You were shown this language earlier,  
2 Mr. Sontag -- well, the first paragraph, the letter in  
3 which Mr. Luehs, I think it is, says that the agreement  
4 between Santa Cruz and Novell requires prior written  
5 approval from Novell for all new agreements or changes to  
6 current agreements relating to System V.

7 Do you see that language?

8 A. Yes.

9 Q. Is it your understanding that if Santa Cruz was  
10 executing a Unixware license that it didn't need to get  
11 Novell's approval to license SVRX material with that  
12 UnixWare license?

13 A. That was my understanding.

14 Q. Now, this document is dated May 20, 1996,  
15 correct?

16 A. Yes.

17 Q. This is a letter from Novell three days later,  
18 May 23, 1996, in which Novell says that it has  
19 transferred to SCO Novell's existing ownership interest  
20 in UNIX system-based offerings and related products. Do  
21 you see that language?

22 A. Yes.

23 Q. Was it your understanding, during your tenure  
24 at SCO, that SCO could license UnixWare however it  
25 wanted?

1       A.    Yes.  That was my understanding.

2       Q.    And was it your understanding that SCO could  
3 license System V products with UnixWare?  Was that your  
4 understanding?

5       A.    Yes.

6       Q.    You were asked about the Microsoft agreement.  
7 Do you recall that?

8       A.    Yes.

9       Q.    And, again, in summary, can you tell me how it  
10 came to be that you ended up in negotiations with  
11 Microsoft regarding that agreement?

12      A.    In early 2003, we came in contact with  
13 Microsoft representatives who were interested in pursuing  
14 a possible license to UnixWare technologies to use in  
15 some of their, what they called UNIX-compatibility  
16 products within Microsoft Windows.  It started a set of  
17 negotiations that occurred through the early part of 2003  
18 culminating in the UnixWare license agreement with  
19 Microsoft.

20      Q.    Now, in the time leading up to the beginning of  
21 those negotiations, had SCO made any public statements or  
22 assertions that there was any SCO IP in any Microsoft  
23 products?

24      A.    I believe there had been some, you know, broad  
25 discussion that there might be IP issues, and not only in

1 Linux but other operating systems, including possibly  
2 Windows.

3 Q. And was that a focus of your discussions with  
4 Microsoft or was it more collateral?

5 A. It certainly was a portion of the discussion  
6 because they certainly wanted to have, you know,  
7 appropriate IP coverage for their products.

8 Q. Now, in Section 2 of the Microsoft agreement,  
9 SCO releases any claims it might have against Microsoft;  
10 is that right?

11 A. Yes.

12 Q. In that agreement, Section 2, did SCO purport  
13 to release any of Novell's claims that it might have  
14 against Microsoft?

15 A. No.

16 Q. Did SCO claim to have the right to release  
17 claims for IP that it didn't own?

18 A. No.

19 Q. Section 2.2 of the Microsoft agreement which  
20 you spoke about earlier is a license for Microsoft  
21 products.

22 A. Yes.

23 Q. Does that section pertain to any particular  
24 technology?

25 A. It pertains to UnixWare.

1 Q. Did you purport to license to Microsoft any  
2 intellectual property that you didn't have rights in?

3 A. No.

4 Q. This is the term sheet that was shown to you  
5 earlier. Can you tell me a little bit about how this  
6 came to be created?

7 A. I think there was a desire to -- that Microsoft  
8 wanted to know what we could possibly have available to  
9 license to them. They had, you know, certain things that  
10 they were interested in. And I, you know, with the help  
11 of others, put together a list of possible topic areas  
12 that could be of interest to Microsoft that was the basis  
13 for starting a discussion.

14 Q. Is that list of products in paragraph 3 in any  
15 particular order?

16 A. No, they are not.

17 Q. The System V term that you assumed Microsoft  
18 would be familiar with?

19 A. I think they would be.

20 Q. Perhaps even more so than UnixWare?

21 A. Yes.

22 Q. Section 3 of the Microsoft agreement was a  
23 Unixware license, correct?

24 A. Yes, it was.

25 Q. Was it a full UnixWare license?

1           A.    It was a limited UnixWare license to only a  
2 limited set of Microsoft products.

3           Q.    Your understanding of this Court's August '07  
4 order is that Novell owns the SVRX copyrights that are in  
5 UnixWare.  Is that fair to say?

6           A.    I do understand that.

7           Q.    So, when you licensed Microsoft UnixWare, you  
8 were licensing the right to use Novell copyrighted  
9 material under the Court's order; is that right?

10          A.    That would be a determination that you could  
11 come to.

12          Q.    Did you pay Novell any money for that Section 3  
13 UnixWare license?

14          A.    No, we did not.

15          Q.    Do you know if Novell is seeking any money from  
16 that Section 3 license?

17          A.    I don't believe they are.

18          Q.    Section 4 of the Microsoft agreement.  Could  
19 you describe your discussions with Microsoft regarding  
20 that section.

21          A.    Microsoft was interested in having a couple of  
22 options when they undertook the source code license for  
23 UnixWare.  They wanted to be able to first evaluate the  
24 source code and determine if it would be useful to them.  
25 So that was provided to them under the initial agreement.

1 They wanted to have the option to be able to use the  
2 technology in a set of products, which was the first  
3 option or Section 3 of the agreement. And then they also  
4 wanted to have the rights to use the UnixWare source code  
5 and derivative products in all of their products, broadly  
6 across all of Microsoft products. And that was the  
7 primary component of Section 4. So that was a second  
8 option that they could obtain.

9 Q. In your discussions with Microsoft regarding  
10 this agreement, what did you say to them about the  
11 subject matter of the expanding UnixWare license in  
12 Section 4? What do you recall discussing with them?

13 A. That it was a significant expansion of their  
14 rights for how they could utilize that UnixWare source  
15 code, that it wasn't just a limited set of products that  
16 had a fairly small, you know, distribution footprint, but  
17 it was all of Microsoft's products and millions and  
18 millions of products. And that was a substantial  
19 expansion in how they could use that UnixWare  
20 technology.

21 Q. Now, in Section 4 you also licensed Microsoft  
22 OpenServer source code; is that right?

23 A. Yes.

24 Q. What do you recall discussing with Microsoft  
25 about the utility of that license?

1           A.    That allowed Microsoft to also have the ability  
2 to have compatibility with a, you know, broad range of  
3 OpenServer applications that were out there for which it  
4 was a large installed base and large customer base of  
5 OpenServer so that it was another very big and  
6 substantial part of that, you know, Section 4 agreement  
7 was an OpenServer source code agreement.

8           I do not believe there is anybody else that has  
9 ever been able to license the OpenServer source code.

10          Q.    SCO had never licensed the OpenServer source  
11 code?

12          A.    No.  It was contemplated, I think, with a few  
13 possible customers but was never executed with any  
14 licensee.  So OpenServer had never been licensed in  
15 source code before.

16          Q.    OpenServer was the more profitable of the two  
17 main products at SCO, correct?

18          A.    It was 2/3 of the business.

19          Q.    Openserver had a larger installed base than  
20 UnixWare did, correct?

21          A.    That's correct.

22                MR. ACKER:  Objection.  Leading.

23                THE COURT:  Sustained.  It is leading.

24          Q.    When you were negotiating the 2003 Microsoft  
25 agreement, did you have a view as to the value of the

1 OpenServer license relative to the value of the expanded  
2 UnixWare license in Section 4?

3       A.    I would view them both as, you know,  
4 substantial portions of the value of Section 4.  How I  
5 would split between them, I'm not sure.  I mean, the  
6 expansion of UnixWare distribution was significant.  The  
7 source code, you know, license for OpenServer on its own  
8 was significant.

9       Q.    And, in your view at the time, why was it  
10 relevant to Microsoft's business, for us lay people, that  
11 there was a large installed base of OpenServer users?

12       A.    It provided Microsoft with potential  
13 opportunities to sell products to that large installed  
14 base of OpenServer customers, and so, in some cases, for  
15 the first time Microsoft Windows-based products to a set  
16 of customers that they may have never dealt with  
17 before.

18       Q.    Now, having exercised the options in Section 3  
19 and Section 4, and with the Section 4 license, Microsoft  
20 now had a full UnixWare license, correct?

21       A.    That is correct.

22       Q.    And Section 4 is also a license to older System  
23 V releases; is that right?

24            MR. ACKER:  Your Honor, it's still leading, the  
25 last two questions.  Every question ends with "correct"

1 or "is that right?" It's his witness.

2 MR. NORMAND: This is a cross examination, but  
3 if we want to do a hard and fast rule, I'll ask only  
4 open-ended questions.

5 THE COURT: It sort of is and sort of isn't.

6 MR. ACKER: I understand that, but, given the  
7 relationship between counsel and the witness, I think  
8 it's appropriate to be a non-leading question.

9 THE COURT: Try not to lead. I'll sustain the  
10 objection. Where are you?

11 MR. SONTAG: You're asking where I am with the  
12 witness?

13 THE COURT: No, just on this last series of  
14 questions.

15 MR. SONTAG: As to the Microsoft agreement?  
16 Probably five minutes.

17 THE COURT: Just the last couple of questions.

18 MR. SONTAG: Do you want me to start over?

19 THE COURT: Just the last couple of questions.  
20 I don't know that he answered them. We got a leading  
21 objection.

22 MR. SONTAG: I'm sorry. I understand.

23 Q. By Mr. Sontag: I guess the question was: Why  
24 were you willing to enter into a license to prior  
25 releases of System V in Section 4 of the Microsoft

1 agreement?

2       A.   Well, it was typical with a, you know, UnixWare  
3 and preceding UNIX source code licenses, to provide a  
4 license to the prior products. The fact we broke it up  
5 and put it into the second release was just, in some ways  
6 a convenient place to put it. But it was not  
7 something -- the prior products was not something that  
8 Microsoft was viewing as highly valuable. I mean, we did  
9 not provide all the versions that -- of prior product.

10           And we had told them that we may not be able to  
11 provide them all because they are very old, you know,  
12 source tapes that, in some cases, had turned to dust.  
13 But there was no objection on the part of Microsoft that  
14 they didn't receive all the versions that were listed on  
15 that schedule. We provided them with the ones that we  
16 were able to get, and that was sufficient for them, and  
17 there was no desire or need on Microsoft's part to alter  
18 the value of, you know, that agreement based on that.

19       Q.   Did you have any understanding, at the time of  
20 the execution of the agreement, as to whether Microsoft  
21 was going to use those prior releases of System V as  
22 stand-alone products?

23       A.   No. We had no expectation that they would use  
24 it. If you are developing a software product, again, as  
25 I've said a number of times previously today, you would

1 want to utilize the latest version of the source code for  
2 the development of a new product. And especially with a  
3 UNIX-based operating system product that has built into  
4 it a high degree of backward compatibility, you would  
5 want to use the latest to take advantage of all the new  
6 features and bug fixes, and you would still have that  
7 backward compatibility. There is no need to go to a  
8 prior release.

9 Q. Do you recall entering into an amendment 3 to  
10 the Microsoft agreement?

11 A. Yes.

12 Q. And can you recall --

13 Actually, can you bring it up? And blow up  
14 that paragraph B.

15 Do you recall discussing and negotiating this  
16 paragraph in the agreement?

17 A. Yes.

18 Q. It says, and I understand it's hard to read:

19 The parties recognize that, A, parts of the  
20 software, excluding material portions of the kernel,  
21 may be distributed by Microsoft by default in the  
22 majority of the editions.

23 This is in section 3, right?

24 A. yes.

25 Q. Section 3 is a license for UnixWare, correct?

1           A.    Yes.

2                   MR. ACKER:  Same objection, Your Honor.

3    Leading.

4                   MR. NORMAND:  We are talking about the text of  
5 an agreement.  We can take five minutes and walk through  
6 it.

7                   THE COURT:  You can answer that, which you did.

8                   THE WITNESS:  Yes.

9           Q.    What is your understanding as to what rights  
10 Microsoft gained in this paragraph B of amendment 3?

11           A.    That they would be able to license the UnixWare  
12 software into a majority of their, you know, Windows  
13 products.

14           Q.    Did you have any view, at the time of the  
15 execution of the agreement or its amendments, as to  
16 whether Microsoft had any intention to use the older  
17 System V releases in its Windows products?

18           A.    My understanding is they had no intention of  
19 using the older UNIX versions for anything other than a  
20 source analysis project that they were contemplating.

21           Q.    Now, I asked you a similar question earlier as  
22 about Sun, as to whether you had a view as to whether  
23 they intended to use the older System V releases as a  
24 stand-alone product.  Do you recall my asking you that  
25 question?

1 A. I kind of recall that.

2 Q. We discussed drivers. Do you recall that?

3 A. Yes.

4 Q. Did there come a time when you entered into a  
5 clarification agreement as to the Sun 2003 agreement  
6 regarding the subject matter of drivers?

7 A. Yes. There was an amendment to the agreement  
8 that was related to the drivers, binary and source code  
9 drivers for UnixWare.

10 Q. This is SCO Exhibit 189. I think you might  
11 have objected to it. Let me ask one foundational  
12 question. Were the drivers sent?

13 A. The drivers were --

14 Q. The drivers addressed in this agreement, were  
15 they sent to Sun?

16 A. Yes, they were.

17 MR. NORMAND: I would like to move the document  
18 into evidence, Your Honor.

19 MR. ACKER: No objection.

20 THE COURT: SCO 189 is received.

21 (SCO Exhibit 189 received in evidence.)

22 Q. And can you quickly summarize for me how this  
23 came about?

24 A. I don't recall the specifics, but I think it  
25 was very important to Sun that they receive all the

1 drivers that they possibly could to UnixWare that -- for  
2 which there were not restrictions that we could not  
3 provide them to them, and this amendment was just for  
4 them to ensure that they were receiving all of the  
5 drivers for UnixWare that we could provide them. And we  
6 did, in turn, provide those UnixWare drivers to them.

7 Q. Do you know whether Sun received the rights to  
8 OpenServer drivers?

9 A. I believe we provided those drivers to them as  
10 well.

11 Q. Do you know whether Sun received any rights  
12 under this clarification to drivers to older System V  
13 releases?

14 A. No. I believe they did not.

15 MR. NORMAND: Novell 422, if you could blow  
16 that up.

17 Q. Do you recall reviewing this document,  
18 Mr. Sontag, with Mr. Acker?

19 A. Yes, I do.

20 Q. And do you recall a reference -- I think it's  
21 on page 2. This is a reference to SCO IP. Do you see  
22 that reference?

23 A. Yes.

24 Q. And do you see, in the second line in the top  
25 paragraph, SCO's intellectual property ownership or

1 rights?

2 A. Yes, I do.

3 Q. In this agreement, did you purport to release  
4 or license anything other than SCO's intellectual  
5 property rights?

6 A. No, we not.

7 Q. Did you purport to release or license any of  
8 Novell's rights?

9 A. No, we did not.

10 Q. There's a reference, I believe, in that  
11 agreement to UNIX-based code. Do you recall that?

12 A. Yes.

13 Q. Is UnixWare UNIX-based code?

14 A. Yes, it is.

15 Q. Is OpenServer UNIX-based code?

16 A. Yes, it is.

17 Q. To the best of your knowledge, did you ever pay  
18 Novell anything for the System V code or old SVRX code in  
19 any release of UnixWare or OpenServer?

20 A. No, we did not.

21 Q. There is a reference in Novell Exhibit 422 to,  
22 quote, SCO's standard commercial license. Do you recall  
23 that phrase?

24 A. Yes.

25 Q. Do you have an understanding as to whether,

1 under its standard commercial license for UnixWare,  
2 whether SCO licensed prior System V products?

3       A.    I know that in the UnixWare source code  
4 agreement that was provided, up until the most recent  
5 versions of the UnixWare source code agreement, that the  
6 prior versions were specifically listed.  In the most  
7 recent version of the UnixWare license, that was omitted  
8 only for the purpose of reducing the size of the  
9 agreement, but my understanding is that it was still  
10 provided to a customer if they requested it, and it was  
11 implicitly included.

12       Q.    Do you have an understanding as to why that  
13 was?

14       A.    Because that was the standard practice of SCO  
15 and its predecessors in terms of licensing the UNIX  
16 software, that source code licensees of different  
17 versions could interact with each other or share code in  
18 certain cases, if they were of a similar licensing level,  
19 and that was enabled by the fact that they would be  
20 licensed to all prior versions, depending on the version  
21 they licensed at that point.

22                So, that was a standard practice that had been  
23 used by SCO, by Novell, by AT&T, USL and part of the  
24 licensing of the UNIX code, and it continued with  
25 UnixWare.

1 Q. You were shown a series of agreements towards  
2 the end of Mr. Acker's questions, and I think we can  
3 safely lump those together and call them SCOSource  
4 agreements. Do you recall doing that?

5 A. Yes.

6 Q. How did you come about arriving at a price for  
7 these SCOSource agreements?

8 A. I -- we determined that we wanted to price it  
9 basically at the same price as UnixWare, so a comparable  
10 capability of UnixWare, if it was a 1-CPU system, was  
11 priced at, you know, \$1400, which was the same price for  
12 UnixWare.

13 Q. And who did you speak with on that issue?

14 A. Oh, I had gotten input from John Maciaszek and  
15 also from Jeff Hunsaker, who were more familiar with the  
16 UnixWare price list than I was.

17 Q. Now, was there any source code given to a  
18 licensee under a SCOSource license?

19 A. No, there was not.

20 Q. Could you describe, to the best of your view,  
21 what the license was in the SCOSource license?

22 A. It was primarily a release, aspects of a  
23 covenant not to sue and a Unixware license and SCO IP  
24 license.

25 Q. Now, you were shown the phrase in several of

1 the agreements, quote, SCO's IP rights. Do you recall  
2 that?

3 A. Yes.

4 Q. In these SCOSource agreements, did SCO purport  
5 to release anything other than its rights?

6 A. No, we did not.

7 Q. Did SCO purport to license anything other than  
8 its rights?

9 A. No.

10 Q. You were shown Novell Exhibit 227. This is the  
11 Jeff Hunsaker e-mail. Do you recall that?

12 A. Yes.

13 Q. And in that e-mail, Mr. Hunsaker's says that  
14 this is not a Unixware 7.13 SKU. Do you recall that?

15 A. Yes.

16 Q. Do you know what SKU is?

17 A. Stock-keeping unit or -- a box of UnixWare  
18 software, in this case.

19 Q. Were these SCOSource agreements simply UnixWare  
20 licenses for purposes of stock keeping?

21 A. No. They were a separate package and agreement  
22 and separate SKU.

23 Q. Now, you were asked further about

24 Mr. Hunsaker's statement that --

25 If we could pull it up.

1           Mr. Hunsaker's says:  
2           There is no connection between a UnixWare  
3 OpenServer and the SCO UNIX IPC license whatsoever.  
4           Do you see that statement?  
5       A.    Yes.  
6       Q.    Now, taking it alone, just pulled out of that  
7 document, do you agree with it?  
8       A.    There is no similarity of the license? Yes.  
9 The licenses are not the same.  
10       Q.    Now, did Mr. Hunsaker negotiate these  
11 agreements, by the way?  
12       A.    No, he not.  
13       Q.    Who did?  
14       A.    I was involved in that, along with our  
15 attorneys.  
16       Q.    What was Mr. Hunsaker's position at the time  
17 that he made this statement?  
18       A.    I believe he was over worldwide sales for the  
19 UNIX business. He did not have responsibility for  
20 primary sales for SCOSource-related products. That was  
21 done by me through my own sales group.  
22       Q.    Did you ever speak with Mr. Hunsaker in  
23 conjunction with your negotiation of the SCOSource  
24 agreements?  
25       A.    No.

1 Q. Did you have discussions, Mr. Sontag, with  
2 Novell in late 2002?

3 A. Yes, we did.

4 Q. Can you describe the nature of those  
5 discussions?

6 A. We had a number of back and forth discussions  
7 between representatives from Novell and myself and, in  
8 some cases, with Darl McBride. In our case, we were  
9 interested in clarifying the language of the Asset  
10 Purchase Agreement related to excluded assets. In the  
11 case of Novell, they were interested in finding out or  
12 interested in SCO's involvement with United Linux. That  
13 was the overall nature of the conversations in late  
14 2002.

15 Q. Can you recall who you had discussions with?

16 A. I had a number of conversations with Gregg  
17 Jones and at least one conversation with another  
18 gentleman from Novell, whom I can't remember his name at  
19 this moment.

20 Q. And did you have occasion to speak with  
21 Mr. McBride about his discussions with Novell?

22 A. I did.

23 Q. And what was the general nature of those  
24 discussions?

25 MR. ACKER: Objection. Hearsay, Your Honor, if

1 he's going to relate what Mr. McBride told him.

2 MR. NORMAND: This goes to state of mind, but  
3 we can cut it short if there are concerns, Your Honor.

4 THE COURT: He can answer the question asked,  
5 the general nature, without saying what somebody else  
6 said. So, talk about the general nature.

7 THE WITNESS: His discussions, as I understood  
8 it from Mr. McBride, were very similar to my discussions  
9 that I had primarily with Gregg Jones.

10 Q. Did you, in your discussions with Novell, ever  
11 ask Novell to partner in the SCOSource program that you  
12 were contemplating?

13 A. No, I did not.

14 Q. Did you, when you were speaking with Novell,  
15 ever ask Novell to participate in the SCOSource  
16 program?

17 A. No, I did not.

18 Q. Did you have a view, at the time of these  
19 discussions, as to whether Novell would have any right to  
20 any monies you might receive under the SCOSource  
21 program?

22 A. No. I did not believe they would have any  
23 rights.

24 Q. Did anyone from Novell suggest to you that they  
25 thought they had some right to the monies you might

1 receive under this program?

2 A. No.

3 Q. Did you have a view, at the time of these  
4 discussions, as to whether SCO had the authority to  
5 execute the SCOSource agreements it was contemplating?

6 A. I believed we had those rights.

7 Q. Did anyone, in your discussions with Novell,  
8 ever suggest to you that they thought they could limit  
9 your authority to execute these agreements that you were  
10 contemplating?

11 A. No.

12 Q. Did you ever have discussions with Novell  
13 about -- before the execution of the agreement -- your  
14 authority to execute the 2003 Sun agreement?

15 A. No, we did not.

16 Q. Did you have any trepidation about whether SCO  
17 had the authority to execute that agreement?

18 A. No. I had no concern.

19 Q. Now, the 1994 Sun agreement, that concerned a  
20 buyout; is that right?

21 A. Yes, it did.

22 Q. In what sense?

23 A. It was a buyout for Sun of their binary  
24 distribution of Solaris, so they would not have to make  
25 payment for every copy of Solaris that they sold.

1 Q. Do you know whether, at the time of the 1994  
2 agreement, Sun was paying binary royalties?

3 A. Prior to the 1994 --

4 Q. Yes.

5 A. -- time frame? I believe they likely were  
6 making royalty payments.

7 Q. Do you know whether, as of the 2003 agreement,  
8 Sun was paying any binary royalties?

9 A. No. They would not be.

10 Q. How come?

11 A. Because they already had a buyout in the 1994  
12 agreement.

13 Q. In the 2003 agreement, did you amend or change  
14 that 1994 buyout?

15 A. No, we did not.

16 Q. Can you explain what you mean?

17 A. The buyout related to -- you know, to Solaris  
18 for SVR code binary distribution and was taken care of by  
19 the '94 agreement.

20 Q. And did you have any understanding, as of the  
21 2003 agreement, as to whether Sun was intending to use  
22 the UnixWare technology and license?

23 A. It was my understanding they were intending to  
24 use the UnixWare technology.

25 Q. Did you have an understanding, at the time of

1 that 2003 agreement, as to whether any of the code that  
2 was in Solaris was also in UnixWare?

3       A.    There would be substantial portions that would  
4 be very much the same because Solaris was, you know,  
5 based on, you know, a previous version of UNIX System V,  
6 similar to UnixWare.

7       Q.    Did you have a view, as of the time of the 2003  
8 agreement, as to whether Sun would have paid UnixWare  
9 royalties for its distribution of Solaris if not for the  
10 terms of the 2003 agreement?

11           MR. ACKER:  It calls for speculation and  
12 hearsay, Your Honor.

13           MR. NORMAND:  It does call for speculation.  I  
14 don't know that that's necessarily a basis for precluding  
15 him from answering.

16           THE COURT:  I'll let him answer.

17           Go ahead.

18           THE WITNESS:  No.  I don't believe Sun would  
19 have to be paying a UnixWare royalty for what they were  
20 doing with Solaris prior to the 2003 agreement.

21       Q.    Now, what about what they would do with Solaris  
22 after the 2003, if all they had gotten was a Unixware  
23 license and if there was code in UnixWare that was also  
24 in Solaris?  What kind of royalties would Sun be  
25 paying?

1       A.    Similar to the royalties that we would have  
2 other UnixWare source code licensees pay.

3       Q.    And can you explain what kind of royalties  
4 those were?

5       A.    It would vary, but it would be on the order of  
6 tens to hundreds of dollars per unit shipped on an  
7 ongoing royalty basis.

8       Q.    Now, at the time of the execution of the  
9 Microsoft agreement, what was your view as to the  
10 relative value of the SVRX component of that agreement?

11      A.    Insignificant.  It was licensed as a matter of  
12 course.  I don't believe that Sun -- or Microsoft was  
13 valuing it at all.  What they were valuing was the  
14 UnixWare source code, the UnixWare binary distribution  
15 rights and broad binary distribution rights and  
16 OpenServer source code distribution rights.

17      Q.    And at the time of the 2003 Sun agreement, what  
18 was your view as to the relative value of the new  
19 SVRX-related rights that Sun had acquired?

20      A.    They had almost all of those rights already.  
21 What they acquired were new rights to UnixWare, which is  
22 what they needed to develop their, you know,  
23 Solaris-on-Intel product offerings.

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

1 THE COURT: Thank you. I assume your redirect  
2 will be more than three to five minutes?

3 MR. ACKER: Yes. That's a good assumption,  
4 Your Honor.

5 THE COURT: My hearing starts at 2:30 so we  
6 will take up again at 8:30 in the morning. If you want  
7 to leave stuff here, if you just push it aside a little,  
8 nobody is going steal it. I don't think they would want  
9 it. We'll see you at 8:30 in the morning.

10 And you get to come back, Mr. Sontag.

11 MR. NORMAND: Thank you, Your Honor.

12

13

14

15

16

17

18

19

20

21

22

23

24

25 (Whereupon the proceedings were concluded.)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

REPORTER'S CERTIFICATE

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

I, REBECCA JANKE, do hereby certify that I am a  
Certified Court Reporter for the State of Utah;

That as such Reporter I attended the hearing of  
the foregoing matter on April 29, 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 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 29th day  
of April, 2008.

\_\_\_\_\_  
REBECCA JANKE, CSR, RPR, RMR