

EXHIBIT 16A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., : Case No. 2:04CV00139
:
Plaintiff, : Videotaped Deposition of:
:
vs. : R. DUFF THOMPSON
:
NOVELL, INC., :
:
Defendant. :
:

COPY

February 13, 2007 - 9:13 a.m.

Location: HATCH, JAMES & DODGE
10 West Broadway, Suite 400
Salt Lake City, UT 84101

Reporter: Teri Hansen Cronenwett
Certified Realtime Reporter, Registered Merit Reporter
Notary Public in and for the State of Utah

1 February 9, 2007

9:13 a.m.

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

3 VIDEOGRAPHER: This is the videotaped deposition of
4 Duff Thompson being held in the law offices of Hatch, James
5 and Dodge in Salt Lake City, Utah on February 9th, 2007. The
6 time is 9:13 a.m. My name is Gavin Bohne, certified legal
7 videographer for Garcia & Love Reporting. The court reporter
8 is Teri Cronenwett, also with Garcia & Love Reporting. Will
9 counsel please state their appearances for the record, and
10 the witness be sworn.

11 MR. SINGER: Stuart Singer from Boies, Schiller,
12 Flexner on behalf of the SCO Group and witness.

13 MS. FLEISCHER: Lauren Fleischer from Boies,
14 Schiller & Flexner, also on behalf of SCO and the witness.

15 MR. TIBBITTS: Ryan Tibbitts, general counsel from
16 SCO Group, here for the witness as well.

17 MR. JACOBS: Michael Jacobs, Morrison and Foerster,
18 for Novell.

19 R. DUFF THOMPSON,
20 called as a witness at the instance of the defendant, having
21 been first duly sworn, was examined and testified as follows:

22 EXAMINATION

23 BY MR. JACOBS:

24 Q. Good morning, Mr. Thompson.

25 A. Good morning.

1 were aware in your Novell capacity or -- that is, your
2 still -- strike that. In October 1996 are you still working
3 at Novell?

4 A. As a consultant, but I had left my position as
5 senior vice president of corporate development. But I was
6 still, A, an appointee to the board, and B, a consultant to
7 Novell reporting directly to Bob Frankenberg.

8 Q. Do you recall whether you became aware of Amendment
9 No. 2 through communications with Novell personnel or the SCO
10 Group personnel?

11 A. I don't remember where -- which happened first, but
12 I am aware of the fact that both -- I was in contact with --
13 on both sides, with Bob on one side and with Alok on the
14 other.

15 Now, the interesting thing is that Bob left the
16 company, and that's who my principal contact was was Bob
17 Frankenberg. And I don't exactly have a date in mind as to
18 when he left, but my recollection is, it was before the
19 Amendment 2 was actually signed. I'm a little fuzzy on that
20 date, but it was around that time.

21 So I don't -- so in answer to your question, I am
22 not absolutely certain who informed me first, but I was aware
23 of it from both sides.

24 Q. Were you aware that Amendment No. 2 contained a
25 provision regarding ownership of Unix copyrights at that

1 time? Sorry, strike that. Were you aware at that time of
2 the fact that Amendment No. 2 contained a provision regarding
3 ownership of the Unix copyrights?

4 A. I was aware that the Amendment 2 had a clarifying
5 provision in it relating to the APA language and that the
6 subject matter of that clarifying language related to
7 copyrights, Unix copyrights.

8 Q. When the -- when Amendment No. 2 was being
9 negotiated, did you provide any input to the SCO Group on the
10 question whether such an amendment was advisable as it
11 related to ownership of the Unix copyrights?

12 A. I did not. I was a member of the board. The --
13 because of my relationship with Novell, whenever some of
14 these Novell issues were discussed at the SCO board, I would
15 voluntarily excuse myself, and by the way, this was a
16 practice that was quite common on their board.

17 They had a Microsoft representative on their board
18 and a Novell representative on their board, and so from time
19 to time, the board would like -- would want to hold
20 discussions that related to issues that were potentially
21 conflicting issues between Microsoft and SCO or Novell and
22 SCO, and so we as board members would simply excuse ourselves
23 from those discussions.

24 Q. And so specifically with reference to board-level
25 discussions at the SCO Group about Amendment No. 2, you

1 recused yourself?

2 A. I did, and my recollection is that the -- while I
3 was aware that this amendment was in the works, that I was
4 not given any information by either party, by either side as
5 to how it was being negotiated and who was signing it and all
6 those sorts of things.

7 Q. So you anticipated my next question, but just to be
8 clear, did you provide any input to the Novell side about
9 Amendment No. 2 as it related to ownership of the Unix
10 copyrights?

11 A. I don't remember any instance in which I was either
12 asked to give input or that I did give input. Is it
13 possible? You have to understand that all of the legal staff
14 or many members of the legal staff at Novell were employees
15 of mine who I had hired and brought into the company, and so
16 I had not -- I hadn't brought them into Novell. I had
17 brought them into a previous company which merged with
18 Novell. And so I had interaction with these attorneys on a
19 fairly regular basis, socially and just in the community.

20 And so is it possible I had discussions? Yes. I
21 saw Bob Frankenberg on a social basis. Is it possible I had
22 discussions? Yes. But I have no recollection that there was
23 any specific input that I was asked to give nor that I
24 actually gave that resulted in the creation of Amendment 2.

25 Q. So just to prod your memory a little bit, you don't

1 recall something along the lines of, Duff, there is a
2 provision in the asset purchase agreement that gives Novell
3 ownership of the Unix copyrights. SCO is claiming that needs
4 to be clarified. Do you recall why that provision is the way
5 it is in the asset purchase agreement?

6 A. I don't recall having that discussion with anyone.

7 Q. When you prepared this declaration that's in front
8 of us dated November 9th, 2006, did you have in mind the fact
9 that Amendment No. 2 had a provision relating to ownership of
10 the Unix copyrights?

11 A. In the general sense.

12 Q. So if you take a look at paragraph 8, for example.

13 MR. SINGER: Paragraph 8?

14 A. Did you say eight?

15 Q. (By Mr. Jacobs) Yes. You say there in the first
16 sentence: Likewise, it was my understanding and intent, as
17 the Novell executive responsible for the negotiation of the
18 transaction, that the Unix copyrights were transferred to
19 Santa Cruz as part of the transaction that was closed in
20 December 1995. You see that?

21 A. Yes.

22 Q. Now, the Amendment No. 2 was executed in October
23 1996. Does Amendment No. 2 and the fact that it has, as you
24 said, a clarifying provision relating to Unix copyrights,
25 bear on your testimony in that first sentence?

1 A. Not at all. My understanding of the deal starting
2 in May and June of 1995 was exactly this, and the document,
3 the APA, that I -- that we signed in September of '95 to my
4 understanding said this. And to the extent it didn't say
5 this, the -- or at least it didn't say it clearly, the
6 Amendment No. 2 was a clarification of the ambiguous
7 language.

8 But you have to read that whole paragraph 8
9 together to kind of understand part of the rationale there,
10 because not only did we sign the APA, but we signed the
11 technology license agreement in December of 1995. And it
12 certainly wouldn't have made any sense to me to sign the
13 technology licensing agreement in December from SCO to Novell
14 if Novell had retained all of that intellectual property.

15 That was kind of -- I mean, I didn't -- maybe a way
16 to answer your question is, the Amendment 2 was not the
17 instructive document on where the copyrights were for me.
18 The instructions I received from Bob Frankenberg were the
19 instructive charge. What I said to Alok Mohan when I was
20 negotiating this transaction were consistent with Bob's
21 directions, and the APA -- we intended in the APA to make
22 that clear. So I didn't need Amendment 2 to help me
23 understand what we had conveyed and what we hadn't conveyed.
24 I just make that distinction.

25 Q. So just to press that point a bit, do you recall

1 specific discussions leading up to the execution of the APA
2 in September 1995 about copyright -- and I emphasize
3 copyright -- ownership?

4 A. I don't recall any specific discussion about
5 copyright.

6 Q. Do you recall any specific discussions about
7 copyright ownership leading up to the execution in December
8 1995 of Amendment No. 1?

9 A. I mean, the answer is, I -- not only is this now 11
10 and a half years in the past, so trying to remember a
11 specific discussion about copyright is difficult, but what
12 I -- I guess what I can recall is the actual negotiations and
13 the tenor of those negotiations and what was said, what we
14 said and what they said. And so if you are asking me --
15 well, what are you asking me?

16 Q. I am asking you -- I think you're answering about
17 tenor or overall deal structure, and I am asking you
18 specifically about the legal question of copyright ownership.

19 A. Yeah, and I guess I would answer that by saying, I
20 was instructed to sell the entire Unix business, everything,
21 everything. That was the initial instruction, sell
22 everything, from Bob Frankenberg to me, and sell UnixWare.
23 So sell Unix, sell UnixWare.

24 And having practiced law in this area previous to
25 joining Novell, so I was a general counsel for another

1 software company, everything was pretty clear to me. Sell
2 all of the business, all of the assets, everything.

3 Q. So let me take that experiential point for a
4 minute. You had been general counsel at WordPerfect?

5 A. That's correct.

6 Q. How many years?

7 A. Eight.

8 Q. And before that, you had been in private practice?

9 A. Yes.

10 Q. In a transactional oriented practice?

11 A. Yes.

12 Q. Software focused?

13 A. Principally corporate.

14 Q. Corporate meaning securities and M and A kind of
15 work?

16 A. We -- it was -- at that time it was principally in
17 the area of contractual work, licensing.

18 Q. So you were trained in licensing at the law firm
19 you worked at?

20 A. I worked in licensing at the law firm, yes.

21 Q. And did you just on the -- on your knowledge of
22 licensing, you got on-the-job experience?

23 A. I began to represent the WordPerfect Corporation in
24 all of their aspects; licensing, reinstate, employment
25 contracts, everything.

1 me strike that. You understood that a software license is --
2 includes within it provisions allocating intellectual
3 property rights?

4 A. That's correct.

5 Q. And you understood that at WordPerfect?

6 A. Yes.

7 Q. And you understood that some of those provisions
8 can get very granular and detailed, that the rights can be
9 subdivided up in various ways, correct?

10 A. Yes.

11 Q. And you understood that the drafting of those
12 provisions requires a close attention to the detailed
13 allocation of intellectual property rights in the words of
14 the agreement?

15 A. Yes, I understood that that software licenses can
16 be very intricate.

17 Q. And at WordPerfect, were you personally involved in
18 the intricacies of the non-end-user software licenses the
19 company entered into?

20 A. I'm not sure I understand your question. Did I
21 write them?

22 Q. Did you review them closely?

23 A. Let me make this -- I had outside counsel, Weil,
24 Gotshal and Manges, Steve Kahn.

25 Q. The estimable Steve Kahn?

1 A. Yeah. Steve Kahn was our outside counsel. He was
2 my right-hand man in really working through almost all of our
3 intellectual property issues. I had contracts specialists
4 inside of our group. I used them to full advantage.

5 And so as a general counsel, while in the early
6 days I had none of these resources and we were writing things
7 on typewriters and trying to get them over to our computers,
8 things changed rapidly in that time frame. And by 1989,
9 1988, '89, '90, much of the detailed licensing work was done
10 by those who were specialists in those areas.

11 Q. So --

12 A. And my responsibility was to essentially make sure
13 we were hiring the right people and make sure that they did a
14 good job.

15 Q. So by the time of the asset purchase agreement, you
16 have moved from a legal function to a business function?

17 A. Well, you just skipped a full --

18 Q. I know. I'll get there.

19 A. -- generation and change in job title.

20 Q. I'll get there.

21 A. Yeah.

22 Q. By the time of the asset purchase agreement you are
23 no longer in a legal function?

24 A. No. That's correct.

25 Q. And so this -- and so in the -- when you were

1 involved in the asset purchase agreement negotiations, who
2 were you relying on for the detailed drafting of the
3 agreement?

4 A. Our counsel, Wilson Sonsini.

5 Q. Tor Braham in particular?

6 A. Tor and his team. There were a couple of others
7 within his group that -- you know, Tor -- Tor was a mergers
8 and acquisitions guy in reality. He was a deal maker within
9 Wilson Sonsini, and so I would say Tor -- Tor was not the
10 principal drafter of the document. I would say that he had
11 people within his firm who were specialists in these items
12 that were probably doing the bulk of the actual drafting.

13 Q. That would include Aaron Alter?

14 A. Uh-huh.

15 Q. And what was your role in reviewing their work?

16 A. My role was to assign my -- my team to work with
17 them and basically then to review their progress on a regular
18 basis, so I had a team made up of a couple of people from the
19 legal -- from the business development staff; in particular,
20 Ed Chatlos, who knew more about Unix business than anyone
21 within Novell.

22 So Ed was the principal negotiator of the deal,
23 lived on-site for months, and worked most closely -- in most
24 -- closest association with the legal team.

25 Q. Did you review drafts of the asset purchase

1 agreement as it was under development?

2 A. Yeah. I saw drafts, and I would review those
3 drafts with Ed. Specific -- principally not as an overall
4 document, but specific provisions that we -- they would bring
5 specific issues to me. I -- if they were beyond my ability
6 to resolve, I would take them to Bob, and Bob would give us
7 his direction.

8 Q. Now, there was a point in time in the negotiations
9 of the asset purchase agreement where it became clear that
10 SCO could not afford to buy the Unix business lock, stock and
11 barrel, correct?

12 MR. SINGER: Object to the form.

13 A. Yeah. It became clear to us in this process that
14 they did not have the cash to buy the business. They were a
15 great candidate to buy the business because of their
16 OpenServer products and their Unix experience. They just
17 didn't have the resources to buy it.

18 Q. (By Mr. Jacobs) The deal ultimately was a stock
19 deal, correct?

20 A. Actually, the -- well, the answer is no.

21 Q. The consideration that was transferred at the time
22 of the asset purchase agreement -- well, let's just approach
23 this a little differently. The result of those
24 considerations was a change in the structure of the deal from
25 what had previously been anticipated, correct?

1 A. I think I know where you're headed here. Let me
2 just, if you don't mind -- we had hoped that we could find a
3 buyer, we, we, being Bob, had hoped and thus it became my
4 hope that we could find a buyer that was capable of paying
5 cash for this business. And inasmuch as Novell had recently
6 purchased the business from USL, there was a feeling that we
7 needed to get a certain amount of money or be able to reflect
8 a certain value for the shareholders of Novell in the sale,
9 and so we had a general idea of how much value we should be
10 able to show for the Novell shareholders.

11 I had no pre -- I had never met anyone at SCO at
12 the time that this -- this was proposed, and so I had no idea
13 what their capabilities were from a cash standpoint or what
14 their resources were. And so it would probably be incorrect
15 to say we had formed a hope and a plan for someone to come in
16 and pay cash for this. That would have been great, but we
17 really hadn't tested the market to see who could pay what and
18 who could -- and what kind of consideration could be given.

19 Once it was determined that SCO was the best
20 candidate and we -- and I was instructed to try to commence
21 the negotiations and figure out if there were a way for SCO
22 to be the buyer, it became clear very quickly that cash was
23 not going to be the mechanism, so we started looking for
24 other ways to create value for Novell.

25 Q. And what were those other ways that you ultimately

1 had no idea whatsoever. All I knew was that there were some
2 patents, and whether they read upon the Unix technology was
3 just clearly outside of my expertise. I had no idea.

4 Q. As you noted in your declaration, SCO -- the SCO
5 Group was represented by Brobeck during the negotiations,
6 correct?

7 A. Yes.

8 Q. Did you participate in any meetings in which the
9 Brobeck lawyers or a lawyer from Brobeck was present, in the
10 context of this asset purchase agreement?

11 A. I am --

12 MR. SINGER: Just to be clear, you are asking him
13 if he had any meetings in which a Brobeck lawyer was present
14 during the entire process of the APA?

15 MR. JACOBS: Correct.

16 A. Yes.

17 Q. (By Mr. Jacobs) And was that Scott Lester?

18 A. I don't remember.

19 Q. Do you recall having a -- forming an impression one
20 way or the other about whether SCO was well represented
21 during the course of the negotiations?

22 A. Well, I felt that we were well represented, and
23 that my focus was one on Novell's interests, and I honestly
24 can't remember sitting around wondering whether or not they
25 were well represented.

1 Q. If you turn to, if you focus on 5A, all
2 copyrights --

3 A. Yes.

4 Q. -- I think we covered this before, but just with
5 this schedule in front of you, do you recall any specific
6 discussion with SCO directly or through your representatives
7 around Unix copyrights, that particular intellectual property
8 right?

9 A. As it relates to this -- as it relates to the
10 excluded asset schedule or just in general?

11 Q. Well, let's focus on the first, on the excluded
12 asset schedule.

13 A. I do not remember having a specific discussion with
14 SCO about the excluded asset schedule.

15 Q. And I think before your testimony was that you
16 didn't recall any specific discussions around copyrights as a
17 particular intellectual property right, but you had kind of a
18 view of the overall transaction under which copyrights fit;
19 is that correct?

20 A. That's correct.

21 Q. Let's see. Let's turn to the technology license
22 agreement.

23 A. Okay.

24 Q. And I believe that's previously been marked as a
25 deposition exhibit, but my copy isn't so marked. But in any

1 case, the technology license agreement dated by its signature
2 is December 6, 1995. Do you see that?

3 A. Yes.

4 Q. And that is your signature as senior vice
5 president, corporate development, correct?

6 A. Yes.

7 Q. Did you have any specific discussions with people
8 on your team before executing the TLA about its terms?

9 A. I'm sure as a matter of process we would have
10 discussed the document. I don't remember the particular
11 moment, but yes, I'm sure that we did.

12 Q. And you don't recall any -- as you sit here today,
13 you don't have a recollection of reviewing the specific terms
14 of the TLA with your colleagues to under -- to form a
15 detailed understanding of what it meant?

16 A. What -- I can -- I do have a specific recollection
17 of the fact that this was a checkoff item for us to be able
18 to get through to close, to have this technology license
19 agreement entered into. And they brought it -- it became
20 generated at the operating level, the day-to-day negotiations
21 level, and it was brought to us to review and to sign.

22 Q. And that's the extent of your recollection on this?

23 A. That's what I remember.

24 Q. And so just to close this out, the same question
25 with respect to interactions with SCO. Do you have any

1 sure -- I'm not sure that even today, if you were to ask the
2 members of the board who were there, if they understood that
3 to known Novell was retaining all the Unix copyrights because
4 it says in the next sentence, they're getting back a
5 royalty-free perpetual worldwide license back to Unix and
6 UnixWare for internal use.

7 So my own reading of this is that this is perfectly
8 consistent with what I understood we did and what we were
9 signing the next day in the September 19th APA.

10 Q. Now, it does say, except for the trademarks Unix
11 and UnixWare, doesn't it?

12 A. Right.

13 Q. So it does get pretty granular about something
14 associated with Unix when it talks about trademarks?

15 A. Trademarks, right.

16 Q. But it doesn't have similar degree of granularity
17 when it's discussing copyrights?

18 A. No. But the license back to Unix and UnixWare in
19 the next line, it seems to me, is relatively granular.

20 Q. So let's talk -- let's get granular about that,
21 then. The -- you understood that there were a bundle of
22 assets associated with Unix and UnixWare that were being
23 transferred to SCO?

24 A. That's right, that this was a business that
25 included a bundle of rights. That's right.

1 Q. And a bundle of rights you believed included --
2 looking back on it, you believed the structure of the deal
3 meant that the bundle of rights included the copyrights?

4 A. No. At the time I believe it included the bundle
5 of the copyrights, at the time.

6 Q. Well, I'm a little confused because I thought you
7 said this morning that you don't recall any specific
8 discussion about copyrights.

9 A. Yeah, but that doesn't mean that that's not what I
10 understood we were doing at the time.

11 Q. So you --

12 A. So the fact that I may not have had a specific
13 discussion that I can recall 11 and a half years later should
14 not be taken to mean I don't recall what our intention was in
15 selling the business. It is impossible for me to parse in my
16 mind the assignment that we received to sell the -- to sell
17 the entire business, all of Unix and UnixWare to SCO, and to
18 somehow also in that same breath say, except the copyrights.

19 I just -- I don't understand that kind of thinking,
20 and certainly I just have to tell you that that kind of trick
21 play was not something that Bob Frankenberg would have
22 directed, nor is it something he would have stood for. It's
23 not something I would have done.

24 If we had intended not to transfer the copyrights,
25 we would have been very careful to say, you don't get the

1 copyrights. And it wouldn't have been an oblique reference.
2 It would have been, you get all the business except the
3 copyrights. Not, you get all the business.

4 Q. You know there are a lot of arguments on both sides
5 of this issue, and I don't want to get into a debate with you
6 that you and I can't resolve. But if -- but does your
7 testimony on this point turn on your view that this is all a
8 trick if Novell in fact retained the copyrights? If it were
9 demonstrated to you that it was not a trick, for example,
10 would that change your view?

11 MR. SINGER: Object to the form of the question.

12 Q. (By Mr. Jacobs) I'm trying to --

13 A. I think --

14 Q. -- let me be a little clearer. What exactly -- as
15 you sit here today, what exactly are you calling upon in your
16 memory to testify that you understood it was Novell's intent
17 to transfer the copyrights?

18 A. My conversations with my staff, Ed Chatlos in
19 particular. Ty Mattingly was in some of those meetings. My
20 conversations with Alok Mohan, Jeffrey Seabrook, I think was
21 his name, Steve Sabbath, in which I said, "We are selling our
22 Unix business, lock, stock and barrel, all of it." That's
23 how it started.

24 Q. Exactly. That's how it started, isn't it?

25 A. Yes. We are selling everything.

1 Q. And then there's a major change in the structure of
2 the deal?

3 A. We are selling everything. That's right.

4 Q. And you call upon your staff to execute a change in
5 the structure of the deal pursuant to which Novell is going
6 to retain, from the financial standpoint, 95 percent of the
7 existing Unix business, isn't it?

8 A. No, 95 percent of a royalty stream from existing
9 SVRX licenses. It was not 95 percent of the Unix business.

10 Q. Fair enough.

11 A. We were selling a hundred percent of the business.

12 Q. But in light of the fact that that deal change
13 occurred, and the conversations that you are referring to --

14 A. Yes.

15 Q. -- were at the inception of the transaction.

16 A. Yes, they were.

17 Q. As you sit here today, 11 and a half years later,
18 what are you calling upon in your memory to testify that even
19 under the changed deal structure it was Novell's intent to
20 transfer the copyrights?

21 A. What I'm calling upon is that the change was a
22 financial feature, not a change in the bundle of rights that
23 were going. It was a financial feature. It was a financial
24 methodology to help pay for the purchase of the business. It
25 wasn't a change in what was being sold.

1 C E R T I F I C A T E

2 STATE OF UTAH)

 COUNTY OF SALT LAKE)

3 THIS IS TO CERTIFY that the deposition of R. DUFF
4 THOMPSON was taken before me, Teri Hansen Cronenwett,
5 Certified Realtime Reporter, Registered Merit Reporter, and
6 Notary Public in and for the State of Utah.

7 That the said witness was by me duly sworn to testify;
8 that the testimony was reported by me in Stenotype, and
9 thereafter transcribed by computer, and that a full, true,
10 and correct transcription is set forth in the foregoing
11 pages, numbered 3 through 153 inclusive.

12 I further certify that the original transcript of the
13 same was delivered to Mr. Singer, for submittal to the
14 witness for reading and signature before a Notary Public, and
15 to be returned within 30 days of the date hereon.

16 I further certify that I am not of kin or otherwise
17 associated with any of the parties to said cause of action,
18 and that I am not interested in the event thereof.

19 WITNESS MY HAND and official seal at Salt Lake City,
20 Utah, this 16th day of February, 2007.

21 My commission expires:

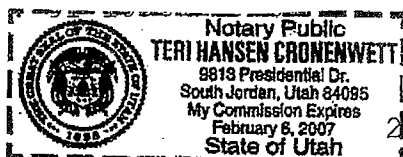
 February 6, 2007

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Teri Hansen Cronenwett

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Teri Hansen Cronenwett, CRR, RMR

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