

EXHIBIT 2

Darl McBride * March 27, 2007

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

THE SCO GROUP, INC., a)
Delaware corporation,) Deposition of:
)
Plaintiff,) DARL McBRIDE
)
vs.)
)
NOVELL, INC., a Delaware) Case No. 2:04CV00139
corporation,)
) Judge Dale A. Kimball
Defendants.)

MARCH 27, 2007 * 8:55 a.m.

Location: Anderson & Karrenberg
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Salt Lake City, Utah 84101

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1 PROCEEDINGS
 2
 3 Darl McBride,
 4 called as a witness, being first duly sworn,
 5 was examined and testified as follows:
 6
 7 EXAMINATION
 8 BY MR. JACOBS:
 9 Q. Good morning, Mr. McBride.
 10 A. Good morning, Mr. Jacobs.
 11 Q. You've been deposed before in SCO related
 12 litigation?
 13 A. Yes, I have.
 14 Q. You know the procedure.
 15 A. Unfortunately.
 16 Q. Maybe after this deposition, you'll say
 17 "fortunately."
 18 You worked for Novell?
 19 A. Yes, I did.
 20 Q. In 1995 what position did you have at
 21 Novell?
 22 A. 1995, if I recall correctly, I was the
 23 Vice-President and General Manager of the Extended
 24 Networks Division.
 25 Q. When you say Vice-President and General

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1 Manager, as you recall the structure of Novell at
 2 that time how did you fit into the hierarchy?
 3 A. I was one level below the most senior
 4 executives. So basically you had the CEO and the
 5 staff of what would be I guess Executive
 6 Vice-Presidents. And then I reported to various of
 7 those Executive Vice-Presidents for a period of the
 8 last few years I was there.
 9 Q. In the summer and fall of 1995, did you
 10 have the same reporting relationship throughout that
 11 period?
 12 A. Oh, boy. Summer and fall of '95, I don't
 13 recall exactly if that changed around then or not.
 14 Q. Do you remember who you were reporting to
 15 in the mid '90s?
 16 A. In the mid '90s at various times I
 17 reported to Richard King, John Edwards, Ray Noorda,
 18 and I think Jan Newman was in there. Jim Bills was
 19 the other one.
 20 Q. Did the Extended Network -- what was the
 21 name of the division again?
 22 A. Extended Networks Division.
 23 Q. Did the Extended Networks Division have
 24 any close relationship with the USL Group in New
 25 Jersey?

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1 A. We had a working relationship with USL
 2 Group.
 3 Q. Did you have occasion to learn, in the
 4 course of your work at Novell, that Novell was
 5 considering selling the UNIX assets to a company then
 6 called the Santa Cruz operation?
 7 A. Yes, I did.
 8 Q. What were the circumstances of that?
 9 A. Well, the circumstances on the USL deal,
 10 if we back up a little bit, the previous assignment
 11 to what we talked about, the Extended Networks
 12 Division, I was running the Japanese office and got
 13 to know the executives at USL pretty well, Roel
 14 Pieper, the team that came in, and actually helped
 15 Ray Noorda get the Japanese companies in agreement
 16 that we would, in fact, acquire USL. That was in
 17 '92, as I recall. '91, '92. As we went through, I
 18 had a fairly good understanding of what they were
 19 doing with UNIX.
 20 As I recall, when we had a change at the
 21 top with Bob Frankenberg coming in, Ray Noorda
 22 leaving, coincidental with that change was also a
 23 change in strategy; whereas Noorda was very keen on
 24 driving UNIX and Word Perfect acquisitions,
 25 Frankenberg had an opposite view which was, "Let's

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1 sell these off." And so about the same time
 2 Frankenberg came on, there was a strategy put in
 3 place. It was communicated to us as executives that
 4 we were going to, in fact, be selling UNIX.
 5 Q. And do you recall the circumstances of
 6 that communication?
 7 A. I believe I heard about it in a staff
 8 meeting.
 9 Q. What did you hear?
 10 A. The plan was to divest the applications in
 11 UNIX business, is my recollection.
 12 Q. What is the next milestone in your
 13 recollection of learning about what would become the
 14 Asset Purchase Agreement in the sale to the Santa
 15 Cruz operation?
 16 A. It's twelve years ago so I don't remember
 17 exact milestones and time frames. I do remember that
 18 along the way there was a discussion that came up
 19 that they were going to sell off the UNIX business in
 20 different parts. The Santa Cruz operation was going
 21 to buy the main body of UNIX; the intellectual
 22 property, the components that went with it, the core
 23 products. And then they were going to, as I recall,
 24 sell the existing binary royalties to big companies
 25 like IBM and Sun and HP and companies like that. So

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1 it was, "We're going to try and get our money out of
 2 this in piecemeal selloffs rather than just in one,"
 3 is my recollection.
 4 Q. So taking the product part of the equation
 5 first, did you come to understand that Santa Cruz
 6 operation would be buying UNIX assets, and other
 7 assets of USL might go to other -- leaving aside this
 8 binary revenue stream for a minute, just focusing on
 9 UNIX products versus other products such as Tuxedo.
 10 Did you become aware that the Santa Cruz operation
 11 would be making some sort of acquisition of the UNIX
 12 products, and other companies would be purchasing
 13 other products?
 14 MR. NORMAND: Objection to form.
 15 A. That's roughly my recollection; that UNIX,
 16 the product, the intellectual property, the core, was
 17 going to go to the Santa Cruz operation. Existing,
 18 pre-existing royalties would go to big companies --
 19 that the big companies had, would stay with Novell.
 20 And that other pieces of USL were not going to be
 21 part of the transaction to Santa Cruz. So Tuxedo was
 22 an example of one that I understood was not going to
 23 be sold to Santa Cruz.
 24 Q. Let's just follow the Tuxedo trail for a
 25 minute. Did you become aware at some point that

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1 Tuxedo was going to be sold, as well?
 2 A. I believe the Tuxedo thing happened, the
 3 sale of Tuxedo happened after I left. I knew the guy
 4 that was running Tuxedo. I believe his name was Joe
 5 Menard, and he was a peer of mine. We were at the
 6 same level there. I understood that it was sold
 7 later, but I don't know the details of the Tuxedo
 8 transaction.
 9 Q. So just to take that last point, at the
 10 time Tuxedo was under consideration for sale, to the
 11 best of your recollection you weren't made aware of
 12 the structure of that transaction?
 13 MR. NORMAND: Objection to form.
 14 A. I think that's correct. I don't remember
 15 if at the time they were really trying to sell Tuxedo
 16 or if they actually thought about keeping it. I
 17 think down the road they did sell it, but I don't
 18 remember them actively shopping Tuxedo the way they
 19 were UNIX.
 20 Q. Now then focusing on the Unix product, you
 21 were distinguishing between the sale to the Santa
 22 Cruz operation of some aspects of the UNIX business
 23 and then the retention of others by Novell. What do
 24 you recall in the summer or fall of 1995 about what
 25 you knew about that structure?

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1 MR. NORMAND: Objection to form.
 2 A. My recollection of the UNIX transaction
 3 was that the Santa Cruz operation was buying UNIX but
 4 they didn't have enough money to buy the -- they
 5 didn't have enough money to just come in and say,
 6 "Okay, we want the same thing that USL sold to
 7 Novell." So my understanding was they focused on the
 8 core product of UNIX, the intellectual property that
 9 was associated with that, and they basically passed
 10 on the old versions of UNIX that had royalty streams
 11 and did not buy those out. So it was sort of an
 12 innovative way of them being able to buy UNIX in a
 13 way that they could afford it.
 14 Q. Did you have an understanding at the time
 15 of that aspect of the transaction which related or
 16 reflected Novell's desire that the Santa Cruz
 17 operation evolve the assets they were buying into
 18 enhanced versions?
 19 MR. NORMAND: Objection to form.
 20 A. I'm sorry. Could you repeat that once
 21 more, make sure I got exactly what you are saying?
 22 Q. Did you have an understanding at the time,
 23 meaning summer and fall of 1995, of that aspect of
 24 the transaction which reflected Novell's desire that
 25 the Santa Cruz operation evolve the UNIX assets they

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1 were buying into enhanced versions of UnixWare in
 2 particular?
 3 MR. NORMAND: Same objection.
 4 A. My understanding was that Santa Cruz was
 5 going to be buying UNIX, and yes, they would be
 6 improving it and moving it forward. That was the
 7 expectation.
 8 Q. Did you have an understanding as to why
 9 that was -- that part of the transaction, the moving
 10 it forward part, was something that Novell was intent
 11 on?
 12 MR. NORMAND: Same objection.
 13 A. There wasn't a lot of discussion at that,
 14 from my recollection, being inside of Novell. I
 15 mean, if anything, there were -- a lot of us at
 16 Novell weren't real happy to see UNIX being sold.
 17 But the discussion that usually came up was, "We're
 18 selling UNIX." The specifics of how that was going
 19 to move forward, I know that there was a discussion
 20 about the Netware technology being part of that, and
 21 that would have been in our interest at Novell if
 22 that had continued forward.
 23 Q. Can you just explain that a little bit
 24 more?
 25 A. I think the idea was to have the future

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1 versions of UNIX that would have Novell's Directory
 2 Service attached to it and propagate Directory
 3 Services through that strategy.
 4 Q. And thereby strengthen the share of the
 5 relevant business marketplace that Novell had?
 6 MR. NORMAND: Objection to form.
 7 A. It would have been in that positive view
 8 from Novel and Santa Cruz's perspective if that had
 9 happened.
 10 Q. And it would be positive from Novell --
 11 this is pretty basic, but the reason it would be
 12 positive for Novell was what?
 13 MR. NORMAND: Objection to form.
 14 A. Well, they would get increased share of
 15 their Directory Services.
 16 Q. And Directory Services, for those of us
 17 who haven't been living this for 15 years, was what?
 18 A. Right. So, basically a directory of
 19 objects inside of a network that a computer relies on
 20 to make system calls and do various processing.
 21 Q. Do you recall anything else -- so let me
 22 start over. When did you leave Novell?
 23 A. I left Novell in, I believe it was
 24 February of '96.
 25 Q. Do you have any other recollection of

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1 discussions or other ways that you became aware of
 2 the structure of what we now know as the Asset
 3 Purchase Agreement in that time frame?
 4 A. I was not involved in the details of that.
 5 All I remember is, "We're selling UNIX." That was
 6 the well-worn phrase around there.
 7 Q. What was the next occasion in which you
 8 had a reason to focus on the sale of UNIX to the
 9 Santa Cruz operation?
 10 MR. NORMAND: Objection to form.
 11 A. Well, let's see. In progression, Novell
 12 sells UNIX to Santa Cruz in 1995. I left Novell in
 13 1996. In 1999 I became a shareholder of Caldera
 14 International as they were doing their IPO, which is
 15 important because a couple years after becoming a
 16 shareholder of Caldera, I received a mailer saying
 17 that Caldera International was, in fact, buying the
 18 Santa Cruz operations. I believe it was the server
 19 division. Basically UNIX from Santa Cruz. So that
 20 was really the next event that I was directly
 21 associated with.
 22 Q. Was the extent of that event receiving the
 23 notice from the company and it triggering a
 24 recollection of the original sale?
 25 A. Right. It was basically, in my mind, I'm

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1 thinking, okay, I was at Novell when we bought UNIX.
 2 It was a big deal. Kind of sad to see it go when it
 3 left Novell to Santa Cruz in '95. And now somewhat
 4 excited about the prospect that the company I was
 5 shareholder of is, in fact, picking up the UNIX
 6 business.
 7 Q. And did you do anything other than just
 8 reflect on that circle of life quality to the
 9 transaction?
 10 A. I think it was just a happy moment.
 11 I don't recall doing anything with it. I
 12 think I probably went out and read some accounts of
 13 the transaction on the internet. But other than
 14 that, it was just sort of, "Let's keep an eye on this
 15 company and see what happens."
 16 Q. What was the next milestone in your
 17 focusing on the sale of UNIX assets from Novell to
 18 the Santa Cruz operation?
 19 A. I guess the next major thing in the
 20 progression would be getting recruited to become the
 21 CEO of Caldera International, which now owned the
 22 Santa Cruz operation UNIX business. And I joined the
 23 company in June of 2002 in that position.
 24 Q. When you were recruited to the company,
 25 was one of the topics in your discussions with them

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1 the possible monetizing of the intellectual property
 2 value in UNIX?
 3 MR. NORMAND: Objection to form.
 4 A. That wasn't a discussion that we had. It
 5 wasn't something that I thought about directly.
 6 There was definitely a thought in my mind that owning
 7 UNIX was a good thing. It's a big deal. It's the
 8 most prolific business operating system in the world,
 9 and this company owns that property. So I thought
 10 that's a good thing. But in terms of, you know,
 11 where that went immediately, it wasn't -- that wasn't
 12 obvious to me.
 13 Q. When did it first strike you that the
 14 business strategy at Caldera International needed to
 15 include a component of monetizing the intellectual
 16 property value in UNIX?
 17 MR. NORMAND: Objection to form.
 18 A. The first couple of weeks after I joined
 19 the company I did a review of the top dozen or so
 20 managers in the company and had each of them come in
 21 and spend an hour or so telling me their thoughts of
 22 the company. "What would you do if you were running
 23 it?" I mean, we are in a situation with this company
 24 that they are not in a great financial situation, so
 25 we are basically in somewhat of a turn-around

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1 situation. So I'm querying them, asking them what
 2 they would do.
 3 In the process of doing that, one of the
 4 managers came to me and said, "You know, there are
 5 some real issues here with respect to our UNIX
 6 intellectual property being inside of Linux. And
 7 Linux is now our number one competitor. It's very
 8 brutal competition out there. And at the same time
 9 Linux is beating us up in the marketplace with this
 10 free operating system, we have a situation where our
 11 intellectual property is being violated." So that
 12 was probably July of '02 when I first heard that
 13 there was a problem in that regard.
 14 Q. Who was that manager?
 15 A. His name was John Terpstra.
 16 Q. Let me mark as the -- what did we decide?
 17 208?
 18 (EXHIBIT-208 WAS MARKED.)
 19 Q. We have marked as Exhibit 208 an e-mail to
 20 you from John Terpstra dated October 2, 2002. A copy
 21 to S. Wilson and Opinder Bawa. Subject, Project
 22 Caramel. Do you see that?
 23 A. Uh-huh (affirmative).
 24 Q. Produced under SCO 1272401 to 02.
 25 First of all, who is S. Wilson?

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1 A. Sean Wilson.
 2 Q. What was Sean Wilson's role?
 3 A. I believe he was Vice-President of
 4 Business Development.
 5 Q. And what was Opinder Bawa's role in the
 6 company at this time?
 7 A. I believe he was over our development
 8 group at that time.
 9 Q. And what was Project Caramel?
 10 A. It was designed to -- Project Caramel.
 11 I'm not sure. I think Terpstra came up with this
 12 one. I'm not sure what that was.
 13 Q. The e-mail says, "Darl, today's efforts
 14 have turned up the following." You see that?
 15 A. Yes.
 16 Q. And it suggests that this has been an
 17 ongoing project. Was it an ongoing project?
 18 A. This is October. Yes, we were in the
 19 middle of things at this point. Been looking since
 20 the summer up to this point, so that's correct.
 21 Q. Was there a particular focus in the period
 22 leading up to this and including this e-mail, a
 23 particular direction to the examination of UNIX
 24 intellectual property in Linux? Let me be more
 25 precise. This e-mail seems to focus on intellectual

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1 property in libraries.
 2 A. Yes. That's right.
 3 Q. And was that the focus from the beginning
 4 of Terpstra's meeting with you through this period?
 5 A. That was the problem that he originally
 6 flagged. And so that was the area that we were
 7 originally looking at; that's correct.
 8 Q. And again for someone who hasn't been
 9 living with this for some years, what was the issue
 10 that Terpstra had identified in general terms with
 11 respect to UNIX intellectual property in libraries?
 12 A. The first time that John put this up on
 13 the white board for me, as I recall, he was talking
 14 about dynamic link libraries versus static link
 15 libraries, and the value of having the dynamic link
 16 library was so much greater. You could get more
 17 efficiency with your system. You could run things
 18 much more productively. And that the dynamic linking
 19 was an area inside of Linux that was problematic in
 20 terms of our intellectual property being abused.
 21 Q. And was the problem in the libraries to
 22 which the links were being made, or in the linking
 23 function in Linux, or both?
 24 A. Well, I believe to link it had to be in
 25 both sides. You had to have something inside the

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1 kernel to catch it, and then you had to have
 2 something in the user space. So I think it was, as I
 3 understand it -- I'm not an engineer myself. But as
 4 I understood the process, it was a bit of both.
 5 Q. When he refers to efforts in this e-mail,
 6 what exactly is he talking about in terms of the work
 7 that was underway at this point?
 8 MR. NORMAND: Let me just make a general
 9 objection about not understanding how this relates to
 10 any claim or defense in the case. And to the extent
 11 it does, I'm not sure how it relates to an unstayed
 12 claim or defense. But obviously I have to give you
 13 some leeway on this front, Mr. Jacobs.
 14 A. Could you repeat the question there?
 15 Q. Sure. He refers there to efforts.
 16 A. Okay.
 17 Q. And my question is what projects were
 18 underway at this time with respect to UNIX
 19 intellectual property in Linux?
 20 A. My recollection is that we were trying to
 21 understand, I was trying to understand more fully
 22 what John's issues were. I mean, he was the one that
 23 came to me and said, "There are problems here." In
 24 the summer had told me there's this dynamic linking
 25 problem with our libraries, so we were trying to get

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1 more clarity around that issue, set of issues.
 2 Q. Was Terpstra somebody who had come with
 3 the UNIX business from the Santa Cruz operation to
 4 Caldera?
 5 A. No. John, as I understood it, had joined
 6 the company within a year before I got there, was not
 7 part of the acquisition, was actually -- came on as
 8 the Linux evangelist and was more of a Linux veteran,
 9 if you will.
 10 Q. And how did he explain to you how he first
 11 became aware of potential UNIX intellectual property
 12 issues relating to Linux?
 13 A. I don't know that he ever told me how he
 14 had that understanding. He just claimed to be one
 15 that knew the insides of Linux well and that there
 16 was a problem with this. I don't recall him telling
 17 me how he came to that understanding.
 18 Q. In paragraph 10 of his e-mail, October 2,
 19 2002, Exhibit 208, he says, "It would appear that a
 20 significant number of sites may be running SCO OSR5
 21 binaries on Linux. This constitutes a violation of
 22 our copyright and licensing terms. It will be a
 23 significant effort to isolate violators should we
 24 wish to enforce our IP through protective measures."
 25 Do you see that?

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1 A. Yes.
 2 Q. So just distinguishing for a minute on the
 3 technical level between an issue in the kernel versus
 4 an issue in the libraries, what did you understand
 5 him to be saying in paragraph 10? Was he talking
 6 about both sides of the equation or just libraries?
 7 A. I don't know exactly what he was talking
 8 about there. Again, my understanding is that whereas
 9 the preponderance of these libraries are found out in
 10 the user space, the reality is you have to have some
 11 way of hooking into the kernel because that's like
 12 the engine that drives the whole thing. So I think
 13 the majority of this was a user space problem but it
 14 had to have some kind of tie in to the kernel.
 15 Q. By "user space," what do you mean?
 16 A. Basically inside of a user environment
 17 you're going to have applications that run your
 18 business. And what the libraries were there to do
 19 was to help make these applications more efficient.
 20 And so you take your set of applications, you have
 21 libraries that are associated with that, and then the
 22 libraries -- again, I'm not an engineer. But as I
 23 understand it, they are interfacing in and out of the
 24 kernel to help make this thing more efficient.
 25 Q. He then goes on to say, "I have discussed

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1 the above with Opinder and we both recommend that
 2 should we wish to pursue our IP that this could be a
 3 viable proposition should you elect to allocate
 4 resources to the task. This may be a necessary task
 5 if we wish to offer a moratorium on copyright and
 6 license infringement by offering to legitimize the
 7 use of our technology by sale of appropriate
 8 licenses." Do you see that?
 9 A. Yes.
 10 Q. So hold that thought for a minute about
 11 what he is saying on October 2 because I want to try
 12 and get that chronology down. But rather than probe
 13 your memory, we'll look at a few more documents and
 14 see if we can set up a chronology.
 15 A. Okay.
 16 Q. Let's go back, first of all, to another
 17 document. Put some other documents into the record.
 18 (EXHIBIT-209 WAS MARKED.)
 19 Q. So we have marked as 209 a "Dear Fellow
 20 Shareholder" letter from you to Caldera shareholders,
 21 produced under SCO 1269208 to 210. This is, I think,
 22 how it was produced to us but it looks to me like we
 23 have a fix of documents here. So let's separate
 24 them, actually, and take off 210.
 25 A. Right. Yeah, that's different on the back

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1 side there.
 2 Q. So we have removed from the stapled
 3 version of this document SCO 1269210, and let's just
 4 set it aside for now.
 5 A. We are going to come back to it?
 6 Q. If I do, I will give it back to you.
 7 A. All right.
 8 Q. So 209, then, is just a two-page letter to
 9 shareholders, and it's from you. Do you recognize
 10 this document?
 11 A. Yes, I do.
 12 Q. Did it reflect your views at the time of
 13 your findings with respect to the assets that Caldera
 14 could leverage in the marketplace to gain maximum
 15 impact?
 16 MR. NORMAND: Objection to form.
 17 Q. Yeah, it's not very good.
 18 You see this letter reports that you
 19 joined the company on June 27, 2002?
 20 A. Correct.
 21 Q. And then you've spent a good amount of
 22 time, quote, "Talking to employees, customers, and
 23 partners. I have been focusing on assets that we can
 24 leverage in the marketplace to gain maximum impact."
 25 You see that?

<p style="text-align: right;">Page 26</p> <p>1 A. That's right. 2 Q. And then you report your findings in the 3 rest of the letter. 4 A. Right. 5 Q. Were those, in fact, your findings at the 6 time? 7 A. This represents accurately what I saw at 8 the time, yes. 9 Q. And in the last sentence of paragraph 1 -- 10 actually, let me just read paragraph 1. "Caldera 11 owns the technology and other key intellectual 12 property rights to UNIX, one of the world's largest, 13 most popular computing platforms. Brands that you 14 may have heard of that derive from our UNIX 15 intellectual property include UNIX SVRX, UnixWare, 16 and SCO Open Server. We can and will be much more 17 aggressive in marketing and protecting these valuable 18 assets." You see that? 19 A. Yes. 20 Q. Was the sentence about being more 21 aggressive in marketing and protecting these valuable 22 assets a reflection of the work that was being done 23 with Terpstra? 24 MR. NORMAND: Objection to form. 25 A. A small part of it. At that point in</p>	<p style="text-align: right;">Page 28</p> <p>1 become known as SCOSource? 2 MR. NORMAND: Objection to form. 3 A. Right. That's correct. 4 Q. The point about the focus on UNIX versus 5 the focus on Linux, when you said the majority of the 6 revenues came from the UNIX side of the business, 7 were you including in that calculation the fact that 8 the SVRX royalties were, at the level of 95 percent 9 of them, then being remitted to Novell? 10 MR. NORMAND: Objection to form. 11 Q. It wasn't very clear. 12 I take it that your calculation of the 13 promise that UNIX held for the company, as compared 14 with Linux, took into account the fact that as to 15 SVRX royalties, 95 percent of those were going to 16 Novell? 17 MR. NORMAND: Same objection. 18 A. As it relates to SVRX, I think my view at 19 that time was that there were different definitions 20 of the SVRX in terms of the discussion we are having 21 here. System V Release X first and foremost to me 22 refers to System V as a code base, as a basis for the 23 intellectual property for UNIX. I mean, 24 interchangeable with SVRX at this time I would have 25 said System V. So I could have just as easily in</p>
<p style="text-align: right;">Page 27</p> <p>1 time, the work that Terpstra was on was related to 2 the libraries tied into Open Server that were related 3 to Linux. What we were talking about in this 4 paragraph was broader. We were talking, first and 5 foremost, about the fact that when I joined the 6 company they had not been marketing UNIX actively. 7 Everything had been focused on Linux at the time. 8 One of the findings that came out of my 9 two-week study with the top managers was that 10 although the previous regime had been focused almost 11 entirely on marketing and promoting and talking about 12 Linux, a preponderance of the company's revenues were 13 coming from UNIX. And so one of the real issues that 14 I saw early on was we need to get out and 15 aggressively market that we are still a UNIX company. 16 I mean, we own the UNIX operating system. And yes, 17 we have a branch of our company, I should say over 18 here, that is around Linux. But the majority of the 19 company's revenues are coming from UNIX and we need 20 to recognize that. We also need to be more active in 21 protecting these assets. 22 Q. And that was, at that point, that's just a 23 general statement about protecting the assets? 24 A. Right. 25 Q. Rather than a precursor of what would</p>	<p style="text-align: right;">Page 29</p> <p>1 this statement said, "We own the UNIX intellectual 2 property including UNIX System V," which is really 3 what we are saying there. It's just a shortened 4 version of it. 5 I think the comment that you're making 6 about the SVRX royalties, I wasn't really thinking 7 about that in the context of this because they were 8 so miniscule it didn't really mean anything. It 9 wasn't even on the radar screen. Monies came in, 10 monies went out. We got 5 percent of a small number. 11 That wasn't something that I was focused on at the 12 time. 13 Q. So let me flip it around a little bit. I 14 think my question wasn't clear. At this point, 15 Caldera, soon to be renamed SCO, is marketing -- is 16 marketing a UnixWare product? 17 A. Yes. 18 Q. And a SCO Open Server product? 19 A. Correct. 20 Q. And both of those are derivatives of UNIX. 21 A. Correct. 22 Q. The SCO Open Server product, you're 23 retaining a hundred percent of the revenues? 24 A. Yes. When you say "retaining --" 25 Q. Meaning you're not passing -- that's not</p>

1 an SVRX revenue so you don't have to pass that part
2 on to Novell, the 95 percent of that.

3 A. Correct.

4 Q. And at this point, UnixWare, the deadline
5 has either come or passed already for when you don't
6 have to remit any more UnixWare revenues to Novell,
7 correct?

8 MR. NORMAND: Objection to form.

9 Q. Do you recall?

10 A. It was actually a few months before that
11 deadline I think you are referring to. But the point
12 was there were no royalties going to Novell on
13 UnixWare.

14 Q. And as to the System V revenues that SCO
15 was receiving, 95 percent of those were being passed
16 on to Novell.

17 MR. NORMAND: Objection to form.

18 A. The pre-existing SVRX licenses and the
19 binary royalties that it tied to those licenses from
20 the Novell transaction we talked about earlier, we
21 were still passing through to Novell.

22 Q. And when you were looking at the promise
23 that UNIX held in terms of the revenues the company
24 was receiving, you were focusing on UnixWare and SCO
25 Open Server?

1 MR. NORMAND: Objection to form.

2 A. Well, in this particular statement, what
3 we are talking about here is not revenues. We are
4 talking about brands. Brands you may have heard of
5 that derive from this UNIX intellectual property,
6 UNIX SVRX -- so again, we could just as easily have
7 said UNIX System V, UnixWare, and SCO Open Server.
8 So the company has all right, title, and interest in
9 the UNIX operating system. And springing off from
10 this well, if you will, is UnixWare and Open Server.

11 Q. I think you may be thinking I'm driving at
12 something especially, and I really just wanted to
13 understand your assessment of the revenue base of the
14 company at this point.

15 A. Yes. So on the revenue base, yes, when I
16 talk about the majority of it coming from UNIX, I'm
17 thinking UnixWare and Open Server. The things that
18 we passed along that we were collecting for Novell on
19 their pre-existing licenses that were ten years old,
20 it was miniscule.

21 Q. And it was not part of your assessment of
22 the relative weight of revenues as between UNIX and
23 Linux?

24 MR. NORMAND: Objection to form.

25 A. Well, it would have been rolled up in the

1 UNIX number. But again, it's -- it was a small
2 number.

3 Q. Now, at this point, when you are sending
4 out this letter, are you aware that there is a
5 potential issue - and I'll just use a neutral
6 formulation at this point - about whether the Asset
7 Purchase Agreement needs clarification on the
8 question of ownership in the UNIX copyrights?

9 MR. NORMAND: Objection to form.

10 A. I don't recall exactly. If I were going
11 to bet, I would say that at that point in time I had
12 not flagged that as an issue.

13 Q. This is a document that was used in the
14 IBM case but I think we will put a Novell number on
15 it, so it will be 210.

16 (EXHIBIT-210 WAS MARKED.)

17 Q. Exhibit 210 is an e-mail from Reg
18 Broughton?

19 A. Uh-huh (affirmative).

20 Q. Dated August 13, 2002. Patents and IP
21 Investigation, to you, produced under SCO 1272338 and
22 39. Just take a minute to review that document.

23 A. Okay.

24 Q. And let's do one more document again, just
25 so I'm not confusing on the chronology here. Let's

1 mark as 211 an Analyst Briefings set of slides
2 produced under SCO 12787696 to 7706.

3 (EXHIBIT-211 WAS MARKED.)

4 Q. And this is October, 2002. This is 211.

5 And on the topic of intellectual property,
6 if you turn to page 4 of the set of slides, you are
7 announcing the creation -- the slide is announcing
8 the creation of SCO Tech, "A new organization in SCO
9 with a charter to formalize the licensing of our
10 intellectual property." And then it goes on to talk
11 about -- the slides go on to relate SCO's concern
12 about "violations of our software license
13 copyrights."

14 A. Uh-huh (affirmative).

15 Q. SVR4 libraries, OSR5 libraries. And then
16 on the next page, on page 5 of the slides, SCO's IP
17 Plans, "SCO wants to protect our intellectual
18 property," et cetera. You see all that?

19 A. Yes, I do.

20 Q. So just to get 211 in place here, did you
21 actually deliver those slides at analyst briefings?

22 A. I don't know what analyst briefing this
23 would have been for. I'm not sure what it was
24 targeted for.

25 Q. Did you deliver the content of these

1 slides to an external audience around October, 2002?

2 A. I may have. The presentation looks
3 familiar. I just don't remember which audience.

4 Q. And then there's a note, it looks like
5 from Blake Stowell to you -- well, a note from Blake
6 Stowell saying, "Updated slides for tomorrow
7 morning's discussion," on the front cover. Do you
8 see that?

9 A. Uh-huh (affirmative).

10 Q. Do you have any reason to think you
11 didn't?

12 A. No. We were talking with analysts,
13 customers, industry partners. So that makes sense.

14 Q. There's a slide on page 6, maybe this will
15 trigger your recollection. It's after the slides I
16 was just discussing with you and it says Your
17 Suggestions, and then it asks some questions about
18 how SCO might go about addressing the intellectual
19 property issues discussed in the previous slides. Do
20 you see that?

21 A. Yes.

22 Q. Do you have any recollection of speaking
23 to some external audience and saying, "Folks, what
24 would you do about the situation?"

25 A. If I remember -- as I see that, you're

1 right, it does trigger a bit of a memory. I believe
2 we are talking to industry analysts. I believe it
3 wasn't face to face. I think it was over phone calls
4 in our conference room. And the idea was to lay out
5 the issues, the problems, and the solution, and then
6 to give industry analysts a chance to weigh in on it.
7 So yes, I believe that's what it was.

8 Q. Now, if you go back to -- maybe you
9 remember this well enough. Can you describe what's
10 going on or what you would have said about the slide
11 that is on the top half of page 5?

12 MR. NORMAND: Objection to form.

13 A. It's really hard to see on my copy.

14 Q. All I can make out is, on the left side,
15 it seems to be referring to the SVR4 bullet in the
16 previous slide, and on the right side it seems to be
17 referring to OSR5.

18 A. Right. The discussion really was geared
19 around our libraries. The point on the previous
20 slide probably is the explanation of a lot of this.
21 We were concerned about the violations of our
22 software license copyrights for our SVR4 libraries
23 and for the Open Server libraries. And as I recall,
24 what we were putting in place was a program to allow
25 companies that were treading on our IP, were

1 infringing it, to get clean; to be able to run our
2 libraries with Linux for a fee. And that was the
3 idea. It would be a win/win for both sides.

4 Q. The reference to Open Server Release 5
5 libraries, do you have a recollection of what the
6 distinction was between those libraries and the SVR4
7 libraries?

8 A. The SVR4 libraries were tied to the
9 UnixWare product. The OSR5 products are tied to the
10 Open Server product.

11 Q. Did you have an understanding in the
12 distinction in the code base between those two?

13 A. I didn't know exactly. I knew they were
14 different or we would have not called out the
15 difference. But there were some differences there.

16 Q. And what was your understanding of the
17 evolution of Open Server R 5 from the time that Santa
18 Cruz operation received the UNIX assets from Novell?
19 By that I mean, do you have an understanding that the
20 Santa Cruz operation had written significant code on
21 top of what it had received when it acquired the UNIX
22 assets from Novell in order to evolve the OSR 5
23 product?

24 MR. NORMAND: Objection to form.

25 A. I don't know how much OSR5 evolved. I

1 know it had gone through some updates, upgrades,
2 revisions. I don't know the magnitude of that from
3 the time they got it from Novell.

4 Q. Was Open Server a product that they got;
5 that the Santa Cruz operation got from Novell?

6 A. No.

7 Q. So it was an evolution -- well, what was
8 your understanding of how it was created and
9 positioned?

10 A. That was the product that they had before
11 they had bought UnixWare and UNIX from Novell.

12 Q. And --

13 A. It was based on a license back to the
14 original AT&T for UNIX, but it was a different
15 version of the code base, different version of System
16 V than was UnixWare. So they both ran on the Intel
17 chip set, but were different code bases.

18 Q. So if you look now at 208 -- well, let's
19 spend a minute on 210. What was Reg Broughton's role
20 in the company in August of 2002?

21 A. He was a vice-president reporting to me.
22 I believe he was over sales at the time. I'm not
23 sure exactly.

24 Q. How did he get involved in the IP
25 investigation reflected on 210?

1 A. He was involved as part of my executive
2 team. And as we were going through giving updates on
3 where we were going, he was part of the team that was
4 trying to sort out what was going on with the IP
5 issues.

6 Q. The e-mail that he covers from Michael
7 Davidson to him on August 13, 2002, do you see that?

8 A. Yes, I do.

9 Q. What was Michael Davidson's role in the
10 company?

11 A. He was a senior engineer for us.

12 Q. Had he come over from the Santa Cruz
13 operation?

14 A. Yes, he came from Santa Cruz.

15 Q. And he is reporting on a study that was
16 done by Bob Swartz. Do you see that?

17 A. Correct.

18 Q. Was this the first time you became aware
19 of Bob Swartz -- is it Swartz or Schwartz?

20 A. Swartz.

21 Q. Was this the first time you became aware
22 of the Bob Swartz study?

23 A. Yes. That's the first time I heard of
24 that.

25 Q. The conclusion -- well, at the

1 second-to-the-last paragraph on the first page, he
2 says, "An outside consultant," that's Swartz above,
3 "an outside consultant was brought in because I
4 already voiced the opinion (based on very detailed
5 knowledge of our own source code and a reasonably
6 broad exposure to Linux and other open source
7 programs) that it was a waste of time and that we
8 were not going to find anything." Do you see that?

9 A. Yes.

10 Q. And then he says, "Bob worked on the
11 project for (I think) four to six months during which
12 time he looked at the Linux kernel and a large number
13 of libraries and utilities and compared them with
14 several different versions of AT&T UNIX source code."

15 A. Right.

16 Q. "(Most of this work was automated using
17 tools which were designed to do fuzzy matching and
18 ignore trivial differences in formatting and
19 spelling.)"

20 And then at end he sums up. "At the end,
21 we had found absolutely," asterisk, "nothing," close
22 asterisk, "i.e. no evidence of any copyright
23 infringement whatsoever. There is an, indeed, a lot
24 of code that is common between UNIX and Linux (all of
25 the X Windows system, for example) but invariably it

1 turned out that the common code was something that
2 both we (SCO) and the Linux community had obtained
3 legitimately from some third party." I left out the
4 parentheticals in that last paragraph. Do you see
5 that?

6 A. Yes, I do.

7 Q. So as of August 13, 2002, it looks like
8 there are two tracks to this investigation that
9 you're doing. One is focused on libraries and one is
10 more generally focused on the question of UNIX code
11 in Linux. Would you agree with me?

12 MR. NORMAND: Objection to form.

13 A. At the time, I was trying to understand
14 both propositions; that's correct.

15 Q. What did you do with respect to Reg
16 Broughton's report? What action did you take in the
17 wake of Exhibit 210, his August 13 e-mail?

18 A. I remember reading it. I remember talking
19 to people inside the company. We talked to Terpstra.
20 Terpstra was not a UNIX guy so he wasn't aware of any
21 of this. Other than that, I don't remember
22 specifically what I would have done.

23 Q. Did you drop for a while and then resume
24 the question of whether that was being addressed by
25 Broughton's e-mail as opposed to the library's

1 question in Terpstra's -- let me start over again.

2 Terpstra's at 208 is dated October 2,
3 2002. So it appears, you can agree or disagree with
4 me, that the libraries investigation is still ongoing
5 as of the summer and fall of 2002, correct?

6 A. Correct.

7 Q. Then if Broughton's report is about the
8 general question of UNIX and Linux, he seems to be
9 putting the kibosh to the question of whether there
10 is such code. Did that question lapse for a while
11 and then get picked up again?

12 MR. NORMAND: Objection to form.

13 A. On this broader Linux question, my
14 recollection is that there were other opinions inside
15 the company that didn't mirror this one. I had a lot
16 of discussions with a lot of people, whether it was
17 inside of the company talking to previous holders of
18 the technology such as Alok Mahan and Doug Michaels.
19 I talked to a lot of people.

20 MR. NORMAND: Let me just caution the
21 witness that there was a broad time frame I think
22 embedded in Mr. Jacob's question, and at some point
23 we are going to get into work product problems and
24 arguably attorney/client privilege on when litigation
25 is contemplated in earnest.

1 MR. JACOBS: Do you have a date?
2 MR. NORMAND: I don't have a date in mind
3 that I'm going to set out for purposes of the
4 questions. I'd have to hear the particular question
5 and play it by ear.
6 A. So the net of this, if you play this memo
7 out --
8 Q. 210 you are referring to?
9 A. 210. What you find is this memo is flawed
10 in multiple ways. It is flawed first of all in that
11 the conclusion that what Mike Davidson reported on
12 here was incorrect. It was incorrect in terms of the
13 conclusion that was reached. Eventually I had a
14 chance to read the Bob Swartz report myself and he
15 concluded that there were intellectual property
16 problems inside of Linux. It was the opposite of
17 this. Mike Davidson himself actually later got
18 heavily involved in investigation of the intellectual
19 property rights issues with Linux and, in fact, he
20 became a very strong proponent that, in fact, there
21 were problems. In fact gave us -- he doesn't work
22 for us currently but, in fact, made declarations to
23 that effect; that as he got into it and dug into it
24 more deeply that, in fact, there were problems.
25 The fact that this report was done in 1998

1 and we are sitting in 2002 created another set of
2 problems in that Linux had evolved rapidly and a
3 number of things that we believe are violating our
4 rights most likely happened after 1998. So the
5 bottom line with this is it's an interesting artifact
6 to look at but it doesn't have much connection to
7 reality.
8 Q. With respect to the later investigation, I
9 need now to distinguish between the question of
10 whether there was UNIX code in Linux versus
11 IBM-written code in AIX that found its way into
12 Linux.
13 A. Right.
14 Q. And so first of all, did you understand
15 210 to be dealing with both questions or just the
16 first question?
17 MR. NORMAND: Objection to form.
18 A. I wasn't focused at this point in time on
19 the IBM question.
20 Q. And when you were discussing what later
21 ensued in the question of intellectual property
22 rights issues with Linux, if I confine my question to
23 the first topic, the question of UNIX code in Linux
24 as opposed to IBM-written code in Linux, what is the
25 evolution of your thinking on that question after

1 210?
2 MR. NORMAND: Objection to form. Calls
3 for a narrative. And I think we are going to have a
4 work product problem depending on time frame.
5 A. Can you restate your question?
6 Q. Let me explain why I was -- why I asked it
7 the way I did.
8 You explained and put 210 in context.
9 A. Uh-huh (affirmative).
10 Q. As against other information that you
11 received about intellectual property issues in Linux.
12 A. Right.
13 Q. And what I was trying to do was parse what
14 you had just described in terms of the distinction
15 between UNIX code in Linux versus IBM-written code
16 from AIX or other derivatives of UNIX in Linux.
17 Because I couldn't tell from your answer what you
18 were focusing on.
19 A. Well, my focus was just going back to the
20 Bob Swartz report itself. I don't remember the exact
21 words, but essentially he was saying the only way
22 this kind of information could be in Linux was from
23 somebody who had proprietary access to System V code.
24 So he made a conclusion that there were improper
25 things showing up in Linux.

1 Q. When did you study the Swartz report?
2 A. It was -- it would have been early 2003,
3 as I recall. It was either late '02 or early '03.
4 Q. So for some period of time was the
5 question that was addressed in Broughton's e-mail,
6 210, put on the back burner?
7 MR. NORMAND: Objection to form.
8 A. I wouldn't say that this was put on the
9 back burner. This was one input that had come in.
10 Q. In the wake of it, did you go out and get
11 other inputs right away?
12 A. We did get other inputs.
13 Q. What were those inputs?
14 MR. NORMAND: Let me instruct the witness
15 not to answer to the extent that the inputs that were
16 gotten were gotten in contemplation of prospective
17 litigation.
18 A. And that does move into the privilege area
19 because soon after that is when we retained legal
20 counsel to come in and advise us on these matters.
21 Q. So when did you retain legal counsel, as
22 you were just referring to?
23 MR. NORMAND: You can answer the question
24 with a date, if you recall.
25 A. In the fall of '02. I'm going to guess it

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1 was September.
 2 Q. Was that Boies, Schiller?
 3 A. No, it was not.
 4 Q. Was it Kevin McBride?
 5 A. That was the first one. The first was
 6 Kevin. So basically the progression, when I come
 7 aboard I don't even know that there are intellectual
 8 property problems. John Terpstra, the Linux guy, is
 9 the first one that tells me, "There's a problem
 10 here." So Terpstra is the first one that raises his
 11 hand and says, "There's an issue." So we started
 12 investigating things.
 13 I have worked with Kevin McBride, my
 14 brother, for a number of years on things from a legal
 15 standpoint. So I went to him initially and retained
 16 him to come and look and give me his opinion. He is
 17 more of a generalist. He is not an intellectual
 18 property specialist. And so without talking about
 19 what his conclusions were as we get into privilege,
 20 the point is from there he -- let's see, we brought
 21 on Chris Sontag. And between Chris and Kevin's
 22 workings we retained another attorney, not Boies,
 23 Schiller, an intellectual property specialist
 24 attorney that also was a computer programmer. We got
 25 somebody as specialized as we could find to come in

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1 and start to take a look at these issues.
 2 Q. Who was that?
 3 A. His name is Wes Austin.
 4 Q. Is he in Utah?
 5 A. He is here in Salt Lake City. Very sharp
 6 guy. And so we go Terpstra, Kevin, Chris, Wes
 7 Austin, and at the conclusion of that we put together
 8 our SCOsource licensing program so people could get
 9 clear with running Linux without having intellectual
 10 property problems with this.
 11 Q. When did you first retain Boies, Schiller?
 12 A. I believe the retention of them happened
 13 in January of '03.
 14 Q. Now, in --
 15 A. Or December. It may have been December.
 16 Actually December of '02.
 17 Q. And up until the retention of Boies,
 18 Schiller, what kind of discussions had taken place
 19 about the possibility of litigating these IP issues?
 20 MR. NORMAND: Objection to the extent it
 21 calls for communications with attorneys. Let me read
 22 the question.
 23 And objection to the extent any of those
 24 discussions, even not with attorneys, reflected input
 25 or opinions of attorneys.

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1 Do you understand the scope of the
 2 objection I'm making?
 3 THE WITNESS: (Witness nods head up and
 4 down.)
 5 MR. NORMAND: Okay.
 6 A. So we -- when we launched the SCOsource
 7 licensing program, we were not trying to litigate.
 8 We were trying to license. It was a licensing
 9 program. In fact, we had attorneys involved, they
 10 were there to help set up the structure of this
 11 licensing program. Obviously, at some point along
 12 the way we have a litigation firm involved but that's
 13 not where we started with this. That was not our
 14 intention when we went into it.
 15 Q. And when did it become apparent to you
 16 that you would need to initiate litigation in order
 17 to achieve the results you sought?
 18 MR. NORMAND: Objection to form.
 19 A. I don't remember the exact date.
 20 Q. Before you started talking to Boies,
 21 Schiller?
 22 MR. NORMAND: Same objection.
 23 A. I think the -- probably in that time
 24 frame. I would say late 2002, somewhere in there.
 25 Q. So up until that point, was SCOsource --

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1 called in Exhibit 211 SCO Tech, right?
 2 A. Yes.
 3 Q. Was it directed at licensing the libraries
 4 or was it directed at a broader licensing program?
 5 A. This licensing program was specific to the
 6 libraries.
 7 Q. And when did that change?
 8 A. That changed in probably spring of 2003.
 9 Q. What led to that development?
 10 A. What led to that development was demand
 11 from customers who were asking us to get a broader
 12 license than just the libraries.
 13 Q. When you say "demand from customers," do
 14 you literally mean that the first trigger for the
 15 broader license was requests from customers as
 16 opposed to some initiative on SCO's part?
 17 MR. NORMAND: Objection to form.
 18 A. In the spring of 2003, there was a lot of
 19 angst in the marketplace about the litigation that
 20 had been initiated between SCO and IBM and then the
 21 resulting potential effects on Linux. And as we
 22 enter into the spring of 2003, we start to find line
 23 by line code of System V showing up inside of Linux.
 24 And as that became publicly apparent, there were
 25 people that were calling in saying, "Is there a

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1 license we can get to protect ourselves from that
 2 code that's in there?"
 3 Q. So let's see if we can get the sequence
 4 down. When you discussed SCO Tech in October of 2002
 5 and up through the spring of 2003, you roll out
 6 SCOSource?
 7 A. Right.
 8 Q. The focus is on licensing the libraries?
 9 A. I think initially when we rolled out even
 10 the libraries, SCO Tech changed into SCOSource. But
 11 you're right; the initial direction was around the
 12 libraries in early, say winter of '02. Winter of '02
 13 and '03.
 14 Q. Right. Somewhere there in the transition
 15 between the winter and the spring, SCO starts
 16 announcing that it has found line by line copying of
 17 UNIX in Linux.
 18 A. Correct.
 19 Q. That raises concerns in the marketplace,
 20 and that leads to the development of a broader
 21 license.
 22 A. Correct.
 23 MR. NORMAND: Objection to form.
 24 Q. What -- on the libraries question, besides
 25 Terpstra's input on 208, what other input did you

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1 receive after that that reinforced the conclusion
 2 that there was an intellectual property issue with
 3 respect to libraries?
 4 MR. NORMAND: I'll object to the question
 5 and instruct the witness not to answer to the extent
 6 that any such future input was received when the
 7 company was contemplating litigation.
 8 A. The additional information I got on that
 9 was subject to client/attorney privilege.
 10 Q. And you will follow our counsel's
 11 instruction not to answer to that extent?
 12 A. Yes.
 13 Q. With respect to the existence of line by
 14 line code from UNIX that was found in Linux, separate
 15 from the libraries, what inputs did you receive that
 16 led you to that conclusion?
 17 MR. NORMAND: Same objection and same
 18 instruction. And obstruction, frankly.
 19 MR. JACOBS: I'll be the judge of that.
 20 Let the record reflect laughter.
 21 A. Could you repeat the question now? I lost
 22 track of what we were talking about.
 23 Q. (By Mr. Jacobs) With respect to the
 24 existence of line by line code from UNIX that was
 25 found in Linux that was separate from the libraries

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1 issue, what inputs did you receive that led you to
 2 that conclusion?
 3 MR. NORMAND: And the objection was to
 4 work product and attorney/client privilege, and the
 5 instruction was not to answer to the extent that
 6 additional inputs were given in that context.
 7 A. Right. And those things did come from
 8 something that would have been privileged
 9 information.
 10 Q. And you'll follow your counsel's
 11 instruction?
 12 A. Yes.
 13 MR. NORMAND: If there's a natural point
 14 for a break, let us know.
 15 MR. JACOBS: This is a natural point.
 16 (A break was taken from 10:02 to 10:15.)
 17 Q. (By Mr. Jacobs) I'd like to turn to the
 18 topic of your communications with Novell about the
 19 ownership of the copyrights.
 20 A. Okay.
 21 Q. And let me give you a couple documents.
 22 The first -- 212 is a chart with attachments that was
 23 prepared in the other litigation, the IBM litigation.
 24 (EXHIBIT-212 WAS MARKED.)
 25 Q. 213 is an internal e-mail at Novell from

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1 Greg Jones to Jim Lundberg and Bill LaSala, dated
 2 November 20, 2002 and produced under Novell 39578.
 3 (EXHIBITS-213 AND 214 WERE MARKED.)
 4 Q. And 214 is a string of e-mails ending with
 5 December 4, 2002 and produced under Novell 39579 to
 6 39585. And 215 is an e-mail from Mike Anderer to you
 7 dated January 4, 2003.
 8 (EXHIBIT-215 WAS MARKED.)
 9 MR. NORMAND: I don't want to get in the
 10 way. Maybe we can talk about it when we get there,
 11 but I'm confused as to what 214 is; if it's meant to
 12 be just one chain of e-mails or if it is a purposeful
 13 collection of different e-mails. I'm just not sure
 14 what it is. The last e-mail, for example, is
 15 December 4, so it doesn't seem to be a clean
 16 chronological string.
 17 MR. JACOBS: It isn't, so we'll call it a
 18 collection of e-mails. Thank you. And it looks like
 19 it includes 213, so there will be a little overlap.
 20 MR. NORMAND: Is there a particular
 21 document you want to start with or are you giving Mr.
 22 McBride a chance --
 23 MR. JACOBS: Giving him a chance to look
 24 at all of them, yes.
 25 MR. NORMAND: The exhibits that have been

1 marked, let the record reflect, are fairly
2 voluminous, in particular Exhibit 212.

3 MR. JACOBS: And just to be clear, on 212
4 I'm just interested in the copyright ownership in the
5 later portion of it.

6 MR. NORMAND: Now, Exhibit 212 in the
7 chart does cross reference many of the exhibits that
8 are attached. So I think it is an integral document,
9 or integrated document.

10 A. Okay.

11 Q. (By Mr. Jacobs) I'm just going to focus
12 you a little bit, now that you've had a chance to
13 look these over. If you need any more time, let me
14 know. Let's start with 212, which is the chart of
15 your communications with Novell.

16 A. Okay.

17 Q. And in particular the portion of the chart
18 that I want to focus on now relates to the question
19 of copyright ownership.

20 A. Uh-huh (affirmative).

21 Q. And in the first entry on the chart, the
22 content of the communication with Greg Jones and --
23 between Greg Jones and you is described as follows:
24 "Darl McBride called Greg Jones. Mr. McBride
25 indicated that the intent of the Asset Purchase

1 Agreement as reflected in the parties' past practices
2 was that the copyrights to UNIX and UnixWare had been
3 transferred to SCO. Mr. Jones agreed with Mr.
4 McBride. Mr. McBride then asked whether Mr. Jones
5 had any paperwork confirming their understanding of
6 the Asset Purchase Agreement, and Mr. Jones said he
7 would check. In a later call, Mr. Jones indicated
8 that the documents were in storage and would be
9 difficult to access, but never indicated that they
10 did not agree with SCO. Ultimately, Mr. Jones
11 proposed that someone at Novell simply sign a
12 statement or letter to that effect rather than trying
13 to find the old documents in storage. At no time in
14 these conversations did he indicate that --" I'm
15 sorry. "-- did Mr. Jones indicate that he believed
16 SCO did not own the UNIX and UnixWare copyrights, and
17 in fact consistently agreed with Mr. McBride's
18 statements that the copyrights had transferred to
19 SCO." Do you see that?

20 A. Yes.

21 Q. Did you participate in the preparation of
22 that portion of the chart?

23 A. Yes, I did.

24 Q. You gave the content?

25 A. Yes.

1 Q. And it was, at the time you prepared the
2 chart, your best recollection of what happened?

3 A. Correct.

4 Q. And it's recounting conversations from
5 November, 2002 through January, 2003; two to three
6 conversations. You see that?

7 A. Yes. Later I think it actually, as I look
8 at it, I think it actually went through February of
9 '03, but it was in that rough time frame.

10 Q. So what I've given you in 213 is Mr.
11 Jones's internal account of contact with you and with
12 Joanie Bingham?

13 A. Right.

14 Q. About Asset Purchase Agreement related
15 documents. Do you see that?

16 A. Uh-huh (affirmative).

17 Q. And he recounts that on November 20 he and
18 Dave Wright spoke with you and that you wanted,
19 quote, "Any Novell documents that helped give the
20 history of SCO's rights to UNIX," close quote. Do
21 you see that?

22 A. Right.

23 Q. And then he goes on to explain that you
24 wanted it, quote, "To assert claims relating to
25 infringing uses of SCO UNIX libraries by end users of

1 Linux." Do you see that?

2 A. Uh-huh (affirmative).

3 Q. And then he said that you said, "As Novell
4 still receives more than \$8 million each year from
5 retained revenue streams for old versions of UNIX,
6 Darl suggested that SCO's efforts may lead to Novell
7 receiving greater revenues." Then he tells you -- he
8 says in the e-mail what he said back to you. And he
9 closes by saying, "Darl asked if he could start with
10 a copy of the agreements between Novell and SCO." We
11 will come back to what he said to you, but I wanted
12 to focus for a minute on what you said to him.

13 Does this memorandum refresh your
14 recollection as to the contents of a telephone call
15 on November 20 between you and Greg Jones and Dave
16 Wright?

17 A. Well, this is midstream. In the
18 communication we started with, it talked about me
19 talking to Greg Jones on the phone. Now we are
20 picking up kind of midstream with me and Joanie and
21 Greg Jones and Dave Wright. There's now four people
22 involved with cc's to Lundberg and LaSala. So this
23 is sort of a midstream view of what's going on.

24 Q. As opposed --

25 A. Not the initiation of it.

1 Q. So --

2 A. So it would be helpful in the, you know,
3 in the progression here if Jones would have started
4 with the first communication that he and I had. But
5 this is clearly -- I believe this does relate to a
6 communication that was had along the way.

7 Q. Well, what he says is that the first
8 communication -- he indicates in this e-mail that the
9 first communication came from Ms. Bingham. Do you
10 see that?

11 A. Yeah, and that's incorrect.

12 Q. That's not right?

13 A. That's not correct at all.

14 Q. So what's your recollection?

15 A. My recollection was that as I had gone
16 through and looked at the Asset Purchase Agreement, I
17 read 65 pages of a document or so. That 65 pages was
18 in accord with what I had remembered the deal was
19 back in the '95 time frame, which was SCO had bought
20 the UNIX business from Novell. There was one part in
21 there that didn't make any sense, which was this
22 excluded assets provision that said the assets were
23 excluding the copyrights. And that made no sense to
24 me, and that's what I was trying to come to grips
25 with. It would be as if you were buying an

1 automobile business to sell cars but there's no
2 engine in it. It made no sense.

3 And so as we went through that Asset
4 Purchase Agreement, and as I was trying to get some
5 understanding of this -- the more we looked at it,
6 the more it came down to we felt like there was just
7 an error in this whole thing and that there's
8 probably something somewhere that would clear this
9 up. We looked through our files at the time, didn't
10 find any, and then I thought, "Wait a minute. I know
11 the guys over at Novell because I used to work
12 there." And then I thought, "Who shall I call?"

13 Well, Greg Jones was the attorney that I worked with
14 in the Extended Networks Division we talked about
15 earlier. I had a personal relationship with him,
16 good working relationship. If I recall correctly, I
17 think he first worked in my group when he came into
18 the company. So I knew Greg very well.

19 So the very first conversation was not
20 from Joanie Bingham. It was me picking up the phone
21 and calling Greg Jones, and I had a conversation with
22 him. And I told him what we were trying to do, told
23 him that we were trying to get clarification. Talked
24 about the -- "Greg, do you remember when we, at
25 Novell, remember when Novell sold the UNIX business

1 to Santa Cruz?"

2 "Oh, yeah, yeah."

3 "Okay. We're going through this, we're
4 trying to put together the pieces on this. There's
5 something really strange here. There's an excluded
6 assets that says the copyrights didn't go over. Does
7 that make any sense to you?"

8 "No, that doesn't make any sense. What's
9 going on?"

10 So I was catching him cold, but in a cold
11 response he was agreeing with my position that the
12 business had been sold to Santa Cruz. It didn't make
13 sense that the copyrights wouldn't have gone. And so
14 his reaction to that, Greg's reaction was, "Well,
15 okay. Let me see what I can do for you. I
16 understand the issue. It doesn't make sense to me,
17 either. Let me see what I can do for you." That was
18 well before this November 20 discussion that's going
19 on here.

20 As we continue through this progression,
21 there is a desire on my part -- so Greg's off and I'm
22 not hearing from him so now we are trying to track
23 down Greg. That's probably when Joanie called,
24 trying to get hold of him. And then we pick up where
25 we're going here.

1 Q. Is the contents of what he reports you
2 saying in this e-mail, Exhibit 213 on November 20,
3 2002, consistent, first of all, with your
4 recollection of this phone call?

5 A. No.

6 Q. What do you -- where do you differ?

7 A. Well, with this phone call, meaning on
8 November 20?

9 Q. Yes.

10 A. What I remember him coming back with on
11 the second round of discussion was to say, "That
12 information is not readily available. It's in
13 storage. It is in archives. I can't even get to
14 that." It wasn't a discussion of the kind of things
15 that are written down here. It was that that stuff
16 is just available.

17 Q. Let me break this down a little bit.

18 A. Okay.

19 Q. We will get to what he said to you.

20 A. Okay.

21 Q. But in the paragraph I read that starts
22 with, "Today Dave Wright and I spoke with Darl," he
23 reports what you said to him. And my question is, is
24 that consistent with your recollection of what you
25 said to him on November 20?

1 A. When I was talking to Dave - several
2 conversations, and then Chris Sontag had a couple
3 along the way - I was consistently saying the same
4 thing; that we wanted any document that would help
5 clarify the transaction that happened between Santa
6 Cruz and UNIX. So if I talked to him on this day,
7 then it's very conceivable I would have said, "Do you
8 have documents as to the history of this
9 transaction?"

10 Q. And how about the reference to the \$8
11 million for retained revenue streams for old versions
12 of UNIX?

13 A. Yeah, I imagine at some point along the
14 way -- I don't believe this was in the first
15 discussion, because the first discussion wasn't
16 around that. It wasn't around enforcing our rights
17 with UNIX. It was really simply around, "We are
18 trying to get a copy of this." I'm sure somewhere
19 along the line we did have this discussion.

20 Q. And what were you referring to when you
21 refer to the possibility that Novell might receive
22 greater revenues?

23 A. The fact of the matter was Linux was
24 beating up UNIX in the marketplace, and Linux had
25 intellectual property problems that we were spotting.

1 And the fact that Novell still had pre-existing
2 binary royalties flowing from the '95 agreement, the
3 logic was if UNIX is able to sort of step up and
4 protect itself against these intellectual property
5 issues, then whoever is a recipient of UNIX based
6 revenue would benefit from that.

7 Q. Then on the topic of what he said to you,
8 he writes, "I advised Darl that: Novell carefully
9 considers any request for information in support of a
10 third party's litigation activities; and, as he
11 expressed specific interest in agreements between
12 Novell and UNIX System Laboratories, to the extent
13 any such documents are not publicly available through
14 EDGAR, they would probably be subject to
15 confidentiality agreements." Does that account
16 square with your recollection?

17 A. He may have said that somewhere along the
18 line. That was clearly not the first thing he said.
19 The first discussion we had was like two buddies
20 talking, and it was, "Oh, yeah, that doesn't make
21 sense. Let me go see what I can find for you." It
22 wasn't -- this is sort of legal mumbo jumbo that is
23 well prepared in terms of coming back. The first
24 discussions were like two guys that have worked
25 together for a long time talking together.

1 I think somewhere in the middle of it this
2 sort of language probably did appear, but not
3 initially.

4 Q. And -- okay. So you don't disagree with
5 his accounting of a November 20 call in terms of what
6 he said to you?

7 MR. NORMAND: Objection to form.

8 A. I don't have any reason to disagree with
9 these comments.

10 Q. And then the last line is, "DARL asked if
11 he could 'start with' a copy of the agreements
12 between Novell and SCO." Does that square with your
13 recollection?

14 A. Well, I remember wanting anything that had
15 to do with transactions with the UNIX business.

16 Q. Let's take a look now at 214.

17 Actually, Ted, I think there is a --

18 MR. NORMAND: -- a logic?

19 Q. -- a logic to 214 when I look at it again.
20 214 is an e-mail dated December 4 from Greg Jones.
21 And the subject is "SCO (formerly Caldera) - Linux
22 'licensing' program." Do you see that?

23 A. It's on the first page?

24 Q. Yeah.

25 MR. NORMAND: It's in the subject line.

1 A. Okay. Yeah.

2 Q. And in this e-mail, in the first full
3 paragraph, the first lengthy paragraph, Greg
4 summarizes previous communications and then he starts
5 talking in the second lengthy paragraph about
6 returning a phone call from you. Do you see that?

7 A. Yes.

8 Q. And he wrote, "Today Dave Wright and I
9 returned a phone call from Darl McBride, SCO's CEO.
10 Darl reiterated his request for Novell assistance,
11 and he then informed us that next week SCO will
12 announce a Linux 'licensing' program."

13 A. Right.

14 Q. "Under the program, in exchange for
15 license fees, end users and others will receive a
16 license under any UNIX IP contained in Linux. This
17 is my rough understanding based on the conversation
18 with Darl. Apparently SCO will spin this campaign as
19 a means for Linux vendors and end users to ward off
20 Microsoft IP infringement assertions against Linux
21 (Darl alluded to a CRN article from today, attached),
22 although it seems evident that this characterization
23 is such a stretch that it could not possibly play
24 well in the press or the marketplace (i.e., receiving
25 a license under SCO IP in no way shields a Linux

1 Vendor or user from any claims under Microsoft IP)."
 2 I think it is intermixed in the next
 3 paragraph between the two of you. "Dave and I told
 4 Darl that Novell had no interest in participating,
 5 that his request had been reviewed by business
 6 management and there was no interest. Darl pressed
 7 the matter and argued that Novell would surely be
 8 interested in the potential increase of the declining
 9 \$8 million annual revenue streams Novell receives
 10 from contracts that licensed out older versions of
 11 UNIX. We explained that: 1) any increase would not
 12 necessarily occur, and the amount would likely not be
 13 significant to Novell; 2) the information SCO
 14 requests is not readily at hand. It would require
 15 effort by Novell to gather the information, and our
 16 efforts are prioritized elsewhere; 3) SCO's campaign
 17 of IP enforcement will likely involve litigation, and
 18 in such matters we generally limit cooperation to
 19 appropriately responding to any subpoenas that may
 20 issue; and 4) SCO's enforcement actions would likely
 21 include Novell partners and customers that, in
 22 addition to Novell offerings, also distribute or use
 23 Linux, and that Novell values our relationship with
 24 partners and customers greater than any bump in
 25 legacy UNIX royalties. We did not mention in any way

1 Novell's own interest in becoming more active in the
 2 Linus area in a more direct manner."
 3 "Darl pressed for who was calling the
 4 shots on this at Novell. Not knowing whether Chris
 5 or Carl would want to be drawn into any discussions
 6 with Darl, I advised that the decision had been
 7 reviewed at the worldwide management committee
 8 'level.' Darl told us that he plans to revisit this
 9 matter, that he'll be contacting us again. Dave
 10 Wright will be meeting with Darl later this week on
 11 an unrelated business opportunity."
 12 I read all that to make sure we have in
 13 front of us exactly what Greg says the two of you
 14 said to each other.
 15 A. Okay.
 16 Q. And so my question is similar: Does this
 17 Exhibit 214, the December 4, 2002 e-mail, accurately
 18 recount the substance of your communication with Mr.
 19 Jones and Mr. Wright on December 4?
 20 A. I remember having a discussion with a
 21 number of vendors in that time frame where basically
 22 we put together the SCOSource licensing program, and
 23 Novell was one of a number of vendors that we had
 24 contacted. I remember having a discussion -- I don't
 25 remember it getting down to this level of detail but

1 the general essence of Novell not being interested in
 2 it, I would agree with.
 3 Q. And this included a - Novell not being
 4 interested in it - a rejection of your request for
 5 assistance with respect to documents?
 6 MR. NORMAND: Objection to form.
 7 A. What I remember from the discussions with
 8 Greg around trying to get clarity to the Asset
 9 Purchase Agreement was, first of all, a request for
 10 documents that would help us all understand this
 11 thing better. And then secondly, when he was saying
 12 that this is in storage, this is tied up, it's in
 13 archives, it's too hard to get to, Greg's idea -- and
 14 again he never came back and said, "We disagree with
 15 your point on this." It was just, "It's in archives.
 16 It's just too hard to get to."
 17 He understood what we were trying to do.
 18 He understood what the issue was, and he had agreed
 19 with our position on this. And so his point, he was
 20 trying to help us, and so he made the point of
 21 saying, "Why don't you put together a letter that
 22 articulates what we are trying to do here and then
 23 I'll see if I can get that signed and then we will be
 24 done with it. Then we won't have to go through this
 25 whole -- traipse through the storage unit and try to

1 find it. I mean, it's real clear what you are trying
 2 to do. I don't disagree with it. Let's put it down
 3 on paper. We will put it in writing and we'll sign
 4 it and then you can just put that with your files."
 5 So that was the next major thing.
 6 Now, along the way, we had this side
 7 discussion around -- there were a couple of things
 8 that came up so we were having various discussions.
 9 This discussion in particular had to do with we are
 10 going to market with our licensing program. We had
 11 talked to a dozen or so vendors. Novell was on the
 12 list of vendors to talk to. So it made sense that we
 13 would talk to Greg. He got us in touch with Dave
 14 Wright because he was the business guy that was
 15 involved in this area.
 16 There were other discussions. I think
 17 they reference in here about having some other
 18 business discussions. I think it was just a
 19 management group or the Zen group or some such thing.
 20 And then later there was a discussion about United
 21 Linux. So there were sort of these variant
 22 discussions going along, alongside this quest to try
 23 and get clarity on the Asset Purchase Agreement.
 24 Q. So with the focus on the request for
 25 getting clarity on the Asset Purchase Agreement, that

1 was -- getting clarity on the Asset Purchase
 2 Agreement was at least one, maybe the exclusive
 3 subject, of Exhibit 213, right?
 4 MR. NORMAND: Objection to form.
 5 A. Yes, and the predecessor to 213 was the
 6 initial call that I had with Greg, which doesn't show
 7 up on here.
 8 Q. So the initial call and the call on
 9 November 20 are focused or directed to the topic of
 10 clarity on the Asset Purchase Agreement?
 11 A. Yes.
 12 Q. And then if you look at 214, Greg sends an
 13 internal e-mail on November 21, 2002, which he
 14 attaches to the December 4 e-mail. It's at NOV
 15 39581.
 16 A. Right.
 17 Q. And he is recounting -- he is reporting on
 18 the November 20 conversation and he is saying -- and
 19 he says, "I would suspect Novell has no interest in
 20 supporting efforts to assert UNIX infringement claims
 21 against end users of Linux," quote, unquote. Do you
 22 see that?
 23 A. Yes.
 24 Q. And then he gets e-mails back from Chris
 25 Stone on November 21 and from Carl Ledbetter on NOV

1 39583.
 2 A. Right.
 3 Q. That endorse his conclusion about Novell's
 4 lack of interest in helping SCO, correct? Do you see
 5 that?
 6 A. Yes.
 7 Q. So does the fact that as of November 21
 8 Greg is reporting internally that Novell has no
 9 interest in supporting SCO's efforts on the IP front,
 10 and getting endorsement of that from senior
 11 executives at Novell, does that refresh your
 12 recollection as to whether Greg was, in fact,
 13 accommodating or signaling accommodation to any of
 14 SCO's requests after November 21?
 15 MR. NORMAND: Objection to form.
 16 A. Well, I don't know what he was doing
 17 behind the scenes. All I know is what he was saying
 18 to me. And what he was saying to me is, "Let's
 19 figure out how to accommodate your request." In the
 20 first call, again which does not show up on here, he
 21 was listening to the issue, agreeing with it, talking
 22 about how to go find it. This one comes up in terms
 23 of the next round of discussions.
 24 Q. "This one" being 213, November 20?
 25 A. "This one" being November 20, 213. And at

1 that point in time was when there was more detail
 2 given on our side as to what we were trying to do.
 3 "We are trying to put together this program." We
 4 gave more of a detailed program on 12-4. So it was
 5 an evolution of sort of laying out our program that
 6 started I would guess in early November, because it
 7 was clearly before November 20 because he's already
 8 got Wright involved by this point in time.
 9 And then we have this discussion, we have
 10 another discussion in December, and then ultimately
 11 he goes to the card of saying, "Why don't you put
 12 together a letter and I'll go try and get that signed
 13 by somebody internally and then we will be done with
 14 this."
 15 Q. And that's your best recollection of his
 16 -- of the thrust of his comments through February on
 17 whether he could accommodate your request for clarity
 18 around the APA?
 19 A. Yes.
 20 Q. Take a look at 215. 215 is an e-mail from
 21 Mike Anderer to you dated January 4. And he -- well,
 22 what can you tell me about the circumstances under
 23 which this e-mail is written?
 24 A. This was written by an outside consultant
 25 named Mike Anderer.

1 Q. Did you commission him to review the Asset
 2 Purchase Agreement?
 3 A. No. I don't recall him doing that. My
 4 recollection is that he came to me with this
 5 information as though it was new news. This is
 6 something that I had been looking at for a long time,
 7 for a period of months.
 8 Q. That is --
 9 A. The Asset Purchase Agreement.
 10 Q. And the fact that it includes all patents
 11 and copyrights was something you were already aware
 12 of?
 13 A. He was troubled by the same thing I had
 14 been trying to get clarification around, which was
 15 the copyrights being included in the excluded assets.
 16 Q. And he says, "I think it also leaves
 17 Novell with practical control of the license
 18 agreements with IBM and others with respect to SVRX.
 19 I think they might get the call on whether to audit
 20 or pull these licenses." Do you see that?
 21 A. Yes.
 22 Q. Have you had a conversation with him about
 23 where you might be headed with respect to the IBM
 24 SVRX license agreements?
 25 A. I don't remember talking with him about

1 it. Mike is a guy who was working with us as a
2 consultant, but we weren't involved in all of these
3 other discussions with him, evidenced by the fact
4 that I had been involved in this asset purchase
5 review for a number of months and he was just coming
6 across it at this point in time. So he wasn't really
7 tuned in, as he says here.

8 I mean, one thing I most agree with in
9 this statement here is, "I need to read this twenty
10 more times to get it straight. So, understand this
11 is just a first read." So he was unclear on a lot of
12 things. For example, on the SVRX comment that he
13 makes here -- let's see. As you get into there and
14 look at it more closely, what you realize is that the
15 SVRX royalty agreements related to the binary revenue
16 streams, not to the actual --

17 Q. Mr. McBride, let me interrupt. I had a
18 pretty narrow question. I didn't ask, really, for a
19 rebuttal of his comments.

20 Is it your testimony that he did this work
21 on the Asset Purchase Agreement at his own
22 initiative?

23 MR. NORMAND: Objection to form.

24 A. Yes.

25 Q. Did you -- at this point, had you not

1 asked him to assist on licensing Microsoft?

2 A. I had asked him to work on licensing of
3 Microsoft, but not any of this stuff.

4 Q. How did he get ahold of the Asset Purchase
5 Agreement?

6 A. It's available out on the internet through
7 10-Ks and whatnot.

8 Q. That's your best understanding of how he
9 got it?

10 A. Yeah. I assume.

11 Q. Did he -- let's back up. How did you
12 happen to commission him to work on the -- well, take
13 out the commission work, because I know there was a
14 monetary dispute at some time. At some point did you
15 direct him or ask him to assist on a transaction with
16 Microsoft relating to SCO's UNIX assets?

17 MR. NORMAND: Objection to form.

18 A. We engaged Mike as a consultant to work
19 with us on trying to get a deal going with Microsoft.

20 Q. When was that? When did you engage him?

21 A. I don't remember when the engagement
22 letter was signed.

23 Q. Why did you ask him for help?

24 A. Mike has worked with Microsoft for a
25 number of years. He's been on their advisory council

1 board. He has been a reseller of them. He has been
2 part of that fabric for many, many years.

3 Q. Had Mr. Anderer also worked with you?

4 A. Yes, he had.

5 Q. At Icon?

6 A. Correct.

7 Q. And what was the scope of his -- what did
8 you understand you to be asking Mr. Anderer to do?

9 A. I was asking him to work on the deal we
10 had been trying to put together with Microsoft. I
11 never commissioned him to go out and work on this
12 particular project that he is commenting on.

13 Q. Do you remember if you responded to this
14 e-mail?

15 A. I don't remember if I responded to this or
16 not.

17 Q. Do you recall getting this e-mail, as you
18 sit here today?

19 A. I remember having -- I remember this
20 coming in and thinking, "Yeah, I've been working on
21 this for a long while." And we had already gone down
22 the path of having outside intellectual property
23 counsel come in to advise us on this. And without
24 getting into the privilege discussions I had with
25 them, it was -- this was like not a new story. So it

1 was sort of pointless to get into a discussion with
2 him.

3 VIDEOGRAPHER: Excuse me. Your mic just
4 fell.

5 THE WITNESS: Wondering what that was that
6 just fell down there.

7 Q. (By Mr. Jacobs) Mr. Anderer did, in fact,
8 proceed to assist you in the negotiation with
9 Microsoft?

10 A. That is correct.

11 Q. Did you in some way set his mind at ease
12 with respect to the concerns he was raising in this
13 January 4, 2003 e-mail?

14 A. I think that I may have gone back to him
15 and said, "We are already dealing with this issue,"
16 but I don't remember the specifics of that.

17 Q. On the negotiations with Microsoft, how
18 did those unfold? Who had the first contact on the
19 SCO side with Microsoft? Was it you?

20 A. When you say "the SCO side," including
21 Anderer?

22 Q. Yes. Was it Anderer or was it you?

23 A. I think the first person would have been
24 with Anderer. That was the point of engaging him as
25 a consultant. He had the relationships up there.

1 Q. And at some point did he introduce them to
2 you and you had a meeting?
3 A. Yes.
4 Q. When was that meeting?
5 A. I remember having a phone call with some
6 people up there in early '02. I don't remember the
7 exact time frame.
8 Q. Early '03 maybe?
9 A. '03, I'm sorry. Thank you.
10 Q. And what did you convey to them as the
11 business proposition you had in mind?
12 A. We had the UNIX business that we own, and
13 the idea was they could license UNIX to get better
14 interoperability with Windows. That was the concept
15 we were proposing.
16 Q. Better interoperability between what on
17 the UNIX side and Windows?
18 A. Well, UnixWare is our flagship product
19 that has evolved and was the core spot where UNIX
20 System V code was held. The idea was to take the
21 latest version of UnixWare and other corollary parts
22 that tied to that, and make that available to
23 whatever versions of Windows; Windows Server was one
24 area, Windows Desktop was another area with
25 interoperability that we were proposing.

1 Q. What was Microsoft's response to that
2 proposition?
3 A. Well, it turned into a license agreement,
4 so I guess it was positive.
5 Q. But did they respond that that was the
6 business motivation on their part, or did they say
7 something else about what they wanted to do?
8 A. They were clear to us that they wanted to
9 get better interoperability with Windows. They had a
10 product called SFU that wasn't working that well in
11 the marketplace, so it seemed to be something that
12 was hitting the mark in terms of what their desires
13 were, as well.
14 Q. Was that the only business objective they
15 conveyed to you?
16 A. I believe they also wanted to get a
17 release. I think they had some concerns around some
18 of our code as it related to theirs, so there was
19 also a release that was obtained. So I suppose that
20 was another business objective of theirs.
21 Q. What did they convey to you about their
22 desire for a release?
23 A. That they wanted one.
24 Q. For what?
25 A. I don't remember the specifics. It just

1 tied into a release as it related to our code.
2 Q. And when you say "our code," what did they
3 -- what did you understand "our code" to be?
4 A. The code that we owned; UNIX and UnixWare.
5 Q. And distinguishing between UNIX System V
6 code and that code base, versus the UnixWare code
7 base, what was your understanding of what they were
8 concerned about?
9 A. I don't know specifics. I don't know why
10 they wanted the release. I can't speak for them.
11 Q. Did somebody else at SCO have more
12 detailed discussions with them about the code issues
13 that Microsoft was concerned about?
14 A. Yes. That would have been Chris Sontag.
15 Well, I don't know if he had specifics. I know that
16 he was the one that got involved in negotiating the
17 deal. I don't know whether they got any more
18 specific with him or not.
19 Q. And your testimony is that from all the
20 communications you're aware of, whether you had
21 directly or indirectly through other SCO personnel,
22 you didn't gain any greater insight into what the
23 particular code concerns were that Microsoft had?
24 A. No.
25 MR. NORMAND: Objection to form.

1 MR. JACOBS: Shall we take another good
2 stopping point?
3 (Break taken from 10:56 to 11:06.)
4 Q. (By Mr. Jacobs) Let's mark 216.
5 (EXHIBIT-216 WAS MARKED.)
6 Q. 216 is a document under SCO 1270095 to 96;
7 a press release dated December 11, 2002. Why don't
8 we go off the record for a second.
9 (Break taken from 11:07 to 11:09.)
10 Q. (By Mr. Jacobs) So this is a press
11 release, Mr. McBride?
12 A. Yes.
13 Q. Was it issued?
14 A. I assume so. I believe it was, yes.
15 Q. And it quotes Chris Sontag in the second
16 paragraph?
17 A. Right.
18 Q. And he says, "SCO is the developer and
19 owner of SCO UnixWare based on UNIX System V
20 technology." Do you see that?
21 A. Yes.
22 Q. "SCO owns much of the core UNIX
23 intellectual property which includes various patents
24 and copyrights and the SVR3, SVR4, and SVR5 runtime
25 libraries." Do you see that?

1 A. Yes.
2 Q. So when he says "much of the core UNIX
3 intellectual property" and then goes on to discuss
4 System V runtime libraries, did you understand the
5 statement to mean that he was asserting that SCO
6 owned the intellectual property to System V?
7 MR. NORMAND: Objection to form.
8 A. I can't speak for him, but that would
9 sound reasonable.
10 Q. Put a little bit differently, this
11 statement wasn't intended to hedge on the question of
12 whether the copyright issue that you'd been
13 discussing with Mr. Jones would not be resolved
14 favorably from SCO's perspective?
15 MR. NORMAND: Objection to form.
16 A. We didn't have a belief that we didn't own
17 the copyrights. We believed that there was a
18 drafting issue in one document along the way that
19 needed to be resolved. But that never changed our
20 core belief. And, in fact, it was reinforced after
21 talking to Greg Jones at Novell that we didn't have
22 an issue. It was more an issue of how we were going
23 to get a document to be reflected correctly than to
24 get anybody to agree on what the issue was.
25 Q. Well, you didn't understand Greg to be

1 doing anything other than trying to be cooperative
2 with somebody he knew as a friend, did you?
3 MR. NORMAND: Objection to form.
4 A. I understood him to be trying to help us
5 resolve our issue, which we felt was a drafting
6 error, and that he was in agreement with that error
7 and that he was trying to help us resolve that error.
8 Q. Was the basis for your comment that he was
9 in agreement -- I think you said agreement with the
10 error, but I think you meant that he was in agreement
11 that it was an error; yes?
12 A. Exactly. An agreement that an error had
13 been made in the drafting process and we were trying
14 to get a resolution.
15 Q. And aside from his initial cooperative
16 response in the first phone call you reported, do you
17 have any other basis for your belief that he was
18 conveying to you agreement with the proposition that
19 it was a drafting error?
20 A. Every call that I had with him was
21 consistent with that. Even the very last one, which
22 was going down the path of -- in fact, it was Greg
23 that proposed, "Put together a letter, put together a
24 letter that indicates what we are talking about here.
25 Let's clarify that you guys own it. I'll try to find

1 somebody internally to sign it." He said, "I would
2 sign it, but I can't. I don't have the authority to
3 do that." Well, I doubt he would say, "I'd sign it,"
4 if he didn't agree with us. Besides the fact that he
5 already said that he did.
6 But then when he ultimately came back and
7 said, "I can't find anybody to sign it. The higher-
8 ups don't want to sign it. They don't want the --
9 the UNIX thing is a thing of the past. They are not
10 going to go down that path," all of that was
11 consistent with that. Even if you go to this letter
12 we just looked at, this e-mail we looked at before
13 where in 213 he is talking about issues here that he
14 doesn't understand or things that they were not sure
15 about what Novell should take a position on, never
16 once does he come out and say, "Oh, by the way," and
17 he's claiming they owned the copyrights and I
18 disagreed with that. I mean, I would think that
19 something as major as that, if he disagreed he would
20 be shooting that around internally, as well.
21 Q. So just to be clear about what you're
22 saying, he never disagreed with your assertion that
23 the copyrights were intended to be transferred in the
24 APA?
25 A. That's part of it. And the second part is

1 that he agreed with our assertion that the copyrights
2 should have been transferred over.
3 Q. And in terms of your recollection of your
4 conversations with him, you put those down in Exhibit
5 212, right?
6 A. Correct.
7 Q. Was that -- and 212 was created after your
8 March 15, 2006 deposition in the IBM case? If you
9 look at the footnote on the first page.
10 A. Yes.
11 Q. Were you relying on any written materials
12 in preparing the entries at number 1 and number 2 on
13 212?
14 A. I was just recalling what had happened in
15 general. Again, if I had to do -- if I had gone back
16 and looked at all of the written documents, I think I
17 said here November through January and as I reflect
18 on it later I think the writings would actually show
19 it was through February, not January. But
20 substantively, the content there I would agree with.
21 Q. In terms of November, the November through
22 January period, did you take any notes of your
23 conversations with Novell personnel on the question
24 of clarifying the copyright ownership issue?
25 A. I don't remember taking any notes.

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1 Q. And how about anybody on your end of the
 2 phone call besides yourself?
 3 A. I don't remember Chris taking any, either.
 4 Q. And then in the February -- the paperwork
 5 you are referring to is the draft letter that Chris
 6 sent to Greg Jones in February?
 7 A. Yes. Again, there wasn't a need, a big
 8 need in my mind to document this because we were in
 9 agreement what we were trying to do. It was -- the
 10 only question was -- the first question was is he
 11 going to find the documents for us that would help
 12 clarify this. The answer to that was no; they are in
 13 storage, they are in archives, it's too hard to get
 14 to.
 15 Q. Mr. McBride, can I interrupt again because
 16 I only have seven hours so I need to try and confine
 17 you to answering my questions.
 18 A. What was the question again?
 19 Q. My question was were there any other
 20 documents besides the February draft letter to Novell
 21 that you were referring to when you earlier said,
 22 "Had I looked at the documents I would have corrected
 23 the date"?
 24 A. No.
 25 Q. Okay.

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1 A. Sorry to use your tape time.
 2 Q. Valuable moments with you.
 3 A. I understand.
 4 Q. Let's take a look at some draft board
 5 minutes from December 16, 2002.
 6 (EXHIBIT-217 WAS MARKED.)
 7 Q. We'll mark as 217 it looks like a "marked
 8 to show changes" version of some board of directors
 9 meeting minutes from Caldera dated December 16, 2002,
 10 produced under SCO 1326902 to 910. And I would like
 11 you to turn to the bottom of page 4, where the
 12 minutes recount your making a presentation regarding
 13 SCOsource.
 14 A. Okay.
 15 Q. And in particular the first full paragraph
 16 on page 5. The document states, "Mr. McBride
 17 reported that, as a result of its dependence on the
 18 Linux community and the necessity of obtaining the
 19 reaction of other major participants in the
 20 development and promotion of Linux, the company
 21 discussed the proposed announcements with several key
 22 entities and received mixed results." Do you see
 23 that?
 24 A. Where was that exactly again?
 25 Q. The first full paragraph on page 5.

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1 A. Okay. I see it.
 2 Q. "Discussed the proposed announcement with
 3 several key entities and received mixed results."
 4 The entities that you are referring to there, who
 5 were they?
 6 A. This is what we talked about earlier.
 7 There were probably eight, ten, twelve companies; Red
 8 Hat, Novell, Oracle, IBM, HP, CA, to name some of
 9 them. I think there are probably some others.
 10 Q. And when you said "mixed results," did
 11 anyone give you a thumbs up to the project?
 12 MR. NORMAND: Objection to form.
 13 A. HP.
 14 Q. What did HP convey to you in the meetings?
 15 A. They thought it was a good idea.
 16 Q. You go on to say -- anyone else, by the
 17 way, besides HP?
 18 A. It seems like CA was semi-positive on it.
 19 SuSE Linux, Greg Blepp from SuSE originally had
 20 weighed in positive and later became negative.
 21 Q. You note, "IBM in particular expressed
 22 serious concern over the Company's proposed
 23 announcement and asked the Company to postpone making
 24 the announcement until after the end of calendar
 25 2002." You see that?

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1 A. Yes.
 2 Q. Now, they had made that request.
 3 A. Yes.
 4 Q. And you declined it.
 5 A. No. We honored their request.
 6 Q. So that was my question, back to whether
 7 216 was issued.
 8 A. So that's a good question. It was issued
 9 but it was not issued on the time frame that's on
 10 that -- what does the document say?
 11 Q. The document says December 11.
 12 A. December 11. That was the time frame it
 13 was supposed to go out. And then based on IBM's
 14 request it got delayed and didn't come out until, I
 15 recall, third or fourth week of January. And I think
 16 that document may have been revised before it came
 17 out.
 18 Q. You say, "Mr. McBride also indicated that
 19 the attorney retained by the company to assist it in
 20 enforcing its intellectual property rights, David
 21 Boies, had indicated that he needed additional time
 22 to complete his review prior to launching the
 23 initiative." You see that?
 24 MR. NORMAND: Objection to form.
 25 A. Yes.

1 Q. Did you, in fact, convey to the board what
2 is reported in this first paragraph, first full
3 paragraph of paragraph 5?
4 A. Well, this is the report to the board.
5 Q. Well, it's minutes.
6 A. I see what you're saying.
7 Q. Another way of saying it is are the
8 minutes accurate?
9 A. I see.
10 MR. NORMAND: Objection to form.
11 A. Let me read it closely here.
12 We were fully ready to launch this on
13 December 11, so I don't -- the SCOSource initiative
14 was going to be launched; so the last statement
15 there, I don't know that they had that exactly right.
16 Maybe he would have liked to have had more time or
17 appreciated more time, but it wasn't something that
18 was going to stop the announcement from going out.
19 Q. So maybe this is the version that actually
20 is the announcement.
21 (EXHIBIT-218 WAS MARKED.)
22 Q. So 218 is a press release datelined from
23 LinuxWorld, January 22, 2003.
24 A. Yes. Okay.
25 Q. Does this refresh your recollection of the

1 announcement of SCOSource?
2 A. Yes.
3 Q. Was this the public announcement of
4 SCOSource?
5 A. I'm pretty sure this was the announcement
6 that went out.
7 Q. The italicized language at the top, "SCO,
8 the majority owner of UNIX intellectual property,
9 creates new licensing programs to expand access to
10 its UNIX technology, beginning with SCO System V for
11 Linux." Do you see that?
12 A. Yes.
13 Q. What was the reference to "majority owner"
14 intended to convey?
15 A. My recollection is that we were looking at
16 UNIX and our partners with respect to this whole UNIX
17 community. So you have UNIX System V that runs
18 through the trunk of this tree and then you have
19 these multiple branches, whether it's AIX made with
20 IBM, HPUX from HP, et cetera, et cetera." SCO even
21 owned a couple of these branches, UnixWare and Open
22 Server.
23 So when you take the tree in total, it's
24 not something where we could say we owned the whole
25 tree. But certainly by having the trunk of the tree

1 and a couple of the branches of the tree, it would be
2 safe to say that we are a majority owner of that
3 intellectual property base.
4 Q. And the label SCO System V for Linux --
5 A. Yes.
6 Q. -- what was that intended to convey?
7 A. Well, if you go to the second page, I
8 believe it's clarified in the second paragraph. "The
9 SCO System V for Linux license will provide access to
10 SCO's UNIX System Shared Libraries for use with
11 Linux."
12 Q. And were those, in fact, UNIX System V
13 shared libraries?
14 A. Yes.
15 Q. This release is consistent with your
16 testimony before; that through the winter of 2003,
17 the focus was on licensing of libraries, correct?
18 A. Correct.
19 Q. Did you understand that at the time of
20 this release, that there was a relationship between
21 the question whether you owned the System V
22 copyrights and whether you had the right to immunize
23 -- strike that.
24 In connection with preparing this release,
25 did you have an understanding that the question of

1 copyright ownership of UNIX System V bore on the
2 viability of this licensing program?
3 MR. NORMAND: Objection to form.
4 A. No.
5 Q. And that's because at this point you
6 believe you own those copyrights?
7 A. That's correct.
8 Q. And it hadn't struck you that this would
9 -- that there would be an issue?
10 A. Yes.
11 MR. NORMAND: Objection to form.
12 A. That's correct. We thought we owned the
13 copyrights from the beginning, and we thought in the
14 middle we own them, and we still think we own them.
15 Q. Let's look at another document. This will
16 be 219. Will you hand them out?
17 A. A lot of work at this deposition. Move
18 the thing around, hand out documents.
19 (EXHIBIT-219 WAS MARKED.)
20 Q. So 219 is an e-mail from Greg Jones dated
21 February 25, 2003 to several people at Novell,
22 covering an e-mail from Dave Wright to Greg Jones,
23 covering an e-mail from you to Dave Wright dated
24 February 25, 2003. You see that?
25 A. Yes.

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1 Q. In the e-mail that you sent to Dave
 2 Wright, you wrote, "Dave, here are the immediately
 3 relevant sections of the contract." And then you
 4 listed a bunch of sections of the Asset Purchase
 5 Agreement, right?
 6 A. Right.
 7 Q. And you referred to the press release.
 8 A. Right.
 9 Q. What were the circumstances under which
 10 you sent the -- strike that.
 11 Why did you send Dave Wright this e-mail?
 12 A. My recollection is that Greg had agreed
 13 with our position on this. In the process of
 14 describing this to Dave, who was not as closely
 15 familiar with the situation as maybe Greg was, he
 16 wanted some clarification around what it was we were
 17 talking about in the APA. So my recollection is that
 18 I pulled some of the key provisions out to send over
 19 to him.
 20 Q. And did you have any verbiage in your oral
 21 discussion with him about what these provisions
 22 represented?
 23 A. I don't recall.
 24 Q. How did you select these provisions?
 25 A. I don't recall the exact issue about

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1 choosing the provisions. He wanted a snapshot of the
 2 issues that we were talking about.
 3 Q. Then on the cover e-mail from Greg Jones
 4 of February 25 he recounts two conversations that you
 5 had with Dave. And he writes, "Dave Wright spoke to
 6 Darl McBride twice today -- one 10-minute
 7 conversation, and another 45-minute conversation.
 8 Darl also sent Dave the attached e-mail, which is
 9 only a list of sections in the Asset Purchase
 10 Agreement. But which Darl says is the outline of
 11 SCO's argument. Darl says the Asset Purchase
 12 Agreement transfers the UNIX business to SCO, that
 13 SCO needs the copyrights to run its business, that if
 14 Novell does not clarify the Asset Purchase Agreement
 15 agreement as he requests, that the matter could end
 16 up in court and have to be resolved in a public
 17 manner. Darl told Dave he wants this resolved by
 18 tomorrow. Dave has reiterated that Novell is not in
 19 a position to adequately evaluate the issues at this
 20 time, and told Darl he'll attempt to have discussions
 21 with an attorney tomorrow. Darl alluded to having a
 22 relationship with Jack Messman and that he may need
 23 to call Jack to apply pressure to get this resolved."
 24 Do you recall that?
 25 A. Yes.

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1 Q. Do you take issue with anything that Greg
 2 recounts about February 25 telephone conversations
 3 you had with Dave Wright?
 4 A. I recall that we were trying to get
 5 resolution to this. We had been working on this for
 6 three months and it was a situation where it was not
 7 happening at the level we were dealing with. He was
 8 asking for things to help them go up line with so he
 9 could understand it better. And so that's why we
 10 sent some of this over.
 11 Q. So is that in addition to or in
 12 contradiction to what Greg wrote or just context,
 13 what you just said?
 14 MR. NORMAND: Objection to form.
 15 A. That was the context for this discussion.
 16 As I recall the discussion, it had to do with Dave
 17 trying to get better versed to be able to go upline.
 18 Because I made the comment to him, "We need to get
 19 this resolved. We've been working at this level now
 20 for multiple months. We need to get this resolved."
 21 And the point here was to put some relevant sections
 22 of the contract in there so that Dave and Greg could
 23 go upline. The point of the document here you see
 24 talks about in the press release, "SCO will acquire
 25 Novell's Unix Ware business and UNIX intellectual

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1 property." This was issued from Novell. So there's
 2 already a problem with this excluded asset. So these
 3 were just some of the things that we were trying to
 4 get in front of him so we could better explain it.
 5 Q. But specifically with respect to what Greg
 6 Jones wrote in this e-mail, do you disagree with
 7 anything about his recounting? Not -- do you
 8 disagree with the accuracy of his recounting?
 9 A. Let me just look at it closely here.
 10 MR. NORMAND: And just so I'm clear,
 11 because there's two parts, are you asking him about
 12 his recounting of what Darl said or his recounting of
 13 what he said to Darl or both?
 14 MR. JACOBS: Both.
 15 A. I don't agree with everything that's in
 16 this e-mail where he says this is the outline of
 17 SCO's argument. I mean, that's what Jones says in
 18 his e-mail. If you look at the thing that was copied
 19 over, that I sent over, it says, "Here are the
 20 immediately relevant sections of the contract," which
 21 is different than saying, "Here are the -- here is
 22 the outline of the argument." So that one I wouldn't
 23 say is accurate. Let me just see what else is here.
 24 I think the point of this ending up in
 25 court, this was on the heels of a discussion I had

1 had with IBM. And corollary to this set of issues
2 was an issue we had with IBM and their contract. And
3 when I sat down with IBM at the end of January to
4 talk to them about the issue, their AIX contract
5 problem, the executive at IBM's response was that
6 they had been talking to Novell, they had looked at
7 the Novell issues, and felt like because the
8 copyrights were an excluded asset, that we didn't
9 have the basis to prosecute anything against IBM.

10 So yes, we were -- this is stated just
11 days before we filed suit against IBM. It was a
12 situation where IBM had already tipped their hand
13 that they expected to go to the Novell card in a
14 legal matter. And so yes, there was some urgency to
15 try and get this issue resolved in a way that Greg
16 and I had been talking about; not going through a
17 multi-year court battle, which is what it's turned
18 into.

19 Q. So that's additional context for the
20 comment that he recounts you making about possibly
21 needing to get this resolved in court?

22 A. Yes.

23 Q. So other than the fragment which says --
24 in which Greg says, "Darl says this is the outline of
25 SCO's argument," is there anything else in this

1 e-mail that you take issue with in terms of the
2 accuracy of its recounting of your conversations?

3 A. I don't remember saying I was going to
4 apply pressure to Jack to get this resolved. I
5 believe I said that I was going to go upstream. He
6 may have implied that that was to apply pressure.
7 Yeah, definitely I was frustrated that we had been at
8 this level for multiple months and nothing had
9 happened.

10 Q. So no other -- other than the two things
11 you've referenced, "Darl says the outline of SCO's
12 arguments," and a specific reference by you to
13 applying pressure, any issue with this e-mail?

14 A. This part about Darl saying he'll have
15 discussions with an attorney tomorrow, I don't know
16 what he is talking about there.

17 Q. No, I think Dave is saying --

18 A. Oh, he's saying he'll --

19 Q. He'll attempt to have discussion with an
20 attorney tomorrow.

21 A. "Dave has reiterated that Novell--" Oh, I
22 see. He will attempt to have discussions with an
23 attorney tomorrow. I misread that one. Okay.

24 Q. Otherwise --

25 A. Otherwise -- I don't have any reason to

1 disagree with that.

2 (EXHIBIT-220 WAS MARKED.)

3 Q. 220 is an e-mail from Duff Thompson to you
4 dated February 27, 2003 --

5 A. Uh-huh (affirmative).

6 Q. -- in which Mr. Thompson recounted his
7 recollections of the negotiation of the Asset
8 Purchase Agreement. Do you see that?

9 A. Yes.

10 Q. Do you recall receiving this?

11 A. Yes.

12 Q. Do you recall the circumstances under
13 which this came to you?

14 A. My recollection of this is that, again,
15 knowing that IBM was going to try and attack us on
16 the Novell excluded assets with respect to the
17 lawsuit that was forthcoming, there was a desire to
18 have somebody that was associated with that
19 transaction to weigh in so that there was a -- given
20 that the Novell guys weren't coming back with
21 something, that there was a basis of somebody that
22 was associated with the transaction as to what the
23 effect or the intent of that deal was.

24 Q. In Mr. Thompson's e-mail he says, "I still
25 need to check with some of my former staff members in

1 the Novell legal department to confirm a couple of
2 the details in the transfer of the UNIX business from
3 Novell to SCO." You see that?

4 A. Yes.

5 Q. Did Mr. Thompson ever report back to you
6 on the results of any checking that he did with
7 former staff members in the Novell legal department?

8 A. I know that he talked to Novell staff
9 members. I know that he came back and was exactly
10 where he was with this. I can't tell you the content
11 of the discussion he had with those members.

12 Q. How about who he spoke with?

13 A. I know he had a discussion at some point
14 along the way with Jim Lundberg. I don't know if it
15 had to do with this time frame or not.

16 Q. Did it have to do with the transfers of
17 the UNIX business from Novell to SCO?

18 A. Again, I don't know the content of
19 everything that he talked about.

20 Q. Did he report back to you at any point,
21 "I've done additional checking and I've confirmed
22 certain points about the Asset Purchase Agreement,"
23 or is this the report, in other words?

24 MR. NORMAND: Objection to form.

25 Q. Let me start over. It was a lousy

1 question.

2 In 220 Mr. Thompson reports to you his
3 recollections of the Asset Purchase Agreement
4 agreement and then says he's going to do some further
5 checking; you see that?

6 A. Yes.

7 Q. Did he ever report further information to
8 you, as is contemplated by this e-mail?

9 A. He reported to me later on having
10 discussion with Novell counsel. I don't remember him
11 coming back tying it directly to the contents of this
12 e-mail.

13 Q. How about the substance of what he
14 reported to you in that conversation?

15 A. Nothing that he said would counter the
16 information that he put down here.

17 Q. Would it have supported it?

18 A. It would have supported it, yes.

19 Q. Would it have fleshed it out?

20 A. Would it have fleshed it out in terms of--

21 Q. More detail.

22 A. I don't remember it -- I don't remember it
23 being positive or negative. I remember that it was
24 along the lines of what he had already said.

25 Q. Did Mr. Thompson at any point report to

1 you that he had spoken with Tor Braham or Aaron Alter
2 or Shannon Whisenant about the Asset Purchase
3 Agreement?

4 A. He didn't give me details of who he was
5 talking to.

6 Q. Did he -- do you happen to know whether he
7 ever spoke to any of them about the Asset Purchase
8 Agreement in --

9 A. I don't know who he would have talked to.

10 Q. How about David Bradford; do you know if
11 he ever spoke to David Bradford about the Asset
12 Purchase Agreement?

13 A. I don't know if he talked to David or not.

14 Q. Do you know if anyone acting on behalf of
15 SCO has spoken with David Bradford about the
16 negotiation or intent of the Asset Purchase
17 Agreement?

18 MR. NORMAND: You can answer the question
19 yes or no, if you know.

20 A. Yes.

21 Q. Who has spoken to David Bradford?

22 MR. NORMAND: You can give a name.

23 A. I remember talking to him.

24 Q. You talked to him?

25 A. Yeah.

1 Q. What did you learn from him?

2 A. He didn't remember anything about it.

3 Q. When did you talk to him?

4 A. It would have been sometime in 2003.

5 Q. What were the circumstances?

6 A. I talked to a number of Novell people
7 trying to get their read on different things as it
8 related to this transaction. He was one of them.

9 Q. And what was the substance of your
10 discussion with him?

11 A. It was a phone call asking him what he
12 recalled about this transaction.

13 Q. And what did he say?

14 A. What I remember him saying is that he
15 didn't have recollection of the details of what was
16 going on around this.

17 Later I talked to him, probably six months
18 after the IBM lawsuit was filed, and I don't remember
19 the exact content of that discussion but it seemed
20 like he had been having some discussions with them,
21 but I don't remember the details of that.

22 Q. So did you ever specifically ask Mr.
23 Bradford the question whether Novell intended to
24 convey the UNIX copyrights to SCO in the Asset
25 Purchase Agreement?

1 A. I don't remember getting any of the
2 details with it because it was not something that he
3 was talking about. I remember talking to Rob Hicks
4 about it and he got into more detail. I don't
5 remember getting into any detail with it with David.

6 Q. And that's in both conversations, correct?

7 A. Yes. The second one was just a social
8 setting. Just kind of said hi to him and talked for
9 a minute, but that's correct.

10 Q. How about Rob Hicks; what did you learn
11 from Rob Hicks?

12 A. Rob Hicks's comment, this would have been
13 in the fall of 2002 time frame, was along the lines
14 of, "Yeah, there were some patent issues." I think
15 he mentioned a pike patent that Novell was concerned
16 about. But he said the bigger issue that he saw with
17 Linux had to do with the copyrights, and copyright
18 issues.

19 Q. And what did you understand him to be
20 referring to?

21 A. I didn't get specifics. He didn't have
22 specific details, but he just said copyrights were
23 the area that he would be concerned with.

24 Q. So the conversation with Rob Hicks -- Rob
25 Hicks was a former Novell person, correct?

1 A. Correct. Novell attorney.
2 Q. And were you -- was this part of your
3 effort to find out more about the intent underlying
4 the Asset Purchase Agreement, your conversation with
5 him?
6 A. The Asset Purchase Agreement and the
7 transaction in general, correct.
8 Q. Did he have any information to convey to
9 you about that?
10 A. He didn't have a lot of knowledge about
11 that. I think I actually talked to him before I
12 talked to Greg Jones, if I recall correctly.
13 Q. And when you say "not a lot of knowledge,"
14 that leaves the possibility of a little knowledge.
15 A. The only thing I remember him specifically
16 saying was, "Don't look at patents. You've got to
17 look at the copyright issues." That's what I
18 remember specifically from him.
19 Q. So you personally have spoken to Duff
20 Thompson, who was involved in the Asset Purchase
21 Agreement?
22 A. Right.
23 Q. You spoke to David Bradford?
24 A. Right.
25 Q. You spoke to Rob Hicks?

1 A. Right.
2 Q. What other conversations have you,
3 yourself, had with people who -- with former or
4 present Novell people in order to find out facts
5 about the negotiation of the transaction with SCO in
6 1995?
7 MR. NORMAND: I would offer the objection
8 that if there were any such discussions and you had
9 them at the direction of Counsel, then keep that in
10 mind in answering the question.
11 THE WITNESS: Okay.
12 Let me just think here for a moment if
13 there's anybody else that doesn't fall under that
14 category. I can't think of anybody else.
15 Q. (By Mr. Jacobs) And Mr. Normand
16 instructed you with respect to conversations you've
17 had at the direction of Counsel. Would you have more
18 information to report, but for that instruction?
19 A. I can't think of anybody else right now.
20 Q. So to click through some possibilities,
21 you personally didn't speak with Bob Frankenberg?
22 A. Okay, I'm glad you brought him up because
23 I did speak with him.
24 Q. I wasn't going to leave you out.
25 A. I better retract my other statement. I

1 definitely talked to Bob Frankenberg and he was
2 definitely at Novell. The people I was thinking of
3 were actually not Novell people, they were SCO
4 people. So I was trying to recount the Novell
5 people. I definitely talked to Bob Frankenberg about
6 it.
7 Q. Anybody else, now that I've triggered a
8 recollection?
9 A. Darcy Mott. Chris Sontag is not a party
10 but he was at Novell.
11 Q. So let's take that in. Chris Sontag
12 didn't have any, I'll use the word "percipient," any
13 percipient information about the Asset Purchase
14 Agreement, correct?
15 A. Right. Just that he was at Novell at the
16 time.
17 Q. And Darcy Mott; what did Darcy Mott convey
18 to you?
19 A. I believe Darcy was one that asked us to
20 go look at the SEC statements because he said in his
21 mind we sold this except for the pre-existing binary
22 royalty streams. So I think he's the one that
23 pointed us to go look at Novell's SEC statements to
24 that effect, because I believe he was involved in
25 that.

1 Q. Anything else?
2 A. I don't remember anything else.
3 Q. And what did you glean from the SEC
4 statements?
5 A. That Novell had stated in their annual
6 report in 1995 -- I don't have it in front of me
7 right now, but essentially that Novell had sold the
8 UNIX intellectual property, and again I'm
9 paraphrasing but they sold UNIX, the intellectual
10 property. They retained some pre-existing SVRX
11 royalties that tied to the source code for some of
12 these older products, was what I recall.
13 Q. How about Mr. Frankenberg; what did he
14 convey to you?
15 A. That they had sold UNIX. He was the one
16 that commissioned it.
17 Q. Did any of those people tell you that one
18 of the directions given to the Novell negotiating
19 team was to make sure that Novell could do additional
20 buyouts?
21 MR. NORMAND: Objection to form.
22 Foundation.
23 A. I don't remember it being specifically
24 stated that way. There was statements that they had
25 sold everything except the binary royalty streams

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1 that were later subject or could be subject to
 2 buyouts. But I don't remember having that discussion
 3 with any of them.
 4 Q. You had a recollection from your time at
 5 Novell that there was a plan or an interest in doing
 6 future buyouts?
 7 A. Right.
 8 One more person. Ty Mattingly was
 9 somebody that I talked to about this topic, because
 10 he was involved in the transaction. And I did have
 11 discussions with him about the topic, as well.
 12 Q. What did he convey to you?
 13 A. Basically what everybody else was saying;
 14 that they had sold UNIX and retained binary royalty
 15 streams.
 16 Q. Let's bring up Mr. Anderer again.
 17 (EXHIBIT-221 WAS MARKED.)
 18 Q. This is an e-mail from him to you dated
 19 May 28, 2003. The subject, "If you are still up,
 20 give me a call." Then, "Darl, if you are still up,
 21 give me a call ... One old agreement has some
 22 interesting and relevant information regarding the
 23 copyrights. Mike." Do you see that?
 24 A. Yeah. It was at 1:28 a.m., like I'm still
 25 awake. It's kind of crazy.

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1 Q. But you did, in fact -- do you recall
 2 receiving this the next morning?
 3 A. I don't remember offhand. Let me look at
 4 it for a second. "One old agreement has --" I don't
 5 remember specifics of this e-mail.
 6 Q. Do you remember having a conversation with
 7 him?
 8 A. I don't remember what he would have been
 9 talking about here.
 10 Q. So you don't know what the old agreement
 11 is that he is referring to here?
 12 A. I'm not sure what he is talking about
 13 here.
 14 Q. Do you have any information about that?
 15 A. I really don't know what he would have
 16 been talking about. This was the date of May 28,
 17 2003. No, I don't recall.
 18 Q. Mike is still a consultant to you at this
 19 point?
 20 A. Yes.
 21 Q. At some point you did get into a
 22 disagreement with -- or "you" meaning SCO -- got into
 23 a disagreement with Anderer about commissions.
 24 A. Yes.
 25 Q. Did that get resolved?

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1 A. Yes.
 2 Q. And to the best of your knowledge,
 3 everybody is happy with that resolution?
 4 A. I believe so.
 5 Q. In May of 2003, SCO put out a letter to
 6 some group of Fortune X customers about the SCOSource
 7 program, correct?
 8 MR. NORMAND: Objection to form.
 9 A. About the SCOSource program? That was one
 10 of the elements of it, yes.
 11 Q. And previously you had issued 218 about
 12 the establishment of SCOSource, correct?
 13 A. Yes.
 14 Q. Why did you put out a press release as to
 15 -- January 22, why did you actually announce
 16 SCOSource in the form of a press release?
 17 A. That's the way we typically launch
 18 programs, products, et cetera. This was a program, a
 19 licensing program.
 20 Q. Was there a need to convey this
 21 information to a very broad community?
 22 A. Again, that's the way we go to market. As
 23 a publicly traded company we have an obligation, when
 24 we come out with a new product that ties to our
 25 revenue line, it's the standard MO that we are going

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1 to come out with a press release.
 2 Q. And then in May when you sent the letters
 3 out to -- was it the Fortune 1500?
 4 A. Yes, it was.
 5 Q. Why did you send the letter to that
 6 audience?
 7 A. We were trying to give them notice of
 8 issues that we had going on with Linux intellectual
 9 property problems at the time.
 10 Q. And what were those issues, as you saw
 11 them, at the time of the issuance of that letter?
 12 A. That we were seeing copyright problems
 13 inside of Linux that was infringing on our
 14 intellectual property.
 15 (EXHIBIT-222 WAS MARKED.)
 16 Q. 222 is an e-mail string ending with an
 17 e-mail from a William T. Warren to Darl McBride dated
 18 March 29, 2003.
 19 A. Right.
 20 Q. Produced under SCO 1273262 to 264. Do you
 21 see that?
 22 A. Yes.
 23 Q. Who is William Warren?
 24 A. He was an employee of, I believe it was
 25 Lehman Brothers, a Wall Street investment firm.

1 Q. What was his relationship or interest, as
2 you understood it, in SCOSource?
3 A. He was either an investor or looking at
4 investing in the company, and I believe he was trying
5 to understand how SCOSource played into that
6 investment idea.
7 Q. Now, he sends you an e-mail on the second
8 e-mail in the string, working backwards. May 28.
9 "Hi Darl, I'm sure you read this morning's WSJ
10 article that claims Novell will challenge your suit
11 by claiming that they retained the intellectual
12 property rights of UNIX. Any thoughts on the article
13 and how such a claim might delay your own legal
14 action?"
15 A. Where are you at?
16 Q. Let me just show you.
17 A. I see. Okay.
18 Q. And then you e-mail him back. "Bill,
19 Novell has obviously not read our complaint. Our
20 claims against IBM and potentially against other UNIX
21 vendors do not involve patents or copyrights.
22 Patents and copyrights protect lines of code. Code
23 can be changed or obfuscated."
24 Then you go on to describe your contract
25 claims and how your contract claims might be compared

1 with copyright claims. Do you see that?
2 A. Yes.
3 MR. NORMAND: Objection to form.
4 Q. And then you say, "Novell is trying to
5 fight for a hill that we don't care about and this
6 will not slow down our IBM fight or our claims on
7 Linux. The fun continues. Best regards, Darl." Do
8 you see that?
9 A. Uh-huh (affirmative).
10 Q. In fact, wasn't Novell's contention that
11 it owned the copyrights relevant to the copyright
12 issues you had laid out in your letter to the Fortune
13 1500?
14 A. Yes, it was.
15 (EXHIBIT-223 WAS MARKED.)
16 Q. 223 is a press release dated June 26, 2003
17 in which SCO announces the existence of Amendment
18 Number 2. You see that?
19 A. Yes.
20 MR. NORMAND: Objection.
21 Q. And Chris Sontag says that, "This
22 amendment simply confirms SCO's long-stated position
23 that it owns all copyrights associated with UNIX and
24 UnixWare businesses." Do you see that?
25 A. Yes.

1 Q. And then it quotes the text of Amendment
2 Number 2, or the text on copyright ownership. Do you
3 see that?
4 A. Yes.
5 Q. How did you happen to -- how did you, SCO,
6 happen to locate your copy of Amendment Number 2?
7 A. My assistant found it in some files. It
8 was filed in a folder called Sleigh Ride.
9 Q. Your assistant being?
10 A. Joanie Bingham.
11 Q. She happened to be -- was she searching
12 for it or did she just come across it?
13 A. She was looking for it. Well, she was
14 looking for something that would resolve the issue
15 that Novell had brought up the week prior in a public
16 press release open letter to me and the company
17 saying that they, in fact, own the UNIX copyrights.
18 She was trying to find something that would relate to
19 the filing they had made the previous week.
20 Q. Had you previously searched for such
21 documents?
22 A. Yes.
23 Q. What information do you have on why you
24 were able to locate it, or she was able to locate it
25 this time around?

1 A. Well, I believe initially the search was
2 around looking in folders around things called "UNIX"
3 and "copyrights" and things where you would expect to
4 find them. I believe that what happened after this
5 attack by Novell hit us was that she went back and
6 just started going through with a fine-tooth comb,
7 looking in every file rather than where they would
8 logically be filed. And that did prove fruitful in
9 that she found it in a file called Sleigh Ride, which
10 wouldn't be intuitively obvious that it would be
11 there.
12 Q. Up until the location of Amendment Number
13 2, did you have any information that there was an
14 amendment that addressed copyright issues?
15 A. No.
16 Q. At the end of the press release, Sontag
17 says, "'SCO is the owner of the UNIX operating
18 system, as well as of the UNIX contracts, claims, and
19 copyrights necessary to conduct that business,' said
20 Sontag. 'None of the litigation we are currently
21 involved with asserts claims based on copyrights.
22 Because others have called into question SCO's
23 ownership of the UNIX and UnixWare copyrights, we are
24 satisfied that we have now proven without a doubt
25 that SCO owns those copyrights.'" Do you see that?

1 A. Yes.
2 Q. So were you involved in the preparation of
3 this press release?

4 A. I don't remember who prepared it. I
5 certainly would have reviewed it before it went out.

6 Q. What was the point of saying, "None of the
7 litigation we are currently involved with asserts
8 claims based on copyrights"?

9 A. I'm not sure exactly what the thought was
10 at the time. I mean, it's a true statement. It was
11 a fact.

12 Q. What was your -- given that fact, what
13 concern drove the issuance of this press release --
14 strike that.

15 Novell issued its press release saying it
16 owned the copyrights.

17 A. Right.

18 Q. You issue a press release that says, among
19 other things, "None of our litigation asserts claims
20 based on copyrights." Why was this issue important
21 at the time; important enough to warrant a press
22 release by you?

23 MR. NORMAND: Objection to form.

24 A. I think if you read the next sentence
25 there it partially answers it. "Because others have

1 called into question SCO's ownership of the UNIX and
2 UnixWare copyrights, we are satisfied that we have
3 now proven without a doubt that SCO owns those
4 copyrights." The "others," of course, being Novell
5 the prior week, going out publicly and saying they
6 owned our copyrights.

7 Q. The previous sentence suggests that
8 copyrights aren't relevant. So what was the
9 importance of the copyright ownership issue around
10 this time?

11 MR. NORMAND: Objection to form.

12 A. There was confusion at the time as to what
13 the relationship of the copyright issue was to our
14 contract claim with IBM. And part of what we were
15 trying to do here was clear up confusion that was in
16 the marketplace.

17 Let's be clear here. IBM is the
18 litigation we are currently involved in. The
19 litigation we are currently involved in does not
20 assert a copyright claim. However, and you go to the
21 next sentence, "Because others have called into
22 question," the others being Novell, "SCO's ownership
23 of the UNIX copyrights," we are here today to let you
24 know we are satisfied as we have now proven we do
25 have those copyrights.

1 Q. And the copyrights were, as you explained
2 earlier, relevant to your letter to the 1500 Fortune
3 companies?

4 A. Well, we can sit down and go through that
5 letter. I know that we had found, at that point in
6 time, copyright code that was copied line by line of
7 System V into Linux, and that was a part of that.
8 That wasn't the only part of that letter, but that
9 was a part of it, yes.

10 MR. JACOBS: Want to break? We have been
11 on a good schedule of --

12 MR. NORMAND: Your call. I think we're
13 fine.

14 Do you want to do a break?

15 THE WITNESS: I'm good with what everybody
16 else wants to do. May as well.

17 (Lunch break taken from 12:07 to 1:13.)

18 Q. (By Mr. Jacobs) Mr. McBride, if you look
19 at the stack, Exhibit 212, the thick exhibit --

20 A. Yes.

21 Q. And you turn to 119 on the Bates stamp.

22 A. Okay.

23 Q. This is your June 6 letter to Jack
24 Messman. June 6, 2003.

25 A. Right.

1 Q. And it concerns Novell's May 20 press
2 release which, among other things, addresses
3 copyright ownership. Yes?

4 A. Yes.

5 Q. And in the second paragraph you state, "We
6 have a direct statement that Chris Stone, an
7 executive employee working closely with you on this
8 matter, stated that the timing of your May 28, 2003
9 press release was intended to coincide with our
10 earnings announcement that occurred later that day."
11 You see that?

12 A. Yes.

13 Q. What was your basis for making -- what was
14 the direct statement you were referring to?

15 A. I was referring to a statement that we
16 received from a member of the press corps saying that
17 this had essentially happened.

18 Q. Who was that?

19 A. Maureen O'Gara.

20 Q. Did you have a direct conversation with
21 Ms. O'Gara?

22 A. Yes, I did.

23 Q. What were the circumstances?

24 A. The circumstances were I was supposed to
25 meet with Chris Stone for a meeting on, I believe it

1 was the 27th of May. He had said he wanted to come
2 over and see the offending code that was in Linux,
3 wanted to sit down and talk. We were supposed to
4 have a meeting. He ended up not showing up to the
5 meeting. We waited and waited. Didn't show. We
6 finally called his secretary and talked to them,
7 asked them what was going on. She said, "He's not
8 going to make the meeting."

9 And then it was just hours later that my
10 P.R. director came in to me and said he had received
11 a message from Maureen O'Gara that Novell was making
12 a big announcement about how they still owned the
13 UNIX copyrights. And then they got into the content
14 of this comment here; that they were timing the
15 announcement of that UNIX copyright ownership to
16 coincide with our earnings call that was going on the
17 following day so as to negatively impact our stock.

18 Q. So at this stage, what you've reported so
19 far is, in terms of how you become aware of this,
20 that your P.R. director -- Blake Stowell?

21 A. Yes.

22 Q. Came to you and said something along the
23 lines of, "I just had this conversation with Maureen
24 O'Gara. Here's what's going down. They are going to
25 make this announcement and it is deliberately timed

1 to coincide with our earnings announcement." Right?

2 A. Yes.

3 Q. What did you do next?

4 A. I called up Maureen O'Gara.

5 Q. What did you say to her?

6 A. I asked if it was true. I told her what
7 Blake told me and said, "Is that true?" She repeated
8 it, said, "This is what he told me," and confirmed
9 it.

10 Q. What words did she use to describe what
11 Chris Stone had said to her?

12 A. Well, sitting here a few years later, I
13 don't know that I could recite the exact words but I
14 can certainly remember the essence of it. And that
15 was that they had -- "they," Novell, were coming out
16 announcing that they owned the copyrights; that Chris
17 Stone had told her Novell had talked about doing this
18 announcement the week prior, but then decided to time
19 the announcement with our earnings release to
20 negatively impact our stock.

21 Q. You specifically remember her saying
22 something about him saying to her, Chris Stone saying
23 to her that it was originally set for release a week
24 earlier?

25 A. Yeah. I couldn't have thought to -- that

1 doesn't just pop out of nowhere. I very specifically
2 remember that it was originally designed to be done
3 earlier.

4 Q. Did you or Mr. Stowell record
5 contemporaneous notes as to what Ms. O'Gara was
6 conveying to you about what Chris Stone had said?

7 A. No.

8 Q. Did you do anything else? Other than the
9 correspondence back and forth with Novell on this
10 topic, did you do anything else on the question of
11 whether Chris Stone had intended, or whether Novell
12 had intended to time the two together?

13 MR. NORMAND: Objection. Form.

14 A. The discussions that I had with Jack
15 Messman -- besides this letter I had a verbal
16 discussion with him around that topic that's detailed
17 here in 212 somewhere.

18 Q. In fact, what happened to SCO's stock
19 price in that period?

20 A. It went down on the day of the
21 announcement, and within a few days of that, I don't
22 remember the exact time frames now, but it had
23 dropped I'm guessing in the 40 to 50 percent range
24 immediately.

25 Q. And then you issued a press release on

1 June 6 with the -- that we have looked at relating to
2 the location or discovery of Amendment Number 2?

3 A. Right.

4 Q. What happened to your stock price in the
5 wake of that?

6 A. I think we got some of it back, but not
7 all of it. I don't remember the exact -- it didn't
8 go back up as high as it was at that point on that
9 announcement.

10 Q. And did it ultimately recover back to the
11 level it was at on May 27?

12 A. It recovered when we had subsequent
13 announcements about major licensing deals, but not
14 before that.

15 Q. "Major licensing deals" meaning the
16 Microsoft and Sun announcements?

17 A. Yes. Sun had already been announced. It
18 would have been the subsequent Microsoft deals that
19 -- it wasn't until that point in time, as I recall,
20 that the stock actually recovered from that Novell
21 attack.

22 Q. Now, in the press release we looked at,
23 223, Mr. Sontag is quoted as saying, "We are
24 satisfied that we have now proven without a doubt
25 that SCO owns those copyrights." For some period of

1 time did you consider the copyright issue to have
2 been put to rest?
3 MR. NORMAND: Objection to form.
4 A. When I talked to Jack Messman in early
5 June on a phone call, and Jack, upon reading
6 Amendment 2 said, "Okay, you've got the copyrights.
7 So what do you want," I assumed that this issue was
8 behind us.
9 Q. And at some point did you come to learn
10 that that was not true?
11 Let me back up a second. In the eyes of
12 the marketplace, was the information that you were
13 receiving in the wake of the June 6 press release to
14 the effect that the copyright issue had been put to
15 rest?
16 MR. NORMAND: Objection to form. Calls
17 for speculation.
18 A. I don't believe it ever got put to rest
19 and, in fact, it went the other direction. It got
20 worse. Because what happened is Novell, although
21 initially retracting and reversing their position,
22 the day after I talked to Jack they eventually turned
23 around again, did another flip-flop and went back out
24 publicly and started saying they owned the
25 copyrights.

1 Q. So my question is actually framed by those
2 brackets, by those bookends. Between June 6 and
3 Novell's later announcement, was the information you
4 were receiving from your colleagues, from monitoring
5 the press, listening to your customers, consistent
6 with the idea that the copyright issue had been put
7 to rest?
8 MR. NORMAND: Objection to form.
9 A. We felt like it had been put to rest in
10 our minds. And it was just going to take the
11 marketplace a period of time to get to the conclusion
12 we had made on it. As we went through the summer of
13 '03 and into the fall of '03, we started hearing more
14 of this Novell, Novell, Novell set of issues coming
15 up. And it was initially confusing in my mind
16 because I thought that issue was behind us. And I
17 couldn't understand why the market was talking about
18 it. And then I started to find out that, in fact,
19 Novell was signaling to others via partners,
20 customers, Wall Street people, et cetera, that the
21 issue wasn't behind us.
22 Q. Now, when you were hearing Novell, Novell,
23 Novell from the marketplace, something else is going
24 on at this point, right? Novell is waiving your
25 claims against IBM and you're dealing with that

1 issue, also.
2 MR. NORMAND: Objection.
3 Q. So can you distinguish the marketplace
4 reaction?
5 MR. NORMAND: Objection to form.
6 A. The marketplace reaction that was by an
7 order of magnitude louder than anything was the issue
8 around copyright ownership. The market in general -
9 when I talk about customers, competitors, partners,
10 et cetera - didn't really have a personal dog in the
11 hunt with respect to the waiver issue with IBM. But
12 they had a big issue as it related to the copyrights.
13 And that was clearly the pushback that we were
14 getting.
15 Q. What testimony can you offer on the
16 specifics of pushback that you were getting that you
17 attributed to the disagreement about copyright
18 ownership?
19 MR. NORMAND: Objection to form. When you
20 say, just so I know, when you say "you" here, do you
21 mean the company or Mr. McBride personally?
22 MR. JACOBS: Mr. McBride.
23 A. From a personal standpoint, it related to
24 discussions with potential SCOSource licensees and
25 discussions with my internal staff who were talking

1 to potential SCOSource licensees.
2 Q. (By Mr. Jacobs) So let's break that down
3 a little bit. The discussions you, yourself, engaged
4 in, what --
5 A. Let's take Hewlett Packard as an example.
6 Hewlett Packard was on the verge of doing a major
7 SCOSource licensing deal with us on their proposal.
8 It was set to be in the \$30 to \$40 million range, and
9 ultimately the deal did not go through. The reality
10 is we were looking for more money than that. But
11 part of the issue of it not going through was them
12 coming back, talking about this copyright issue.
13 Part of their issue of not getting above a
14 \$30 million threshold was that they were still
15 hearing that Novell was claiming copyright ownership,
16 and how could they be paying extraordinarily more
17 amounts of money than we are talking about when all
18 of this wasn't settled in a court? So Hewlett
19 Packard was clearly a case where we had a major deal
20 on the table, SCOSource related; and a major
21 contributor to that deal not coming together was, in
22 fact, this copyright ownership cloud that Novell had
23 created.
24 Q. Let's drill down a little bit. At the
25 last stage of the negotiations, the disagreement in

1 price was what?
2 A. We were in the low hundred million; \$200,
3 \$250 million range was basically what we were
4 targeting. In the end, they were down at \$30. We
5 eventually got our arms around the idea that there
6 was a way of doing a deal with them that was in
7 closer to the range where they were \$30, \$40 million,
8 but it would not be as wide of a scope as what all of
9 us had talked about initially. And that's when we
10 started to make some progress with that, and then
11 eventually that one fell apart.

12 Q. What's the timing on the negotiations with
13 HP that you're referring to?

14 A. It was in the summer of 2003. I would
15 bracket it from let's say August through September,
16 in that rough 60 day time frame.

17 Q. Were drafts exchanged?

18 A. There were -- discussions went back and
19 forth. I know there were things that were on paper.
20 I can't remember if it was coming from them to us or
21 if those were things that we had. The short answer
22 is I don't know.

23 Q. Were there e-mails that documented
24 potential financial amounts and other terms?

25 A. I was involved in direct discussions with

1 some of the principals over there, but I wasn't the
2 lead negotiator. So if there were e-mails, it
3 probably wouldn't have come to me directly.

4 Q. Would they have gone to Mr. Sontag?

5 A. Most likely.

6 Q. Who were you in direct contact with at HP?

7 A. We had -- the lead negotiator on their
8 side was Joe Beyers. Other people involved there.
9 He was telling us he was in direct communication with
10 Carly, who was the CEO. And for a period of time
11 there Rick Becker was involved, but more at an
12 adjunct level. He wasn't as direct in those
13 discussions.

14 Q. Was the SCOSource arrangement with HP in
15 the version in which you were closer on price, was
16 that an immunity for HP customers running Linux on HP
17 boxes?

18 MR. NORMAND: Objection to form.

19 A. It had to do with HP customers being able
20 to run Linux under our SCOSource program.

21 Q. And in what way was it narrower in scope
22 than the version you were talking about at the
23 several hundred million, low hundred millions of
24 dollars range?

25 A. I believe the idea was -- I think the --

1 we kicked around a few things. I think one idea was
2 they were concerned about their customers in total,
3 and then they had customers that were running on HP
4 hardware and those that weren't. So some might have
5 HP hardware, and then they have this broader issue.
6 So they didn't want to indemnify for HP hardware and
7 then wake up one day and see that they still have
8 lawsuit issues on the other side. I think that was
9 one differentiation. I think there were a couple
10 other things we talked about. I don't remember
11 offhand right now the details of that.

12 Q. And how do you know -- by what vehicle of
13 communication do you know that the negotiations
14 ultimately broke down because of their view that the
15 copyright issue made the transaction less valuable
16 than originally contemplated?

17 MR. NORMAND: Objection to form.

18 A. The discussions were going through August,
19 they went into September, and at some point along the
20 line there, Joe Beyers came back and essentially
21 communicated as much.

22 Q. And what do you recall of the form of the
23 communication?

24 A. A phone call.

25 Q. So to the best of your knowledge, there's

1 no -- well, is there any writing, contemporaneous
2 writing by anyone that records that HP thought --
3 strike that. Let me start over again.

4 Was there an e-mail that said it's a
5 copyright issue that's causing this to break down?

6 A. I don't know if there was or not.

7 Q. And did you take contemporaneous notes of
8 the call?

9 A. No.

10 Q. Anybody take notes?

11 A. I don't know if Chris did or not.

12 Q. So the best information you have about how
13 you know or believe that copyright was the reason the
14 negotiations broke down is this phone call from Mr.
15 Beyers?

16 MR. NORMAND: Objection to form.

17 A. The call from Joe, in the end, was the key
18 thing that indicated to us that that was the issue.
19 When I say "copyright problem is the issue," he
20 didn't, as I recall, call up and say, "Novell owns
21 the copyright so we are not doing this deal." It was
22 not that direct. Embedded in his discussion of them
23 going down this other path of doing indemnification
24 and not paying this amount that we were looking for
25 was along the way a discussion that, "Novell is

1 making these claims. You guys don't have that
 2 resolved yet so it's hard for us to pay more than
 3 that." I remember him clearly saying that. And this
 4 being resolved was the copyright issue.
 5 Q. Did he explain any other reasons why HP
 6 was not interested in proceeding further with
 7 negotiations?
 8 A. I don't recall.
 9 Q. In that communication, though, you heard
 10 him say, "We are going to go down an indemnification
 11 path"?
 12 A. I don't think he said the exact details of
 13 what path they were going down. It came out shortly
 14 thereafter, and we became aware of it. So I wouldn't
 15 -- I don't remember for sure whether he said that in
 16 that call or whether that was just something that was
 17 an outcropping of the fact that they did the program.
 18 Q. And the way you were linking them up was
 19 that HP had decided to address customer uncertainty
 20 around Linux by indemnifying rather than buying a
 21 SCOsource license?
 22 A. Right.
 23 Q. Going back to the chronology a little bit
 24 -- sorry. Before I leave this topic, are there any
 25 other or do you have any other testimony about

1 particular instances where you believe the assertion
 2 of copyright affected your ability to reach SCOsource
 3 licenses?
 4 A. Yes. Also -- well, I guess you didn't ask
 5 that. I won't back up. I was going to say something
 6 else, but let's go forward to your question.
 7 The other instances came from our team
 8 that was out in the field doing SCOsource licensing
 9 discussions, primarily led by Larry Gasparro. And
 10 there were a number of customers that came back and
 11 cited as problematic the Novell copyright issue.
 12 Q. Did you ever create a mental list of what
 13 those were, and can you recount that for us?
 14 A. I've got some that I can remember from the
 15 discussions we had. There were a number of customers
 16 that said -- that we moved down the path to license
 17 with, that we didn't license. Some cited the Novell
 18 issue as the reason, some did not. It would be hard
 19 for me to sit here today and attach the name to them.
 20 But what I can tell you is that
 21 predominant around the issues of why people weren't
 22 doing it was this ownership issue. Google was a good
 23 example. We were in multiple levels of discussion
 24 with them, and ultimately what it came down to was,
 25 "Until you get some court rulings on the ownership

1 side, and on the infringement side, we can't move
 2 forward with you." They did offer us some money but
 3 it was a big spread away from what we were asking
 4 for.
 5 Q. What were you asking for from Google?
 6 A. We took our \$699 list price for SCOsource
 7 and discounted it down. It was still in -- I don't
 8 remember the exact amount. It was in the hundreds of
 9 dollars. And their ask was in the tens of dollars.
 10 The bid, I should say. There was too far of a gap.
 11 There was a decimal problem.
 12 Q. An order of magnitude difference?
 13 A. Yes.
 14 Q. And the total revenues that were at stake
 15 for SCO if the Google deal had come in at the
 16 discounted price you were looking at?
 17 A. They never did give us an exact count of
 18 their servers, but my understanding is they are in
 19 the hundreds of thousands of servers magnitude. I've
 20 heard as high as 500,000. I've heard as low as
 21 250,000. So if you multiplied -- CA is an example.
 22 I think we did theirs for \$500 per server. If you
 23 multiplied that against the 250 on the low end and
 24 500 on the high end, you're talking about hundreds of
 25 millions of dollars.

1 Q. And in Google's case -- strike that.
 2 Any other instances in which ownership
 3 affected an ongoing licensing discussion?
 4 A. There were a number of investment banks
 5 that we had discussions with. One of them for sure
 6 had brought up the Novell ownership issue. I can't
 7 remember if it was Morgan Stanley or Lehman Brothers
 8 or Merrill Lynch, but one of those three, I'm pretty
 9 certain.
 10 There was the Pentagon. The Department of
 11 Defense we had sit down, face-to-face discussions
 12 with them and that was an issue that they brought up.
 13 Windham Hotels, I remember that being an
 14 issue with them. Regal Entertainment, the big movie
 15 theater chain; if I recall correctly that was an
 16 issue for them, as well. I think there was a place
 17 called Just U.S.A. Sports that had called out this
 18 issue. And those are the ones that kind of come to
 19 my mind as we sit here.
 20 Q. As you were doing SCOsource, did someone
 21 on the SCO staff create a mechanism to keep track of
 22 the status of the negotiations and what issues were
 23 arising therein?
 24 A. That would have been Mr. Gasparro.
 25 Q. And did he send that report to you

1 periodically?
2 A. Yes.
3 Q. Did it have -- was it annotated with
4 information about the issues you've been discussing
5 over the last few minutes?
6 A. As I recall, he had made comments on some
7 of those. Some of them were listed out in detail.
8 Others were not. But I do believe there were some
9 comments in his little program that he was running
10 and he was keeping updated.
11 Q. Do you remember the title of that report?
12 A. I don't remember the title.
13 Q. Do you think it's been produced in the
14 litigation?
15 A. I don't know.
16 Q. Is Gasparro still at SCO?
17 A. No. He took another job with a company
18 back east.
19 Q. Who would have inherited his SCOSource
20 files?
21 A. I'm not sure. If they haven't been
22 produced, that's probably something that we could go
23 look for. I don't know.
24 Q. And I don't know that they haven't.
25 A. Okay. I don't know where his things would

1 have ended up.
2 Q. Were they e-mailed around, the reports
3 that we were discussing?
4 A. I'm not sure. I remember reading a
5 report, I don't remember how I got access to it.
6 Q. This was a Gasparro report -- well, and is
7 Chris Sontag still in charge of SCOSource at this
8 point?
9 A. I'm not sure. Chris was transitioning to
10 this new mobility business we were doing, and there
11 was also a period of time where Chris was focused
12 more on trying to do the big vendor deals, ala HP,
13 and I was having more direct interface with Larry.
14 So I'm not sure what Chris's involvement was at the
15 time.
16 Q. And Gasparro reported -- if not to Chris,
17 who did Gasparro report to?
18 A. He probably reported to -- well, during
19 the time that I knew him, he reported to Chris. And
20 before that it was Jeff Hunsaker. And when he wasn't
21 de facto reporting to Chris, he probably still was on
22 paper, even though he was sending me the reports.
23 Q. So aside from these annotated reports, is
24 there any other source that you can think of that
25 would corroborate your recollections of particular

1 licensees raising copyright ownership as an issue in
2 the SCOSource negotiations?
3 A. I think the testimony of Gasparro would
4 probably be the most valuable thing in that regard.
5 I don't know if he has been deposed in this case or
6 not. He was the one that was on the front line with
7 a lot of these discussions. The report that he had
8 would probably help. I'm not sure.
9 Q. Can't think of anything else?
10 A. I'm not sure what else I'd point to.
11 Q. Back on the issue of the back and forth
12 with Novell on ownership. If you go a few pages
13 further in to 148.
14 A. Yes.
15 Q. 148 is a letter to you from Joe LaSala
16 dated June 26, so twenty days after the June 6 press
17 release. And he states, "Upon closer scrutiny,
18 however, Amendment Number 2 raises as many questions
19 about copyright transfers as it answers. Indeed,
20 what is most certainly not the case is that 'any
21 question of whether UNIX copyrights were transferred
22 to SCO as part of the Asset Purchase Agreement was
23 clarified in Amendment Number 2' (as SCO stated in
24 its June 6 press release)." And then he goes on to
25 say that Novell disagrees with SCO's public

1 statements on the scope of rights transferred to SCO.
2 You see that?
3 A. Yes.
4 Q. You received this letter?
5 A. Yes.
6 Q. What did you -- what was your take-away
7 after receiving this letter in terms of what you
8 understood Novell's position to be?
9 A. My take-away from this letter was similar
10 to dozens, half a dozen to a dozen to twenty, I don't
11 remember how many, there were a lot of letters coming
12 from Joe LaSala after June 6 all the way through the
13 end of 2003. And my take-away from his letter
14 campaign, this being one of them, this being embedded
15 in the campaign, was that they were trying to create
16 something that wasn't there. That they had come out
17 and said they agreed -- Messman had agreed with me.
18 They had sent out the press release on the copyright
19 issue, saying that it appears that SCO was right on
20 this issue, I'm paraphrasing now. And my read on it
21 was some attorneys had gotten hold of Jack, and Joe
22 was involved, they now have outside counsel involved,
23 and it's trying to build a case as opposed to having
24 a case.
25 Q. And the significance of the distinction

<p style="text-align: right;">Page 142</p> <p>1 was what?</p> <p>2 A. Was that if you go back and look at the</p> <p>3 letter that I sent to Jack after the verbal</p> <p>4 conversation, there was unresolved issues we had</p> <p>5 around this attacking our stock price on the earnings</p> <p>6 call, the securities issues that were associated with</p> <p>7 that. And it appeared to me that they were trying to</p> <p>8 build a situation that said, "In good faith we don't</p> <p>9 know this is true. So it can't be a securities fraud</p> <p>10 issue or it can't be a bad faith issue in the stock</p> <p>11 case because we still think it's true."</p> <p>12 Q. "It" being?</p> <p>13 A. "It" being the ownership of the SCO</p> <p>14 copyrights, even though Messman had already reversed</p> <p>15 course on it once. So that was my take-away on this</p> <p>16 and a whole bunch of letters, that they were trying</p> <p>17 to prop up something that wasn't there.</p> <p>18 Q. In the May 28 letter to you from Jack at</p> <p>19 24115 in Exhibit 212, this is May 28, 2003.</p> <p>20 A. Okay.</p> <p>21 Q. "Dear Darl, as you know, Novell recently</p> <p>22 announced some important Linux initiatives. These</p> <p>23 include an upcoming network (sic) version based on</p> <p>24 the Linux kernel, as well as collaboration and</p> <p>25 resource management solutions for Linux." Do you see</p>	<p style="text-align: right;">Page 144</p> <p>1 A. Yes.</p> <p>2 Q. Which was June 26, I think.</p> <p>3 A. What was the date?</p> <p>4 MR. NORMAND: 148.</p> <p>5 THE WITNESS: 148?</p> <p>6 MR. NORMAND: Yeah. That was the Bates</p> <p>7 number.</p> <p>8 Q. (By Mr. Jacobs) Right. And then let's</p> <p>9 look at the next document, which will be 224.</p> <p>10 (EXHIBIT-224 WAS MARKED.)</p> <p>11 Q. 224 is a transcript that we prepared at</p> <p>12 Morrison and Foerster of an interview you gave on</p> <p>13 July 21, 2003.</p> <p>14 A. Okay.</p> <p>15 Q. And you can see up in the upper left where</p> <p>16 you can actually go download the video if you want to</p> <p>17 look at it yourself.</p> <p>18 A. Gee, thanks.</p> <p>19 Q. That's called corroboration.</p> <p>20 A. It's not on uTube yet?</p> <p>21 Q. It may well be. And in this interview, on</p> <p>22 page 3 --</p> <p>23 A. Okay.</p> <p>24 Q. -- you were asked by the interviewer,</p> <p>25 Farber, "Well, Novell would say that you don't</p>
<p style="text-align: right;">Page 143</p> <p>1 that?</p> <p>2 A. Yes.</p> <p>3 Q. Put simply, "Novell is an ardent supporter</p> <p>4 of Linux and the open source development community.</p> <p>5 This support will increase over time." Do you see</p> <p>6 that?</p> <p>7 A. Yes.</p> <p>8 Q. Did you have any reason to dispute that</p> <p>9 Novell had, by May 28, 2003, made an important</p> <p>10 commitment, company commitment to Linux?</p> <p>11 A. I recall they were talking about going out</p> <p>12 and doing things with Linux. I was not aware of how</p> <p>13 ardent their sport for Linux was at that point in</p> <p>14 time.</p> <p>15 Q. Did you question whether it was ardent</p> <p>16 when you received this, or you just weren't aware of</p> <p>17 it?</p> <p>18 A. I knew that they were talking about it</p> <p>19 publicly. Later I come to find out that they were</p> <p>20 working with IBM, and part of that discussion</p> <p>21 involved acquiring SuSE Linux so it didn't surprise</p> <p>22 me later on. But at this point in time I'm not sure</p> <p>23 what my thoughts were about that.</p> <p>24 Q. We were looking at the "raises as many</p> <p>25 questions as it answers" letter.</p>	<p style="text-align: right;">Page 145</p> <p>1 actually own those copyrights fully." Do you see</p> <p>2 that?</p> <p>3 A. Yes.</p> <p>4 Q. And that followed a discussion by you</p> <p>5 where you said, "There is a huge amount of code</p> <p>6 inside of the Linux kernel today that is improperly</p> <p>7 there that has come from system vendors that we have</p> <p>8 contracts with. What that does is it creates</p> <p>9 copyright violations inside of there, some of it</p> <p>10 coming straight from their source tree. So, yes,</p> <p>11 there are direct line-by-line codes." Do you see</p> <p>12 that?</p> <p>13 A. Yes.</p> <p>14 Q. So you ended up having -- you reference</p> <p>15 the contract claim but you ended up in the copyright</p> <p>16 claim, correct?</p> <p>17 A. Yes.</p> <p>18 Q. And he asked you, "Well, Novell would say</p> <p>19 that you actually don't own those copyrights fully."</p> <p>20 And you say, "Yeah, well, the Novell thing, they came</p> <p>21 out and made a claim that held up for about four days</p> <p>22 and then we put that one to bed. If you go talk to</p> <p>23 Novell today, I'll guarantee you what they'll say,</p> <p>24 which is they don't have a claim on those</p> <p>25 copyrights."</p>

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1 A. Right.
 2 Q. Do you recall giving this interview?
 3 A. Yes, I do.
 4 Q. What did you -- what were you referring to
 5 when you said, "I'll guarantee you what they'll say,
 6 which is that they don't have a claim on those
 7 copyrights"?
 8 A. I was referring to the last conversation
 9 I'd had with Jack Messman, which was him saying,
 10 "Okay, so you've got the copyrights. What do you
 11 want?" This other document we just read previous, I
 12 believe was legal guys trying to put a spin on
 13 things. It wasn't Jack Messman sending me that
 14 letter. The last time I talked to Jack Messman, he
 15 said, "Okay, you've got the copyrights. What do you
 16 want?" I expected that if, at this point in time,
 17 somebody went and spoke to Jack Messman, that he
 18 would say the same thing to them.
 19 Q. You suspected that even though his general
 20 counsel has written you a letter saying that there's
 21 still an open issue on copyrights ownership?
 22 A. I felt like that was legal CYA documents
 23 that were flying our way as opposed to them really
 24 believing it. I still believe that today, by the
 25 way. I still believe all of this is basically a

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1 legal game to try and keep their executives out of
 2 hot water.
 3 Q. And when you say "a legal game," what is
 4 SCO engaged in with its litigation? What's the
 5 difference?
 6 A. SCO is asserting claims that have to do
 7 with defending our intellectual property rights.
 8 That's much different than what Novell is doing here.
 9 Novell went out and registered the copyrights that
 10 they don't even have claim to. The whole thing, I
 11 mean, the whole thing is done by or led by two
 12 executives that weren't there at the time the
 13 transaction was done twelve years ago, and they have
 14 since been fired from the company today. And we are
 15 all left sitting here arguing about things that those
 16 two guys did that don't even relate to reality. I
 17 mean, the whole thing is really, to be frank, quite
 18 disappointing.
 19 Q. The focus on it being legal versus
 20 something else? What's the difference? I just want
 21 to unpack your --
 22 A. The legal --
 23 Q. The Caldera, now SCO, wasn't part of the
 24 1995 transaction any more than Jack Messman and Chris
 25 Stone were.

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1 A. The difference is we have talked to every
 2 person involved in that transaction, and everybody we
 3 can find that had anything to do with it have lined
 4 up squarely with our story; as opposed to Novell who
 5 didn't do the research before they went out. When we
 6 came back and told Jack Messman this over the phone,
 7 Jack said to me, "What's Amendment 2? Amendment 2?
 8 I haven't heard of it." Okay. Well, I sent it over
 9 to him. He calls back and says, "Okay, you've got
 10 the copyrights. What do you want?"
 11 Then we go down this other path that
 12 instead of them coming, at that point in time, and
 13 interviewing all the participants of the APA, they
 14 try to take these extreme positions around language
 15 to try and create a straw man to let them stay in the
 16 game. That's my view on it.
 17 Q. The conversation with Jack Messman that
 18 you're referring to is a June 5 conversation?
 19 A. Let's see. It would have been --
 20 Q. It may help to look at your chart for your
 21 chronology.
 22 A. Yeah, I think it was the 5th, actually.
 23 Q. So we are back to looking at 212. And the
 24 chronology says on or about June 3rd.
 25 A. I think it would have been the Thursday of

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1 that week.
 2 Q. And the chronology states, "Mr. Messman
 3 agreed that Amendment Number 2 -- Amendment 2
 4 confirmed that Novell had transferred the UNIX and
 5 UnixWare copyrights to SCO."
 6 A. Confirmed that we were right. Exactly.
 7 Q. Are you looking at your calendar to see
 8 what the day was?
 9 A. Let me get the exact date here and then
 10 I'll come back to your question.
 11 You're right. June 5 would have been the
 12 day of the discussion with Jack.
 13 Q. And this recounting of that conversation
 14 was also prepared as described in footnote 1 of 212,
 15 right?
 16 A. Right.
 17 Q. Did you have any contemporaneous notes of
 18 what Mr. Messman said to you?
 19 A. No, I didn't.
 20 Q. Any internal e-mails that said, "I just
 21 talked to Jack Messman. He agrees with us"?
 22 A. Chris Sontag was there with me in the room
 23 and he heard the conversation, so he can corroborate
 24 what I was talking about.
 25 Q. Did he take any notes?

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1 A. I don't know that he did.
 2 Q. You have never seen notes of this?
 3 A. I haven't seen notes of this.
 4 Q. Or any other contemporaneous communication
 5 that documented it?
 6 A. No.
 7 Q. In 212, if you look at June 9, 2003, at
 8 125.
 9 A. Okay.
 10 Q. There's the -- this is the first letter in
 11 which 4.16(b) is raised.
 12 A. Uh-huh (affirmative).
 13 Q. And Novell directs SCO to waive any
 14 purported rights SCO may claim to terminate IBM's
 15 SVRX licenses. Do you see that?
 16 A. Yes.
 17 Q. And my question to you is, had you focused
 18 on the possibility that Novell had this right --
 19 emphasize "possibility." You don't have to agree
 20 with me that it does. But had you focused on the
 21 possibility that Novell had this right up until
 22 receipt of the June 9, 2003 letter?
 23 MR. NORMAND: Let me object and instruct
 24 the witness not to answer to the extent that any such
 25 understanding was held as a result of discussions

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1 with attorneys or as a result of efforts undertaken
 2 at the direction of attorneys.
 3 A. I had a view on that topic, and it was as
 4 a result of my discussion with my attorneys.
 5 Q. So in light of the privilege instruction,
 6 you have no testimony to give on what your
 7 understanding of this was up until June 9?
 8 A. Correct.
 9 Q. If you go up to 142, this is Jack
 10 Messman's June 18, 2003 letter to you.
 11 A. Right.
 12 Q. In particular on the claim or the timing
 13 of the copyright ownership announcement?
 14 A. Right.
 15 Q. In this letter Messman reports that, "We
 16 have also spoken with Chris Stone, who you said had
 17 given contrary indications to a reporter. Chris has
 18 made absolutely clear that he never suggested such a
 19 linkage to the reporter. On this issue, it seems as
 20 if the best explanation is that the reporter linked
 21 the two events without prompting from Novell." Do
 22 you see that?
 23 A. Yes, I do.
 24 Q. Did you dispute, take issue with, disagree
 25 with Messman's conclusion in the last sentence?

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1 MR. NORMAND: Objection to form.
 2 A. Well, I put more stock in the person who
 3 reported this to me than the person who was under
 4 attack who has big penalties coming his way if he
 5 doesn't climb out of this hot water somehow. So I
 6 didn't put a lot of credence in this denial coming
 7 back a month after fact, three weeks after the fact.
 8 I mean, I didn't expect him to send a letter saying,
 9 "Hey, we talked to Chris Stone and he agreed. He
 10 helped commit securities fraud against you guys."
 11 No, I didn't expect to see one of those letters.
 12 (EXHIBIT-225 WAS MARKED.)
 13 Q. 225 is a press release, "SCO Registers
 14 UNIX Copyrights and Offers UNIX License," dated July
 15 21, 2003.
 16 A. Right.
 17 Q. Did this press release get issued?
 18 A. I'm pretty sure this is the one that went
 19 out.
 20 Q. Now, the first part is that you've
 21 received copyrights registrations from UNIX System V
 22 source code. You see that?
 23 A. Right.
 24 Q. And in fact, the copyright registrations
 25 were for the UNIX System V operating system, correct?

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1 MR. NORMAND: Objection.
 2 Q. As opposed to some other release of
 3 program.
 4 MR. NORMAND: Objection to form.
 5 Q. Let me start over. I can do this more
 6 simply. Is that first sentence correct, that you had
 7 received U.S. copyrights registration for UNIX System
 8 V source code as opposed to, say, UnixWare source
 9 code?
 10 MR. NORMAND: Objection to form.
 11 A. They were tied together. As I recall, if
 12 you look at the registration -- well, I don't have
 13 the registration in front of me so I don't remember.
 14 But to me when you talk about System V, System V is
 15 embodied inside of UnixWare, so it's impossible to
 16 rip the two apart and say these are different things.
 17 Q. But System V existed before UnixWare.
 18 A. System V is the trunk of the tree of the
 19 branch UnixWare is growing on.
 20 Q. So I'll use your metaphor. Is it your
 21 understanding that these registrations were for the
 22 trunk or for the trunk and the branch?
 23 A. Without seeing them in front of me right
 24 now, I know that we were going out with UnixWare as
 25 the product and UNIX System V as the core engine of

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1 that, or core group system of that, if you will. I
 2 don't know how you separate the two.
 3 Q. You are on to my question, which is why
 4 did you, at this point -- let me start over again.
 5 In May you were offering SCOsource
 6 licenses to Linux users.
 7 A. I believe it was -- wasn't it February or
 8 March we came out with that? It was SCOsource
 9 license for Linux.
 10 Q. That was for the libraries?
 11 A. That was for the libraries.
 12 Q. And at some point you go out with a
 13 broader SCOsource license.
 14 A. SCOsource license, correct.
 15 Q. And that's before this July 21, 2003
 16 announcement, correct?
 17 A. Let's see here. I don't remember the time
 18 frames. Sometime in the area we're talking about
 19 here is when we came out with this broader source
 20 code based license, UnixWare based license that would
 21 hold people harmless if they were going to run
 22 commercial Linux implementations. I thought this was
 23 the announcement of it. If we had something before
 24 that, it could be.
 25 Q. So I think you're on to my question,

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1 though, which is why was it styled as a UnixWare
 2 license?
 3 MR. NORMAND: Objection to form.
 4 A. UnixWare is the way the source code was
 5 offered all the way from the time that we picked up
 6 the product from Novell. In fact, before Novell sold
 7 it to us, that's the way they were offering it. If
 8 somebody was licensing UnixWare, or UNIX code from
 9 Novell, even in the time frame right before we picked
 10 it up, it was styled as a UnixWare license. So that
 11 was how the tradition was for treating the source
 12 code issues. The source code was embodied inside of
 13 UnixWare, is maybe a simpler way of saying it.
 14 Q. At any point did you become aware of
 15 customer concerns that code that was uniquely -- if
 16 we distinguish between the trunk again and the
 17 branch, did you become aware of any customers who
 18 were concerned that there was code from the branch
 19 and not from the -- that there was code from the
 20 branch that they needed immunity for?
 21 MR. NORMAND: Objection to form.
 22 A. There were companies that we talked to
 23 that owned this. I don't remember having the
 24 differentiation between the trunk and the branch. We
 25 owned the trunk, so in a case like I talked to some

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1 customers in Japan, Fujitsu and Hitachi are a couple
 2 of examples. And they were concerned and they were
 3 going to be our next visit after HP. That didn't go.
 4 The thing kind of came back and didn't really take
 5 off. But there was concern with those kind of
 6 companies. But I don't remember it being
 7 differentiated between the trunk and the branch even
 8 though they owned a branch.
 9 Q. "They" meaning?
 10 A. They being Hitachi and Fujitsu as
 11 examples.
 12 Q. When you say they owned a branch, meaning
 13 what?
 14 A. They owned a version of UNIX that was
 15 branched off from the trunk of the system-wide source
 16 code.
 17 Q. Maybe I wasn't clear. One of the branches
 18 you described was UnixWare.
 19 A. Right.
 20 Q. And so my question is did any customer say
 21 to you specifically, "We don't want immunity for the
 22 trunk only. We need immunity for the trunk and the
 23 branch; that is, UnixWare"?
 24 A. It was usually dealt with in total. The
 25 oddity with UnixWare, if you will, is that while

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1 serving as a branch it also carried the trunk with
 2 it. So rather than licensing these things separately
 3 and saying here's all the System V source code over
 4 here, and then here's UnixWare over here, and here's
 5 Open Server, it was basically -- when somebody wanted
 6 a license to the source code, they licensed UnixWare.
 7 IBM is an interesting example. If you go
 8 back to Project Monterey days, they came in to get a
 9 license to System V Release 4 code. They didn't
 10 license System V. They licensed UnixWare, because
 11 that's where System V Release 4 was found.
 12 Q. Did you ever identify in your -- in any of
 13 the presentations you made over the course of the
 14 spring, summer, or fall of 2003, code in Linux that
 15 was uniquely from the UnixWare branch?
 16 MR. NORMAND: Objection to form.
 17 A. Identify code that was uniquely in the
 18 UnixWare branch and then what?
 19 Q. And then in Linux.
 20 A. And then in Linux. Yes, we did. That
 21 gets into the privilege issues, but absolutely we
 22 did.
 23 Q. Sorry, but I'm talking about presentations
 24 you made.
 25 A. Oh. These were subject to discussions

<p style="text-align: right;">Page 158</p> <p>1 with experts and attorneys and whatnot. I don't know 2 what is in the presentations that were out there. 3 There was some code that we were showing under NDA in 4 the summer of 2003 that was subject to what you're 5 talking about. What I don't remember is what code 6 version. I remember it came from UNIX and I remember 7 it came from System V. I don't remember if it was 8 tied directly to UnixWare or not. 9 Q. And in this press release, 225, on July 10 21, 2003 -- 11 A. Yes. 12 Q. -- you're saying that you're registered, 13 the copyrights to UNIX System V source code, a 14 jurisdictional pre-requisite to enforcement of SCO's 15 UNIX copyrights. Do you see that? 16 A. Yes. 17 Q. In fact, wasn't it the case that what you 18 were showing to people you were making presentations 19 to about the IP risks in Linux was your view that 20 there was UNIX System V code in Linux? 21 MR. NORMAND: Objection to form. 22 A. I don't think you can cut the line that 23 thinly. I think some of it may have been System V, 24 but the System V was also showing up inside UnixWare. 25 So I think it would be hard to bifurcate those two</p>	<p style="text-align: right;">Page 160</p> <p>1 says, "The corporate position seems to be the 'wait 2 and see game.'" It's on the second page of the 3 printout. Right there. But you can read it for 4 context, so take your time. 5 Did you understand him to be -- the next 6 sentence, he says, "The audit committee person may be 7 the key but until the CFO and CIO are convinced 8 'prove it in court' (Hon Industries) the sales team 9 may be asked to tread water for a while." Do you see 10 that? 11 A. Yes. 12 Q. What was Hon Industries? 13 A. I don't know. I see where you're looking. 14 Hon Industries. It sounds like one of the customers 15 we met with. 16 Q. And Hunsaker responds, "Good message Larry 17 and I feel your pain. We have completed the sales 18 process steps for the Global 1500 SCOX seeding 19 campaign," and then he goes on to discuss some issues 20 that have arisen with the campaign. Do you see that? 21 A. Right. 22 Q. And then he goes on to say, "In the 23 meantime, your suggestions below keep surfacing from 24 customers who call in to me as well and demand 25 'proof.'" Do you see that?</p>
<p style="text-align: right;">Page 159</p> <p>1 issues. 2 Q. Well, let's refer to the code that's new 3 to UnixWare over System V. 4 A. Okay. 5 Q. Let's refer to that as UnixWare unique 6 code. 7 A. Okay. 8 Q. And let's refer to the rest of the 9 UnixWare code base that's also found in System V code 10 as System V code. 11 A. Right. 12 Q. So with that clarification, were any of 13 the assertions you were making about the IP risks in 14 Linux related to UnixWare unique code? 15 MR. NORMAND: Objection to form. 16 A. I don't know, as I sit here today. 17 Q. Let's change the tape. 18 (Break taken from 2:11 to 2:23.) 19 (EXHIBIT-226 WAS MARKED.) 20 Q. We are back to May, 2003. 226 is an 21 e-mail string ending with an e-mail from Blake 22 Stowell to, among others, yourself. Do you see that? 23 A. Yes. 24 Q. And it starts with an e-mail from Gasparro 25 on May 21 to you and then copied to others. And he</p>	<p style="text-align: right;">Page 161</p> <p>1 A. Yes. 2 Q. And the suggestions seem to relate to 3 getting the evidence out there that there's copied 4 code in Linux, right? 5 MR. NORMAND: Objection to form. 6 A. Right. 7 Q. And then, "Just a quick update," on the 8 top line. "George Weiss at Gartner Group has 9 expressed a lot of interest in visiting our 10 headquarters and viewing the code. There are others 11 lining up to do the same. I think we can do this, 12 with the assistance of Chris and others, to exhibit 13 this to many of the IT industry analysts." Do you 14 see that? 15 A. Yes. 16 Q. So around May of 2003, was one of the 17 reasons the SCOSource campaign was running into 18 trouble skepticism as to the quality of the proof you 19 had on the part of the target audience? 20 MR. NORMAND: Objection to form. 21 A. No, I wouldn't say that. 22 Q. Why not, in light of this e-mail? 23 A. At this date, at this point in time, we 24 had not gone out and published our proof, per se. We 25 had established a snippet of code that if people were</p>

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1 willing to look at under nondisclosure, because it
 2 was protected code, we would sit down and review it
 3 with them.
 4 The expectation of people receiving this
 5 potential infringement letter relating to our 1500
 6 letters that went out the week before, and then the
 7 week later they were all going to be lining up
 8 saying, "Where do I take my license," that wasn't
 9 what we were expecting was going to happen.
 10 Q. So what was your expectation or plan in
 11 the middle of May, 2003, for how you were going to
 12 roll out SCOSource and persuade people that they
 13 needed to take a license?
 14 A. Well, SCOSource started with people
 15 initially asking to see code. Even before this
 16 letter, there were demands for, "Show us some code."
 17 I remember one call or one Linux guy sending me an
 18 e-mail or calling me on the phone or something, I
 19 remember a communication, "Just show us twenty lines
 20 of code so that we know that you are talking about
 21 something here."
 22 We ended up having hundreds of lines of
 23 code that were directly copied over from UNIX into
 24 Linux. People who signed up for that, the
 25 nondisclosure, we would show that code to. And from

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1 there many times that led into licensing discussions.
 2 Q. At this point in time, May 21, had you
 3 figured out that you needed to do that sort of show
 4 and tell?
 5 MR. NORMAND: Objection to form.
 6 A. We believed that that was part of the
 7 process, that people wanted to understand what was
 8 going on. Part of the thing that we were seeing at
 9 the time was we have a range of issues here we are
 10 dealing with. It talks later about how we had
 11 experts that had gone out and evaluated, and we had a
 12 lot of different code areas that were problematic.
 13 And we had this one bucket of code that we were
 14 showing under nondisclosure. This first paragraph on
 15 the second page indicates that, "The Linux end user
 16 community had suspected issues over IP for quite some
 17 time." So it wasn't a shock to a lot of these
 18 people. It was more of a question of what is it and
 19 what do we do about it?
 20 This e-mail came in a week or so before
 21 Novell's big attack on us. It also came in before we
 22 had substantially gone out and done any showing of
 23 the code. So I guess it doesn't surprise me that the
 24 issue at the time is (A), it's not Novell at the time
 25 because Novell hasn't come up as an issue yet, and

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1 (B), it's related to, "Show me the code," because we
 2 hadn't shown the code yet.
 3 Q. And my only question was had you -- was it
 4 this feedback that persuaded you that you needed to
 5 show the code as opposed to realizing, when you
 6 launched the campaign, that you were going to need to
 7 come up with proof to satisfy people?
 8 MR. NORMAND: Objection to form.
 9 A. I don't remember the details and the
 10 timing of when we said we've got to show people the
 11 campaign. It seemed like it was before this. For
 12 example, it says, "George Weiss has expressed
 13 interest in visiting our headquarters to view the
 14 code." Well, that tells me at that point in time we
 15 did have the code-viewing program in place. But at
 16 that point in time there were only -- I mean, the
 17 only person that was really showing the code was
 18 Chris Sontag, so it was a matter of how many people
 19 Chris could visit in a day.
 20 Q. But Gasparro is saying in his e-mail, and
 21 I don't mean to argue with you, I just want to make
 22 sure I understand what your recollections are.
 23 Gasparro is indicating that -- Gasparro is out there
 24 managing the sales force for SCOSource, right?
 25 A. Right.

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1 Q. And he is saying to you, "We are getting,"
 2 in effect, "We are getting a lot of questions asking
 3 for proof."
 4 A. Right.
 5 MR. NORMAND: Objection to form.
 6 Q. And indicating that as of May 21, 2003,
 7 you had not yet conveyed to Gasparro, as part of the
 8 rollout of SCOSource, "We have a plan for showing our
 9 proof."
 10 MR. NORMAND: Objection to form.
 11 A. Well, additionally we had not gone out in
 12 our letters to the 1500 saying, "Here's the proof,
 13 here is what you are supposed to do about it, and do
 14 it now." It was actually the opposite of that. It
 15 was more generally written. It was that we are in
 16 litigation with IBM; we suspect that there are
 17 problems inside of Linux with our code and we are in
 18 the process of investigating that. And we didn't
 19 give them instructions on what to do. We didn't
 20 demand them to do anything.
 21 Q. So what seems to be happening, then, in
 22 this Gasparro letter, he says, "I smell opportunity
 23 and we are very anxious to begin the home run derby."
 24 He is suggesting that your letter had more of an
 25 effect than maybe even you anticipated and that

<p style="text-align: right;">Page 166</p> <p>1 there's an opportunity to sell SCOsource licenses if 2 we can show them the proof. 3 MR. NORMAND: Objection to form. 4 A. I think you may be on to something there. 5 I mean, Larry is a sales guy. He'd come out of doing 6 sales for years and years. And when he smells 7 opportunity, whether it's selling a product or a 8 licensing program, he says, "Let's get on this and 9 go." There were a number of times where we had to 10 sort of rein Larry in with his exuberance on this 11 because there was a process we had to go through, and 12 it wasn't to go out there right now. The letters 13 were out there to give notice. They weren't there to 14 -- again, we didn't send out letters saying, "We are 15 here to collect." It was just a notice letter. 16 Q. I've got a letter here, a July 29 letter. 17 (EXHIBIT-227 WAS MARKED.) 18 Q. 227 is a letter dated July 29, 2003 with a 19 signature block for you. Do you recall this letter? 20 A. I believe this is one my counsel prepared 21 that didn't go out. How do you guys want to deal 22 with that? 23 MR. NORMAND: Why don't we take a break 24 and I can ask the witness some threshold questions 25 about this letter.</p>	<p style="text-align: right;">Page 168</p> <p>1 A. Right. 2 Q. And started to be in July what it was 3 before? 4 A. (Witness nods head up and down.) 5 Q. And is that consistent with your 6 recollection of the announcement of licensing? 7 A. It seems like it -- 8 MR. NORMAND: Objection to form. 9 A. I'd have to look at the whole thing going 10 out, but it seems like it was up and then it went 11 back down. What was the level there? I'm not sure 12 exactly where that's at. I think that it went up, 13 came back down, and went up again. That's my 14 recollection. 15 Q. And pretty quickly went back up again? 16 MR. NORMAND: Objection to form. 17 A. I'd have to see the whole thing to get the 18 reading on it. 19 Q. If you look at the next page, there's a 20 chronology. 21 A. Right. 22 Q. Does that help with what you were trying 23 to remember before about why the stock price 24 rebounded? 25 MR. NORMAND: Objection to form.</p>
<p style="text-align: right;">Page 167</p> <p>1 MR. JACOBS: Okay. 2 VIDEOGRAPHER: We are going off the 3 record. 4 I've got a better idea. Let's hold it for 5 a moment. So we are going to hold 227. You guys can 6 talk about it at a break and we will march on. 7 MR. NORMAND: Okay. 8 (EXHIBIT-228 WAS MARKED.) 9 Q. 228 is a set of slides dated July, 2003, 10 under SCO 1295248 through 5276. It says, "Darl 11 McBride, President & CEO." Did you use those slides 12 in presentations? 13 A. It looks familiar. 14 Q. I did not have this in mind when I asked 15 you this question before. If you go to the third or 16 the fourth page, there's a stock performance slide. 17 A. Right. 18 Q. Does this help clarify or refresh your 19 recollection as to the chronology on SCO's stock 20 price? 21 A. Let's see here. Just looking at this 22 right now, I see the dip that came down on the Novell 23 announcement and then it came back later on. 24 Q. And it looks like it came back maybe at 25 the end of June?</p>	<p style="text-align: right;">Page 169</p> <p>1 A. On the stock price, I mean there are a lot 2 of reasons that the stock goes up and stock goes 3 down. I don't remember stock being tied directly to 4 the elements that are on here. There's -- early in 5 the April time frame it goes up when we have the 6 Microsoft license announced. That's the only one I 7 can see that would directly correlate to the price 8 going up on here. 9 Q. So looking at this now, do you have any 10 better recollection of what, at the time, you thought 11 was contributing to the increase in price after the 12 dip occasioned by the Novell May 28 press release? 13 Occasioned, in your view, by that dip? 14 A. I think the fact that we came out and 15 addressed the Novell ownership issue did help us get 16 a rebound on the stock price. It was -- the market 17 reacted negatively, it was down for a few days. We 18 came out and put out our release that we had, in 19 fact, put the copyright ownership issue to bed. 20 Novell followed that with an announcement that they 21 were somewhat agreeing with that. And then it's a 22 period of time, if you follow this chart out, where 23 you see the impact of Novell's actions having more of 24 a long-term effect on the stock price. Novell was 25 not out publicly, at this point in time, talking in</p>

1 the marketplace, saying that they were, in fact,
2 still owning it. In fact, the last thing the market
3 had seen from them initially was, you know, that
4 wasn't the issue; that they weren't claiming to own
5 it.

6 Now, behind the scenes it starts to -- if
7 you track into the August, September, October time
8 frame, you start seeing it. But that's not on this
9 chart.

10 Q. If you skip ahead to -- by the way,
11 there's some references in here to SCO Japan?

12 A. Yes.

13 Q. Does this -- do you recall preparing these
14 with a view toward giving them in Japan?

15 A. I gave a presentation in Japan in July.

16 This could have been the one.

17 Q. If you go to SCO 1295266, in the middle
18 is, among other things, some stuff about SCO and the
19 IBM litigation. And then this slide is SCO and
20 Linux.

21 A. Okay.

22 Q. And then on the next page, 95267, there's
23 a summary of your contention about Linux and your
24 intellectual property rights. Do you see that?

25 A. Yes.

1 Q. And it says that, "Enterprise use of Linux
2 based on the 2.4 and upcoming 2.6 kernel directly and
3 irrefutably violates SCO's copyrights and SCO's
4 contract rights in UNIX System V software code and
5 various UNIX derivative works." Do you see that?

6 A. Yes.

7 Q. And then on the next page, "SCO owns the
8 copyrights to UNIX System V."

9 A. Yes.

10 Q. Do these slides refresh or reinforce your
11 recollection that the thrust of your argument to
12 Linux users about the need for a SCOsource license
13 was directed to the existence of UNIX System V trunk
14 code in Linux, as opposed to UnixWare unique code?

15 MR. NORMAND: Objection to form.

16 A. I don't recall making that distinction; in
17 that, given a situation where UNIX System V is
18 embodied inside of UnixWare, it would be like
19 describing a person as opposed to the trunk of the
20 person and the limbs of the person. We always just
21 -- I mean ultimately we would refer to UNIX as the
22 System V, the UNIX System V software code, UnixWare.
23 It just isn't as easy as bifurcating those and
24 saying, "Here is the trunk code and here is the
25 unique code."

1 Q. So do you recall ever, in the summer of
2 2003, urging that there was UnixWare unique code as a
3 basis for a customer needing to take a Linux license,
4 a SCOsource Linux license?

5 MR. NORMAND: Objection to form.

6 A. I don't remember specifically the way you
7 said it. My understanding is that there are a number
8 of things that are problematic with Linux. And they
9 are subject to whatever experts would talk about.
10 But my general understanding is there are issues with
11 Linux that relate to the System V trunk code, the
12 System V code, and things that are unique to UnixWare
13 but I couldn't sit here, as we sit here today, and
14 tell you what those pieces are.

15 Q. So I'm asking you more about what you are
16 talking to customers about. And I appreciate that
17 you weren't using the vocabulary of "UnixWare unique
18 code."

19 A. Right.

20 Q. But in terms of what you were conveying to
21 customers about your view that they should be taking
22 a SCOsource for Linux license, isn't it true that you
23 were directing them to the intellectual property
24 risks occasioned by the existence of UNIX System V
25 code in Linux?

1 MR. NORMAND: Objection to form.

2 A. We were offering a UnixWare based source
3 code license that enveloped System V but also
4 included anything in there from UnixWare. So whether
5 it was UnixWare unique or the trunk code, they would
6 have had a sense that would protect them for it.

7 Q. That wasn't quite my question, which is,
8 you were throughout this period putting customers on
9 notice, as you said, of intellectual property risks
10 in Linux.

11 A. Right.

12 Q. And isn't it true that the notice you were
13 putting customers on of those risks related to UNIX
14 System V code?

15 A. Some of them were System V. Some of them
16 could have been related to UnixWare. Some of them
17 were even related to Open Server. If you go back to
18 the first discussion we had, we were talking about
19 library licensing issues. The library issue did not
20 disappear when the bigger license came around. The
21 library license got subsumed by the UnixWare or the
22 SCOsource for source code license for Linux. I
23 forget what it's exactly called.

24 And so one of the things that you don't
25 see here in the summertime frame is direct talk or

1 unique talk about the library license program. Why
2 not? Because that was included in what they got
3 here. Anybody who wanted to run the libraries in the
4 standalone mode, the way we were offering in
5 February, could still do that with this license.

6 They could also use System V source code as a backup
7 for potential infringements. They could also use
8 UnixWare, various parts of UnixWare unique code.

9 Q. Was the Open Server -- we did look, when
10 we were looking at the libraries, there was the
11 System V libraries and then the Open Server
12 libraries. Remember that?

13 A. Yes.

14 Q. How were the Open Server libraries
15 included in the SCOSource license you were offering
16 in the summer of 2003?

17 A. Eventually the UnixWare and the Open
18 Server code basis came closer together and started
19 mirroring each other. I don't remember the exact
20 time frame, but especially as it related to the
21 library side of things the interfaces started to
22 mirror each other. So after a while, it became kind
23 of a moot point as to whether it was Open Server or
24 UnixWare.

25 Q. If you look at 272.

1 A. All right.

2 Q. Laura DiDio, a Yankee Group analyst, was
3 shown evidence by SCO group earlier this week. Do
4 you see that?

5 A. Yes.

6 Q. What UNIX code in the sense of trunk,
7 branch, other branch was she shown?

8 A. It was a code called MALLOC, M-A-L-L-O-C,
9 which stands for memory allocation code, which would
10 have been -- it was System V code, and I think we
11 tracked it down eventually to being improperly
12 contributed by SGI.

13 Q. Then if you look at Bill Claybrook?

14 A. Yes.

15 Q. "If everything SCO showed me today is
16 true, then the Linux community should be very
17 concerned."

18 A. Yes.

19 Q. Same code?

20 A. Yes.

21 Q. And then George Weiss, Vice-President of
22 Gartner Group, I guess he did come in ultimately and
23 see the code.

24 A. Yes.

25 Q. Same code?

1 A. Yes. Now, when we were having the
2 discussions on the code, yes, we showed line by line
3 code, but then we also talked about these bigger
4 issues relating to derivative works coming out of the
5 IBM case that were problematic with Linux, as well.
6 So it was a broader discussion than just saying,
7 "Here's this MALLOC code," and then they went home.

8 Q. In terms of -- you were clear, I believe,
9 my recollection from this period is you were pretty
10 clear with the Linux end users that the derivative
11 works issue in the IBM sense, that was not an issue
12 that you were going to carry against Linux users;
13 that was a dispute between you and IBM, correct?

14 MR. NORMAND: Objection to form.

15 A. The initial discussions were around that.
16 Later on, things that get subject to the privilege
17 start to get into issues around the structure and
18 sequence of Linux and that's something I'm not
19 prepared to talk to as it relates to things I've
20 since learned from my experts with respect to how
21 that structure and sequence becomes a problem inside
22 of Linux. But at the time we were saying this, what
23 you said I believe is accurate.

24 Q. And to the extent structure and sequence
25 in Linux was an issue for Linux end users, it would

1 be an issue because of the copyright claim, not
2 because of a derivative works claim arising only out
3 of the contract rights you had against IBM, correct?

4 MR. NORMAND: Objection to form.

5 Q. That was what -- well, let me withdraw the
6 question.

7 In this time period you did not urge, that
8 being the spring and summer of 2003, you did not urge
9 Linux users to take SCOSource licenses on account of
10 your derivative works claims against IBM, correct?

11 A. I don't remember cutting it that finely.

12 Q. You think you may have more broadly
13 conveyed to them there are problems in Linux and
14 included the derivative works issue?

15 A. I know that we spent a lot of time going
16 through derivative works and how, for example,
17 journal file system was showing up inside of Linux.
18 And I don't know that we said one way or another, but
19 I don't think it was definitive that we're saying,
20 "You can just waive off the derivative works issue,"
21 either.

22 Q. Let's look at another set of slides.
23 (EXHIBIT-229 WAS MARKED.)

24 Q. So this is a set of slides dated September
25 2003, under SCO 1769390 to 9433. SCO Intellectual

<p style="text-align: right;">Page 178</p> <p>1 Property Compliance License Program. 2 A. Uh-huh (affirmative). 3 Q. Do you recall these slides? 4 A. Generally speaking, yes. 5 Q. And these are in the notes form where 6 there's some notes for the speaker, right? Like if 7 you look at page 3 of the slides. 8 A. Oh, I see. I see notes on that page. 9 That's the only one I see. 10 Q. That's the only one? Did you deliver this 11 presentation? 12 A. I don't remember giving this presentation. 13 Q. If you look at -- do you remember it being 14 given? 15 A. Do I remember it being given. 16 Q. Actually, if you look to the end, there's 17 information for the sales force. 18 A. Okay. 19 Q. So that may help explain what this is. 20 Sales Approach on page 32. 21 A. I don't remember the details of this 22 presentation. It looks like something that was 23 prepared for our sales force, but I don't -- it looks 24 like something that Sontag and Gasparro would have 25 been working on.</p>	<p style="text-align: right;">Page 180</p> <p>1 what the sales case is for SCOsource licenses? 2 MR. NORMAND: Objection to form. 3 A. It certainly looks like it was prepared 4 for the sales force. It looks like it gives basis 5 for a case. Gives a background to it. Pricing for 6 the licensing program. Limitations. Looks like a 7 general overview of the IP license program. 8 Q. If you go to 39 and 40. 9 MR. NORMAND: Pages 39 and 40? 10 Q. Yes. It refers to a customer viewing 11 center in Lindon, and then a viewing center for 12 Munich. 13 A. Yes. 14 Q. Munich. Sorry. And then the next page it 15 says, "Be able to quote the actual number of lines of 16 infringing code." 17 A. Right. 18 Q. Was the actual number of lines of 19 infringing code that you had in mind at SCO in 20 September of 2003 the same number of lines of code 21 that would be viewed in the viewing center in Lindon 22 or the one scheduled for Munich? 23 MR. NORMAND: Objection to form. 24 A. I don't know what they were referring to 25 here. I don't know if they were asking for just the</p>
<p style="text-align: right;">Page 179</p> <p>1 Q. If you look at page 12 of the slides, 401 2 Bates stamp. 3 A. Uh-huh (affirmative). 4 Q. Is this -- this slide says SCO UNIX System 5 V Copyright Infringements on Linux. 6 A. Right. 7 Q. And it refers to four categories; literal 8 copying, derivative works, obfuscation, nonliteral 9 transfers. 10 A. Right. 11 Q. And in each case where -- other than 12 obfuscation, it refers to System V. Do you see that? 13 A. Yes. 14 Q. And leaving aside the derivative works, 15 whether that's, in fact -- it says "contracts" there, 16 so I guess that clarifies the nature of that claim, 17 right? 18 A. Right. 19 Q. If you look at literal copying and 20 nonliteral transfers, those are directed to claims of 21 copying from System V into the Linux kernel, correct? 22 A. Right. That's what it says. 23 Q. And this presentation, would you agree 24 with me that this appears to be a presentation to 25 educate the sales force on what the basis for -- on</p>	<p style="text-align: right;">Page 181</p> <p>1 MALLOC code or the actual number of lines, including 2 all the code that we thought was infringing. 3 Q. Did you have a number in the second case 4 as of September, 2003? 5 A. I had been given advice from my code 6 experts that the actual number including derivative 7 works infringement was over a million lines. 8 Q. How about if you separated out the 9 derivative works infringements? 10 A. I think if you go look at the final 11 disclosures we put in, the number of lines in the IBM 12 case that was infringing that was not derivative was 13 still in the hundreds of thousands. 14 Q. But as of September, 2003, do you recall 15 what you were saying about the number of lines of 16 code? 17 A. I think what we were saying at that time 18 was that we knew for a fact there were small amounts 19 of direct line-by-line copying, and that there were a 20 lot of derivative works code at issue in the case. 21 MR. NORMAND: Mike, could we take a break 22 to see Ryan off, and we can come right back. 23 MR. JACOBS: Sure. 24 MR. NORMAND: Just a couple minutes. 25 (Break taken from 3:01 to 3:10.)</p>

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1 MR. JACOBS: Do you want to do your 227
 2 thing?
 3 MR. NORMAND: I do. Mr. Jacobs had
 4 introduced earlier proposed Exhibit 227, which is a
 5 draft letter. And my understanding is that the
 6 letter was never sent and that it was drafted by
 7 counsel for the company. Therefore, I conclude that
 8 the letter is attorney/client work product, or
 9 attorney work product, and therefore I'm withdrawing
 10 the letter as an exhibit and claiming work product
 11 protection over it, and we will endeavor to send a
 12 letter to that effect to Novell.
 13 Q. (By Mr. Jacobs) Let's spend a few minutes
 14 on Sun, Mr. McBride.
 15 A. Okay.
 16 Q. Let me show you a couple e-mails.
 17 (EXHIBITS-230 AND 231 WERE MARKED.)
 18 Q. 230 is an e-mail dated February 4, 2003
 19 from Melanie Cordero to you and several other people.
 20 The re line, "Confirmed: Sun/SCO Call." And 231 is
 21 an earlier e-mail, October 25, 2002 from Mike
 22 Ballengee to you, among others, "Re: Meeting with
 23 our new CEO."
 24 A. Okay.
 25 Q. Let's start with 231, actually, since it's

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1 earlier.
 2 A. Uh-huh (affirmative).
 3 Q. Maybe I can focus the questions a little
 4 bit. At some point in the spring of 2003, SCO
 5 concluded negotiations with Sun on an expanded UNIX
 6 license, correct?
 7 A. Correct.
 8 MR. NORMAND: Objection to form.
 9 Q. How did that negotiation unfold?
 10 A. I believe the precursor to the 2003 Sun
 11 agreement was -- let's see here. I had sent an
 12 e-mail to Scott McNealy and some point along the way
 13 we had a phone conversation. And then after the
 14 phone conversation with Scott, that led into more
 15 detailed discussions with some of his people,
 16 Johnathan Swartz being the main driver and then John
 17 Loiacono, as well.
 18 Q. Sun and Novell had entered into a buyout
 19 transaction in 1994, correct?
 20 A. That's right.
 21 Q. And what was it that SCO was interested in
 22 obtaining from Sun - I'll separately ask you what Sun
 23 wanted from SCO - in the 2002, 2003 discussions that
 24 led up to the SCO/Sun arrangement?
 25 A. After SCO bought the UNIX technology from

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1 Santa Cruz -- I'm sorry. After Santa Cruz bought the
 2 technology from Novell and subsequently ties in to
 3 Caldera and becomes the SCO group, there's a period
 4 of time of -- I guess we are talking about seven,
 5 eight years now that had elapsed where we had owned
 6 the technology. So even though Sun had licensed core
 7 UNIX technology back in the mid '90s, we had done a
 8 lot of advancement of the technology in that period
 9 of time that we had had it. So whether it was System
 10 V or advancing System V inside of UnixWare, we had a
 11 lot of technology, especially as it related to the
 12 Intel chip set that we thought would be valuable to
 13 Sun, especially since they had announced they were
 14 going to market with an Intel version of Solaris.
 15 Q. So that's what you thought you had to
 16 offer them?
 17 A. That was the primary thing that we thought
 18 we had to offer them. And that was, in the end, the
 19 primary thing that they found value in.
 20 Q. What else did they find value in?
 21 A. I think the UnixWare technology base
 22 itself had evolved and grown a lot. The thing that I
 23 was specifically referencing there had to do with
 24 drivers; that what they were looking for was we had a
 25 broad set of drivers, device drivers that worked with

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1 all kinds of different devices in an Intel
 2 environment. That was the first thing they talked
 3 about.
 4 We had other advancements inside/outside
 5 the kernel that had happened with the System V based
 6 UnixWare over that period of time. I couldn't go
 7 through all the technical discussions. I'd have to
 8 get one of our engineers in to do that. But clearly
 9 there was value above and beyond the technology as
 10 they had seen it when they did the buyout.
 11 Q. In 1994?
 12 A. In '94.
 13 Q. Were there aspects of the 1994 buyout that
 14 Sun simply wanted to expand, separate from new
 15 technologies that had been added since 1994?
 16 MR. NORMAND: Objection to form.
 17 A. Well, the discussion was on this Intel
 18 environment. That's what I remember specifically.
 19 They wanted the drivers, they wanted to go into
 20 Intel, they wanted to go out and do that. And that's
 21 where Santa Cruz was always king of the hill. That's
 22 what I can remember from that transaction.
 23 Q. What was the structure of the negotiating
 24 teams between the two companies?
 25 A. Let's see. On our side it was Chris

1 Sontag and an outside guy that we had named Kimball
2 Jenkins. Those were the two guys involved in the Sun
3 deal.

4 Q. Kimball Jenkins was --

5 A. He was an outside investment advisor.

6 Q. How did he get involved in this?

7 A. We were in the process of doing a money
8 raise with him. We were trying to figure out how to
9 get the business going. And part of getting the
10 business going was the question of do we bring in
11 equity capital or do we do licensing deals? So it
12 was one thing or another, and it ended up turning
13 into more of a licensing situation. So he was
14 helpful in putting together the books that financiers
15 do to help present what we're doing. So on our side
16 it was Chris Sontag, Kimball Jenkins. On their side
17 John Loiacono was the key guy.

18 Q. What is his role? What was his role at
19 Sun?

20 A. At the time, he was the Vice-President at
21 Sun. If I look at his title on 231, V.P. of the
22 Operating Group is what they had here. I don't know
23 if that's what it was in February when we did the
24 deal, but it was something like that.

25 Q. Was any of the Sun -- was Sun at all

1 motivated by the -- strike that.

2 Did you articulate to Sun in the
3 negotiations that led to the February 2003 deal, the
4 intellectual property concerns you had identified as
5 part of the SCOSource project?

6 A. I'm trying to remember. We didn't have
7 them as one of the companies that we went out to when
8 we talked about December of '02, talking to the big
9 hardware vendors. Because at that time, they were
10 competing directly with Linux. So we may have
11 brought up the discussion of there being infringement
12 problems there, but more as a matter of, "Here's
13 what's going on." We had a public announcement. So
14 I'm sure we had some level of discussion on that, but
15 mostly it was a discussion about licensing this
16 technology.

17 Q. And how about Sun's interest in open
18 sourcing Solaris; was that a discussion topic in the
19 negotiations leading up to the February, 2003
20 agreement?

21 MR. NORMAND: Objection to form and
22 foundation.

23 A. I think there were some discussions there
24 that would get into the area of privilege that I'm
25 probably not at liberty to talk about.

1 Q. Well, if you talked about them with Sun,
2 then they are not privileged, right? So what would
3 your communications with Sun have been on that topic?

4 MR. NORMAND: I understood the question to
5 be discussions with Sun on the issue.

6 A. Okay. I thought we were talking
7 attorneys.

8 As it related to discussions with Sun,
9 there was some discussion along the way around that.
10 There was a concern that we had to make sure this
11 stuff wasn't going to get open source GPL'd, and if
12 you go look at the contract and how it was worded,
13 that was a concern that was dealt with.

14 Q. How was it dealt with in the contract?

15 A. Well, it was -- if you read the license
16 agreement, they don't have in there that they can go
17 GPL our software.

18 Q. And you're talking now about the 2003
19 agreement, correct?

20 A. Yes.

21 Q. So looking, jumping ahead a little bit to
22 the open sourcing issue.

23 (EXHIBIT-232 WAS MARKED.)

24 Q. 232 is an e-mail from Blake Stowell to
25 Jeff Hunsaker covering an announcement or statement

1 from SCO regarding Sun's open sourcing of Solaris 10?

2 A. Uh-huh (affirmative).

3 Q. And that's dated May 10, 2005. And then
4 here's another stack of similar or related material.

5 (EXHIBIT-233 WAS MARKED.)

6 Q. 233 is an e-mail from Hunsaker to
7 "Darlstaff" dated April 15, 2005.

8 A. Okay.

9 Q. I think I've got one more.

10 Let's look at these first and then I'll
11 find the other one. Here we go. If you look on 232
12 there's a statement, "From SCO's perspective it is
13 important to note what all of the available
14 information confirms." You see that?

15 A. Yes.

16 Q. "That Solaris: Will not be licensed by
17 Sun under the GPL; will not be contributed to Linux
18 or any open source project that is distributed under
19 the GPL or GPL-like license; will be licensed and
20 distributed under a Sun license for value; and will
21 be licensed in a way that retains and protects the
22 validity of SCO's underlying copyrights." Do you see
23 that?

24 A. Yes.

25 Q. And this was an announcement that was

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1 prepared to explain why SCO was not taking issue with
2 Sun's plans to open source Solaris 10, correct?
3 A. Correct.
4 Q. And that was a topic you had looked at?
5 A. Yes.
6 Q. And you had had communications with Sun
7 about that in the 2005, April, May time frame?
8 A. Yes.
9 Q. And what was the substance of those
10 communications?
11 A. The substance, as I recall, was a
12 discussion around the license agreement that we had
13 signed with them in 2003 that gave certain
14 protections. And the response coming back from them
15 that these four points that are listed on here were
16 areas that they called out as to what they were
17 doing. And as we related that to the agreement that
18 we had with them, it did not create a contractual
19 problem for us with Sun.
20 Q. In negotiating the 2003 agreement, you
21 included a provision that required that Sun license
22 and distribute licensed code for value, correct?
23 A. Correct. Something like that.
24 Q. And when you said here that SCO had
25 concluded that Sun had licensed and distributed under

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1 a Sun license for value, emphasize "for value," what
2 were you referring to or what was the "for value"?
3 A. I don't recall the specifics of how they
4 responded. I know that they had laid out to us what
5 they were doing, how they were taking Solaris. They
6 were tying an economic requirement for people who got
7 in and used this code, and based on that it was for
8 value. It wasn't something they were giving away.
9 It wasn't something GPL could turn around and put
10 through the grinder and out the other end would come
11 the ability to be free to distribute it. So it hit
12 the mark for what we were concerned about.
13 Q. When you said economic value, it wasn't
14 actually for a dollar amount.
15 MR. NORMAND: Objection to form.
16 Q. Correct?
17 A. No, I thought they had a dollar amount
18 tied to how people would take on the software. I
19 don't remember the specifics of it right now. But --
20 somebody was paying them money to run Solaris. I
21 don't remember the exact details of how the program
22 worked. I'd have to go back and look at that.
23 Q. Did you consider, in February, 2003, when
24 you were concluding the Sun agreement, whether you
25 had rights under the Asset Purchase Agreement to give

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1 Sun expanded rights under their 1994 agreement?
2 A. The discussion that we had with Sun was
3 well within the rights package that we had as we
4 understood it, as we understand it today.
5 Q. Well, or as you understood it then?
6 A. Then and today, right.
7 Q. And why was that? Why did you think you
8 had the rights to do that?
9 A. Because we had bought all right, title,
10 and interest in the UNIX operating system from
11 Novell.
12 Q. Did you have in mind the provisions of
13 Section 4.16 governing a buyer's rights to modify or
14 amend SVRX licenses?
15 A. We were not modifying or amending an SVRX
16 license. We were doing a UnixWare license with Sun.
17 And incidental to that license there were things that
18 may have attached back to the original SVRX license,
19 but that was incidental.
20 Q. When you were negotiating the protections
21 in the 2003 agreement, protections against GPLing of
22 Solaris, were you doing that solely on SCO's account
23 or also out of a concern that you had a requirement
24 to do that under the Asset Purchase Agreement?
25 MR. NORMAND: Objection to form.

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1 A. I don't remember the specifics what we
2 were looking at. I know that we were concerned about
3 making sure that our valuable code that we had
4 purchased was being protected.
5 Q. Do you remember a provision in the 1994
6 license that required Sun to use the same efforts it
7 uses with respect to its proprietary code to protect
8 the code that was licensed to it?
9 A. I don't remember that provision offhand.
10 Q. Do you -- when you said, "We'll be
11 licensed," in (d), "We'll be licensed in a way that
12 retains and protects the validity of SCO's underlying
13 copyrights."
14 A. Right.
15 Q. What were you referring to in your
16 understanding of Sun's plans?
17 A. Section (d), as I recall, ties back to
18 Section (a) in that if they had the ability to go GPL
19 our source code, then it would have been problematic
20 for our copyrights. And so I believe (d) is closely
21 correlated to (a).
22 Q. It would have been problematic for your
23 copyrights because they would have been subject to a
24 copyleft license?
25 A. Something like that.

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1 MR. NORMAND: Objection to form.
2 Q. Hunsaker says in 233 -- first of all, what
3 is Darlstaff?
4 A. Those are my direct reports.
5 Q. And you?
6 A. Yes.
7 Q. So it's like an internal distribution
8 list?
9 A. Right.
10 Q. He says, "Do we really give the 'green
11 light'? Are we as confident in Sun's position with
12 OpenSolaris as the article intimates? I personally
13 still have my doubts. I think we should discuss."
14 Do you see that?
15 A. Yes.
16 Q. What was the -- what ensued from this
17 e-mail by way of discussion?
18 A. Well, I think the net result of it is what
19 you see over here in 232, where this thing is a
20 couple weeks down the road. Let me look here and see
21 what the -- okay. So that's the article there.
22 Yeah, I mean, the SCO statement that came out of this
23 whole discussion is what's found on the second page
24 of 232.
25 Q. So Blake says -- actually, he says this

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1 was from February of this year so it looks like maybe
2 that was something that was prepared earlier on.
3 A. We've had this come up a handful of times,
4 and we typically referred back to the statement that
5 we prepared. It's usually the same issue and we just
6 resolve it the same way.
7 Q. Okay. Blake goes on to say, "One other
8 thing to note in addition to these statements,
9 OpenSolaris isn't a whole lot different from
10 Microsoft's 'shared source' plan where customers gain
11 access to see what is happening with the code, but
12 Microsoft isn't giving up any of their rights of
13 ownership, control, protection, and confidentiality
14 of Windows. I believe the same applies here to
15 Solaris." Do you have an understanding whether what
16 Stowell said is correct?
17 A. I don't know. I don't know how their
18 shared source program works.
19 Q. So just to go back to the back and forth
20 with Sun, did you, yourself, participate in
21 discussions or communications with Sun about the --
22 about how the OpenSolaris plans related to their
23 license obligations to you?
24 A. I know I have had a discussion or two with
25 them along the way on that topic.

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1 Q. Who have you had that discussion with?
2 A. It would have been with Jonathan Swartz.
3 Q. When did it occur?
4 A. It would have been in the same general
5 time frame.
6 Q. So did you call up because they made an
7 announcement and asked for a clarification?
8 A. As a result of these issues that were
9 bubbling up, I took it on myself to give him a call
10 and make sure I was hearing it correctly, or make
11 sure that they were managing this correctly. And
12 after talking with him and getting the assurances
13 that that was the case, then we moved on.
14 Q. Did you receive any communications in
15 writing from Sun on this topic?
16 A. I don't remember.
17 Q. And just, now that we have talked about
18 this again, let's just go back to the "for value"
19 point in (c) on 232.
20 A. Uh-huh (affirmative).
21 Q. What's your best information on why SCO
22 concluded that OpenSolaris was being licensed and
23 distributed under a Sun license for value?
24 MR. NORMAND: Objection to form.
25 A. I'd have to go back and look at the

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1 specifics of it. I know that the way they had laid
2 out the program and the way they described it, it was
3 much different than a typical open source license
4 that gets out there and you can use it and you are
5 good to go, and then you can turn around and
6 redistribute and recopy. That wasn't the issue. And
7 then the "for value" piece was included in there. I
8 just don't remember the details of it.
9 Q. So you said in 233, on page 56 of the
10 e-mail string, "SCO's chief executive, Darl McBride,
11 said SCO has no problem with that," that is the plan
12 to open source under the CDDL license. Do you see
13 that at the top?
14 A. Yes.
15 Q. "We believe we have a pretty good idea of
16 what Sun is trying to do," he said. "After reviewing
17 what their plans are and reviewing what our
18 agreements with them are, we feel comfortable with
19 the direction they are going," he added. And then it
20 says, "Sun took out a fresh UNIX System V license
21 from Sun," obviously that's a typo, "in February,
22 2003, joining Microsoft corporation as one of only a
23 handful of SCOsource licensees." Do you see that?
24 A. Yes.
25 Q. So did you convey to the reporter what is

<p style="text-align: right;">Page 198</p> <p>1 attributed to you here in quotes? 2 A. That actually isn't -- the part that is in 3 quotes, yes. The part about Sun taking out that is 4 not in quotes, I wouldn't have said that. If I would 5 have said something like that, I wouldn't have said 6 it that way. 7 The part that is in quotes, I don't have a 8 reason to disagree that I would have said that. I 9 don't remember specifically, but I remember making a 10 statement along the way. 11 MR. JACOBS: Why don't we take a few 12 minutes, Ted. 13 (Break taken from 3:38 to 3:46.) 14 Q. (By Mr. Jacobs) Mr. McBride, I may have 15 confused matters a little bit by not having these 16 press releases properly organized, so take a look at 17 225 again and then take a look at this one. 18 (EXHIBIT-234 WAS MARKED.) 19 Q. So 234 is a press release under an e-mail 20 to you from Blake Stowell dated August 1, 2003, with 21 a press release anticipated for August 5. And it's, 22 "SCO Announces Intellectual Property License for 23 LINUX. SCO provides Linux users with run-time, 24 binary license to run UNIX intellectual property in 25 Linux." You see that?</p>	<p style="text-align: right;">Page 200</p> <p>1 Q. This will be 235. It's a "SCOsource - 2 Chris Sontag, August 2003" set of slides under SCO 3 164161 to 164183. 4 Did this presentation get delivered? 5 A. It's really hard for me to sit here today 6 and know if a particular presentation or press 7 release was in draft mode or one that was eventually 8 delivered. I remember giving some of these slides 9 myself so I know something like this got delivered, 10 but I couldn't tell you the details of who, how, and 11 when this particular release was delivered, if at 12 all. 13 Q. If you turn to 164166. 14 A. Okay. 15 Q. "SCO owns all UNIX System V copyrights." 16 Do you see that? 17 A. Right. 18 Q. Do you have any reason to believe this 19 slide or the substance of this slide was not conveyed 20 in a presentation? 21 A. No. 22 Q. And just to step back a little bit, 23 whether this was the draft or a final, what was this 24 presentation aimed at, or who was it aimed at? 25 A. Anyone who was interested in SCOsource, I</p>
<p style="text-align: right;">Page 199</p> <p>1 A. Yes. 2 Q. And if you look at 225, you thought 225 3 had been released but you didn't have 234 in front of 4 you. So -- was it 225 or 22-- 5 MR. NORMAND: 225 is from July 21, 2003. 6 MR. JACOBS: Yes. 7 A. So you are saying we didn't release that 8 one? 9 Q. (By Mr. Jacobs) Let's get to the right 10 one. 11 Ted, can you find 225 in this? 12 MR. NORMAND: Why don't you work off that 13 one, Darl, while I look here. 14 Q. (By Mr. Jacobs) So does showing you 234 15 refresh your recollection whether you issued 225? 16 A. Now I'm totally confused. To be honest 17 with you, Mr. Jacobs, when you put those in front of 18 me today I can't recall exactly what was issued that 19 far back. I know that we issued a press release on 20 our licensing program, but without looking at the 21 public record I couldn't tell you which of these 22 releases went out. 23 Q. Let's take a look at another set of 24 presentation slides. 25 (EXHIBIT-235 WAS MARKED.)</p>	<p style="text-align: right;">Page 201</p> <p>1 suppose. 2 Q. So it was intended for -- not intended for 3 a specialized audience but rather anyone who wanted 4 to see your views on why SCOsource was a good idea? 5 A. I don't know for sure. It appears to be 6 just a general SCOsource presentation. I don't know 7 if it would have been targeted to a particular 8 audience in this case or not. 9 Q. If you look at the next slide, 164167. 10 A. Yes. 11 Q. "SCO UNIX System V Copyright Infringements 12 in Linux." 13 A. Right. 14 Q. And the next one, 168. 15 A. Uh-huh (affirmative). 16 Q. "Direct System V code has been copied into 17 Linux Release 2.4X and 2.5X." You see that? 18 A. Yes. 19 Q. And then it says further in that slide, 20 "Line-for-line copied System V code is available for 21 viewing under NDA." Do you see that? 22 A. Yes. 23 Q. How about those slides; any reason to 24 think they would not have been presented? 25 A. No.</p>

1 Q. Let's look at an interview you gave,
2 reportedly gave. We will find out if you gave it.
3 (EXHIBIT-236 WAS MARKED.)
4 Q. 236 is an e-mail from Mike Anderer to you
5 enclosing a CNET article. "Why SCO decided to take
6 IBM to court," by David Becker, June 16, 2003. Do
7 you see that?
8 A. Yes.
9 Q. Did you, in fact, give an interview to
10 David Becker, the substance of which -- leaving aside
11 any particular sentence that I'll ask you about, the
12 substance of which was reported on June 16, 2003?
13 A. I remember having an interview with David
14 Becker, I think more than once. I don't remember the
15 specifics behind this particular interview.
16 Q. If you look at the bottom, it talks about
17 how you began with your Linux action, and on the top
18 of the second page it talks about problems with IBM,
19 the lawsuit against IBM. And then the third
20 paragraph on page 2 of 6. "During the period of time
21 we were focused on the IBM issues, it came to our
22 attention that we had our code, UNIX System V code,
23 showing up directly inside of Linux." Do you see
24 that?
25 A. Yes.

1 Q. Exactly how did that come to your
2 attention?
3 MR. NORMAND: Objection to form.
4 A. I think Chris Sontag showed it to me, but
5 I don't recall for sure.
6 Q. Was it something like MALLOC that he
7 showed you?
8 A. I believe this is referring to the MALLOC
9 code.
10 Q. And then you say, "So that, in turn, led
11 us to send out letters to 1500 of the largest
12 companies around the world to let them know we had
13 these substantial intellectual property violations
14 and to notify them that we had these problems." Do
15 you see that?
16 A. (Witness nods head up and down.)
17 Q. And that's consistent with your testimony
18 earlier that this was in the nature of a notice
19 letter, correct?
20 MR. NORMAND: Objection to form.
21 A. Right. As far as the answers on these, I
22 don't know that I would have answered all these
23 exactly the way they are. I think the essence of
24 what I'm talking about is probably accurate. Most
25 press interviews that I gave, I sort of got

1 conditioned to the fact that people would report
2 things slightly different than the way I said them.
3 And you just hope that they reported it better than
4 what you had given. And sometimes it was worse. And
5 you just kind of lived on the margins and you didn't
6 get too wound up over it.
7 So I don't know that the answers that are
8 in here are exactly the way I would have said them.
9 As I see some of this, I don't know that that's
10 exactly what I would have said. But again, I would
11 stand by the essence of it.
12 Q. And so with the passages we have just
13 focused on, you don't take issue about the way any of
14 that was reported?
15 A. Well, the one that stuck out to me here
16 that seemed a little bit odd was the statement that
17 the MALLOC code alone was the driving force for the
18 1500 letters. It's sort of the way this comes
19 across.
20 Q. I asked you about MALLOC but it doesn't
21 say MALLOC here.
22 A. Yeah. And what I'm saying is that you
23 could interpret that in there. And so that's just
24 one little nit.
25 Q. So how would you rephrase what you think

1 you actually said versus the way he reported it here?
2 A. Well, I don't remember what I said at this
3 point in time, and I don't know that I would have --
4 I don't remember saying it this way, but I don't
5 remember what I would have said.
6 Q. If you go to the bottom.
7 A. Yeah.
8 Q. "How blatant was the code-lifting you
9 discovered? When we take a top-tier view of the
10 amount of code showing up inside of Linux today that
11 is either directly related to our UNIX System V that
12 we directly own or is related to one of our flavors
13 of UNIX that we have derivative works rights over -
14 we don't necessarily own these flavors but we have
15 control rights over how that information gets
16 disseminated - the amount is substantial. We are not
17 talking about just lines of code. We are talking
18 about entire programs. We are talking about hundreds
19 of thousands of lines of code." Do you see that?
20 A. Yes.
21 Q. Any quibble with the way that was
22 reported?
23 A. No. That's roughly the way we were
24 articulating it at that time.
25 Q. In the middle of the next page, "What

1 prompted the 1500 letters? Couldn't you have found a
2 more informal way to tell these companies what was
3 going on?"
4 A. Where is it? Okay.
5 Q. You got it?
6 A. Yes.
7 Q. Okay. The answer: "Those letters had to
8 do with the fact that we had just uncovered these
9 issues, and with the legal requirements ... we felt
10 we had to go out and let the world know we had come
11 across these problems. We can sit there and talk to
12 IBM all day long," et cetera. You see that?
13 A. Yes.
14 Q. Any quibble with the way that was
15 reported?
16 A. Again, I don't know that this is how I
17 would have said it. But I don't have a big argument
18 with how it comes across.
19 Q. If you look at the middle, sort of the
20 bottom third of the next page, "How did Microsoft's
21 agreement to pay you for UNIX rights happen?" Do you
22 see that?
23 A. Yes.
24 Q. "In the Microsoft case, they saw an
25 opportunity. We originally approached them and said

1 we're on a new licensing path. We have this
2 intellectual property that we have started
3 approaching vendors about. IBM is one we approached.
4 Microsoft was another. We had about four big vendors
5 in the last quarter that we talked with. With two of
6 them we signed deals. The other we're still talking
7 with, and IBM we reached an impasse." Do you see
8 that?
9 A. Yes.
10 Q. The reference to "the other we are still
11 talking with," was that HP?
12 A. That's correct.
13 Q. Then you go on, "As far as what Microsoft
14 gets out of the deal, they get the source code rights
15 in order to be able to -- in order to be better able
16 to integrate their services for UNIX products, which
17 gives them a much stronger, tighter integration
18 between UNIX and Windows." Do you have any issue
19 with the way that's reported?
20 A. I think along the way we would have
21 clarified to them the source code rights relating to
22 UnixWare, which was what the deal was, and other UNIX
23 source code rights that went with that. I don't see
24 that as being spelled out here.
25 Q. When you say "we would have clarified,"

1 what do you mean?
2 A. Well, I would expect that as we were
3 talking about this, we would have given more clarity
4 around what the source code rights were, but I don't
5 know. Maybe not. I could have said it that way.
6 Again, it's a few years ago.
7 Q. Bay Star.
8 A. Yes.
9 (EXHIBIT-237 WAS MARKED.)
10 Q. 237 is a letter to Darcy Mott from Larry
11 Goldfarb at Bay Star dated April 7, 2004 re the SCO
12 Group. Do you see that?
13 A. Yes.
14 Q. And it's got a redaction down at the
15 bottom and at the top of the second page.
16 A. Uh-huh (affirmative).
17 Q. Did you reply to this letter? You, SCO?
18 A. I don't remember. Probably did. It was a
19 shareholder, so we probably had some response.
20 Q. Written, you think? You don't remember?
21 A. I don't remember.
22 Q. What is the subject matter that's --
23 strike that.
24 In general terms, what's underneath the
25 redaction stamps?

1 MR. NORMAND: Objection to form. The
2 question is what has been redacted, in general terms?
3 MR. JACOBS: Yes.
4 MR. NORMAND: Wouldn't that be set forth
5 in a privilege log?
6 MR. JACOBS: If we had one.
7 MR. NORMAND: I mean, it's going to be set
8 forth in a privilege log.
9 A. I don't know that I've seen this letter
10 before. I mean, this is a letter sent from Goldfarb
11 to Darcy Mott so I don't know that I'm in a very good
12 position to comment on it or to predict what is
13 underneath the redacted box.
14 Q. Darcy Mott again was?
15 A. He was on our board of directors, and
16 still is.
17 Q. So you don't recall receiving a copy of
18 this letter?
19 A. I don't remember specifically seeing this
20 letter.
21 Q. It would have -- I think it would have
22 seared in your memory. It says on page 2, "We demand
23 that the memories --" excuse me. "We demand that the
24 members of the board of directors discharge their
25 duty by immediately commencing a search for an

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1 experienced chief executive officer with legal and
 2 public company experience," et cetera. Do you see
 3 that?
 4 A. Yes.
 5 Q. You don't recall reading a letter from Bay
 6 Star in April of 2004 that called for a change of
 7 leadership at SCO?
 8 A. Like I said, not specifically. During
 9 that period of time, he was on the warpath and there
 10 was attack after attack after attack. This specific
 11 one that went in, I may have read this. I know that
 12 he was on the warpath at that period of time.
 13 Q. In the third paragraph on page 1 he says,
 14 "We were shocked to learn that Novell claims that SCO
 15 does not even own the intellectual property that
 16 forms the cornerstone of its litigation initiative.
 17 Regardless of whether Novell is ultimately successful
 18 in getting the suit dismissed, the fact that Novell
 19 can make a colorable argument in this regard high-
 20 lights the deficiencies in the company's management.
 21 How can the board have confidence in the ability and
 22 judgment of the current management team when they
 23 pursued such an aggressive business strategy without
 24 first assuring something as critical as the ownership
 25 of the intellectual property in question?" Do you

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1 see that?
 2 A. Yes.
 3 Q. Do you recall being consulted about how to
 4 respond to this contention, whether as a result of
 5 this letter or otherwise, from Bay Star?
 6 A. There were a lot of attacks from Bay Star
 7 in that period of time. I don't remember
 8 specifically going through this. Our outside counsel
 9 mostly did the responses back to them. They had
 10 initiated a letter campaign and our outside counsel
 11 would respond back. It was mostly a ploy on their
 12 part to try to put pressure on in order to --
 13 Q. Get their money back?
 14 A. Get their money back, is what they were
 15 trying to do. It was an amp-up-the-pressure
 16 campaign.
 17 Q. I'm sorry. I didn't mean to interrupt
 18 you.
 19 A. So I didn't get as directly engaged in the
 20 tit-for-tat on responses on these kinds of things.
 21 Q. When you say "outside counsel," do you
 22 mean Boies Schiller?
 23 A. No. In this case it was our corporate
 24 legal counsel, Nolan Taylor.
 25 Q. What firm is he with?

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1 A. Dorsey & Whitney.
 2 Q. Now, Mr. Goldfarb submitted a declaration.
 3 (EXHIBIT-238 WAS MARKED.)
 4 Q. 238 is a declaration of Lawrence R.
 5 Goldfarb in the IBM litigation dated September 13,
 6 2006. Do you see that?
 7 A. Yes.
 8 Q. And in paragraphs 6 and 7 Mr. Goldfarb
 9 discusses how he interacted with Microsoft around
 10 investing in SCO. You see that?
 11 A. Yes.
 12 Q. And he says, "Sometime in 2003, I was
 13 approached by Richard Emerson (Microsoft's senior
 14 vice-president for corporate development and
 15 strategy) about investing in SCO, a company about
 16 which I knew little or nothing at the time. Mr.
 17 Emerson stated that Microsoft wished to promote SCO
 18 in its pending lawsuit against IBM and the Linux
 19 operating system, but Microsoft did not want to be
 20 seen as attacking IBM or Linux. For that reason,
 21 Microsoft wanted to further its interest through
 22 independent investors like Bay Star." Do you have
 23 any information, Mr. McBride, that corroborates or
 24 contradicts Mr. Goldfarb's assertions in paragraph 6?
 25 A. Yes. With respect to 6 and 7 I called

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1 Richard Emerson after this declaration came out and
 2 asked him about it straight up, because I hadn't seen
 3 this before. I wasn't party to any of those
 4 discussions, if they happened. And I was interested
 5 to see his response to it. And he flat out denied
 6 it. He said, "I don't know what the guy's talking
 7 about."
 8 Q. So in 7, Goldfarb discusses kind of a
 9 promise of backstopping?
 10 A. Right.
 11 Q. You asked Mr. Emerson about that?
 12 A. I asked him specifically about that. He
 13 says, "I have no idea what he's talking about." But
 14 he said, "That's Larry." He has known Larry for a
 15 long time. He said, "That's Larry." That's what I
 16 remember him saying.
 17 Q. And on paragraph 6, at the time of the Bay
 18 Star investment did you have any communications with
 19 anyone that would support or contradict Microsoft's
 20 role in the Bay Star investment? Let me start that
 21 over again.
 22 A. I asked -- go ahead.
 23 Q. Aside from your conversation with Mr.
 24 Emerson more recently, and looking back to when the
 25 investment was made, did you have any information at

<p style="text-align: right;">Page 214</p> <p>1 that time that is consistent with or contradicts Mr. 2 Goldfarb's assertions about Microsoft's role in the 3 investment? 4 A. I had another conversation with somebody 5 at Microsoft that would have gone back previous to 6 this point in time when these charges originally came 7 out from Goldfarb in the press. And he denied it, as 8 well. 9 Q. Who was that? 10 A. His name is Dan Neault. 11 Q. How do you spell that? 12 A. N-E-A-U-L-T. 13 Q. Did he give you any more -- other than a 14 flat out denial, did he give you any more 15 information? 16 A. No. He didn't know what the guy was 17 talking about either. 18 Q. When you were negotiating the Microsoft 19 transaction between SCO and Microsoft -- 20 A. Yes. 21 Q. -- was there any discussion with Microsoft 22 about the value of the SCO litigation to Microsoft? 23 MR. NORMAND: Objection to form. 24 A. No. Not that I'm aware of. 25 (EXHIBIT-239 WAS MARKED.)</p>	<p style="text-align: right;">Page 216</p> <p>1 A. Roughly a year. 2 Q. And on the second column of the third page 3 in the fifth paragraph, "Turning to the SCOSource 4 division." 5 A. Uh-huh (affirmative). 6 Q. He said, Burt Young said, "Due to 7 questions being raised in end users' minds arising 8 from Novell's claim that SCO does not hold the 9 copyrights to UNIX, which we believe is a false 10 claim, revenue to date from our SCOSource division 11 has been minimal. However, our SCOSource initiatives 12 are moving forward. Our sales funnels continue to 13 build and we have engaged in discussions with 14 potential customers for significant licensing 15 opportunities. "Do you see that? 16 A. You know, I'm lost on where we are. Tell 17 me again. 18 MR. NORMAND: I lost that, too. I never 19 found it. What's the Bates number, Michael? 20 MR. JACOBS: 12535. 21 A. I'm on the wrong page. Okay. 22 Q. (By Mr. Jacobs) It's the third page if 23 you count the cover page. 24 A. Okay. I was looking at page 3. Okay. 25 Q. Do you have any quarrel with the way Mr.</p>
<p style="text-align: right;">Page 215</p> <p>1 Q. 239 is a transcript of your Q2 2004 2 earnings conference call. Do you see that? 3 A. Yes. 4 Q. Do you typically get these transcripts at 5 the company? 6 A. Not typically, no. 7 Q. I want to ask you -- so by 2004, Burt 8 Young is the CFO? 9 A. In spring of 2004 he came aboard as CFO. 10 Q. And he replaced -- 11 A. Bob Bench. 12 Q. And Bob Bench went where? 13 A. I think he went to a small investment 14 company. 15 Q. Were there any issues with Mr. Bench's 16 performance by way of accounting, the propriety of 17 the accounting that SCO was using that figured into 18 his departure? 19 A. No. 20 Q. In the -- on the second page -- so, let's 21 see. The date of this is June 10, 2004. So this is 22 a year after the dueling press releases on ownership, 23 correct? 24 A. Yes. 25 MR. NORMAND: Objection to form.</p>	<p style="text-align: right;">Page 217</p> <p>1 Young's comments are reported here on this 2 transcript? Meaning to the best of your recollection 3 is the transcript accurate in this paragraph? 4 A. I don't have a reason to know why it 5 wouldn't be. 6 Q. When you were into the 2004 calendar year, 7 so literally starting around January 1 of 2004. 8 A. Right. 9 Q. Were you still seeking SCOSource licenses? 10 A. We were still seeking them. 11 Q. So he says, "Our SCOSource initiatives are 12 moving forward. Our sales funnels continue to 13 build." Do you see that? 14 A. Yes. 15 Q. "And we have engaged in discussions with 16 potential customers for significant licensing 17 opportunities." 18 A. Yes. The precursor to that is that 19 arising to -- "Due to questions being raised in end 20 users' minds arising from Novell's claims," that SCO 21 does not hold the UNIX copyrights, which we believe 22 is a false claim, revenue to date has been minimal. 23 So that was the key thing that he was reporting in 24 that paragraph. 25 Q. But he goes on to talk about the licensing</p>

1 initiatives still going forward.

2 A. In spite of Novell putting up all of these
3 flags, these blockades, what he is saying is yes, we
4 are going to keep charging ahead.

5 Q. And when he says that you were in
6 discussions with potential customers for significant
7 licensing opportunities, what is he referring to on
8 June 10, 2004?

9 A. I don't know exactly at that point in time
10 what he would have been referring to. I know that we
11 had a big-size deal that eventually didn't go through
12 that would have been sizable. It would have
13 accounted for saying the pipeline is getting bigger.

14 Q. Who was that with?

15 A. It was some hosting company. I can't
16 remember the name of it offhand.

17 Q. A web hosting company?

18 A. A web hosting company. I don't know if
19 that's what he was talking about, or something else.

20 Q. Who carried on the discussions with the
21 web hosting company?

22 A. Gosh. I think it would have been Chris
23 Sontag.

24 Q. What information do you have on what
25 specifically led to that not closing?

1 A. Well, I don't have the specifics. There
2 was -- seemed to be some relationship to the Novell
3 deal. The Novell thing was always somewhat binary;
4 it's on or it's off. Some of these other issues were
5 a little infringement, a lot of infringement. But if
6 they couldn't get over that Novell hurdle, then it
7 kind of shut down everything else.

8 Q. But you don't have any specific
9 information about whether Novell or some other issue,
10 including the price you were charging, was the
11 principal reason that deal did not close, the web
12 hosting deal you are referring to?

13 MR. NORMAND: Objection to form.

14 A. I remember there being issues with Novell
15 but I don't remember the specifics. I do remember
16 that the Novell claims were what eventually got us to
17 just shutter up the SCOSource licensing division for
18 a number of years. It is still technically available
19 on our web site. It has technically never really
20 been closed. But in terms of going out and spending
21 energy or cycles behind it, it just got to a point
22 where there were so many problems of trying to get
23 people to come to an understanding of where we were
24 on this, given where Novell was coming from, that we
25 basically said we've got to table this until we get

1 through with our litigation with them.

2 Q. Did you ever do projections about what
3 SCOSource would likely generate?

4 A. We did a lot of work around that. Doing
5 "what if" scenarios. Generating -- at the point in
6 time that we were doing our SCOSource licensing
7 originally and then at different steps along the way,
8 we had projected what would come from end user
9 licensing and then also from big OEM licensing. So
10 those were the two different models we looked at
11 mostly.

12 Q. What form did this modeling take?

13 A. Oh, we had -- usually I would sit down and
14 go through it on the white board with Chris or Bob
15 Bench. You know, guys on the finance side. We would
16 kind of lay out what the number of units of Linux
17 were that were in the marketplace against what our
18 list price was for the SCOSource license, reduced by
19 any kind of discounts that we might give for volume
20 or for being an early adopter. And it was usually a
21 pretty big number that we were talking about.

22 Q. Because there's a lot of units of Linux
23 out there.

24 A. Right.

25 Q. Did you do any board presentations about

1 the potential for recovery under SCOSource?

2 A. I would imagine I would have talked to
3 them about some of those projections ongoing, but I
4 don't recall offhand which meeting or what form.

5 Q. You don't recall any presentation more
6 than -- you talked about a white board modeling?

7 A. Right.

8 Q. Do you recall anything more tangible than
9 that?

10 A. I remember that the models were showing --
11 we would look at IDC numbers, and there were X
12 millions of servers and growing at a certain rate.
13 And I remember specifically 4 million servers going
14 to 6 million servers over some time frame. I'd have
15 to go back and refresh what the time frames were, but
16 I remember bracketing if you've got 4 million servers
17 against our list price of \$700, you multiply that
18 out, you get \$2.8 billion. If you go up to the full
19 list -- or the list price against the 6 million then
20 you are talking about \$4.2 billion. So it was always
21 -- it's just a ridiculously big number. So okay, I
22 guess we could get finite on whether the number is \$5
23 billion or \$1 billion or \$6 billion. The point is it
24 was a lot of money for the company, and the size of
25 company that we were.

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1 Q. And that was true even with substantial
 2 discounting.
 3 A. Yes. Now, while it was big revenue, it
 4 was also, if you go back and look at the history of
 5 the company, not out of the ordinary of what probably
 6 would have happened if we had stayed on the course we
 7 had hoped to be on.
 8 Q. Meaning on the UNIX course?
 9 A. Well, so we are on the UNIX course where
 10 we think that is where we are heading, is to be a big
 11 revenue company. And then we have problems that come
 12 out so we start fighting back, and as we fight back
 13 we start doing the SCOSource licensing program. And
 14 the SCOSource licensing program starts to pick up
 15 some steam and we figure, hey, we will either sell
 16 them UNIX or we will give them the license to run
 17 UnixWare and then they can run Linux, and then either
 18 way we'll get our fair value out of the marketplace.
 19 So in the first instance we are talking about, you
 20 know, the damages that were done to us in the
 21 marketplace. The second instance we are talking
 22 about damages that were done to our SCOSource
 23 business.
 24 Q. And the damages that were done in the
 25 marketplace are the -- is, in effect, the state of

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1 the UNIX business at SCO when you become CEO.
 2 MR. NORMAND: Objection to form.
 3 A. Exactly. The state of the UNIX in the
 4 marketplace when I joined in June of 2002 was that,
 5 while Linux, a variant of UNIX was going gang-
 6 busters, the product UnixWare and Open Server were
 7 coming down and had been coming down for a number of
 8 years. And so while not technically dead, the hole
 9 was certainly being dug.
 10 Q. And just to be clear about the way you
 11 view all this, that was not -- what you have just
 12 testified to was not on account of anything that
 13 Novell did, correct?
 14 MR. NORMAND: Objection to form.
 15 A. I would draw a distinction between the
 16 issues we have with Novell and the issues that we
 17 have with IBM and others. When I joined the company,
 18 and the thing that led into our initial litigation
 19 against IBM, clearly that was related to issues we
 20 had with them.
 21 Q. And their impact on the UNIX business of
 22 the company.
 23 A. In the marketplace.
 24 Q. Yes.
 25 A. When I joined -- I go back to the value

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1 again. So there's sometimes a difference between the
 2 value that's in a company versus how much is showing
 3 up on the revenue line. And I looked at the revenue
 4 line of UnixWare and Open Server, and clearly they
 5 were coming down. They had gone to a couple hundred
 6 million down to a little over \$50 million, and it
 7 was, you know, the thing was marching south. That
 8 was not a good situation.
 9 But we had this other value proposition of
 10 the intellectual property rights to UNIX, which the
 11 company did hold, which I thought were extremely
 12 valuable. And so it's back to this trunk and the
 13 tree analogy again. It's almost like if you say that
 14 the branches out here were kind of dying off from a
 15 revenue standpoint, the trunk was still very vibrant.
 16 The major versions of UNIX around the world were tied
 17 into this trunk. Linux was tied into it in what we
 18 viewed as an unauthorized way. So the trunk or the
 19 System V code base that was found inside of UnixWare
 20 we thought had an exceptional amount of value. And
 21 that's what we were trying to mine.
 22 Q. Did you report -- did you make any formal
 23 presentations to the board, by "formal" I mean
 24 sitting down in advance and preparing some PowerPoint
 25 slides or some other vehicle, about why SCOSource was

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1 not going well in, say, the summer or fall of 2003?
 2 MR. NORMAND: Objection to form.
 3 A. I think -- the answer -- the question was
 4 about formal presentations.
 5 Q. Uh-huh (affirmative).
 6 A. I don't remember a formal presentation.
 7 Q. How about discussions with the board?
 8 A. I remember discussions. I remember having
 9 a discussion about the HP situation, as an example,
 10 that was problematic because of the Novell situation.
 11 Q. And you remember conveying that to the
 12 board?
 13 A. I had -- I know we talked about it at the
 14 board because we had been talking to them about the
 15 HP deal. So the question came out of what happened
 16 to the HP deal? So that was conveyed to them.
 17 Google, some of these others, I don't recall whether
 18 that became a board level discussion or not.
 19 (EXHIBIT-240 WAS MARKED.)
 20 Q. 240 is an e-mail from Sean Wilson to you
 21 covering a report from the IDG news service dated
 22 November 18, 2003. "SCO's CEO: Novell-SuSE breaks
 23 SCO contract." And it's an article about an
 24 interview you gave relating to Novell's planned
 25 acquisition of SuSE Linux. Do you see that?

1 A. Yes, I do.
 2 Q. The first paragraph says, "Novell, Inc.'s
 3 \$210 million planned acquisition of SuSE Linux AG
 4 will put it in violation of a non-compete agreement
 5 the networking vendor has with The SCO Group, Inc.,
 6 and could possibly lead to legal action, SCO's CEO
 7 Darl McBride said Monday in an interview." Do you
 8 see that?

9 A. Yes, I do.
 10 Q. Did you tell the reporter that Novell's
 11 planned acquisition would put it in violation of a
 12 noncompete agreement?
 13 MR. NORMAND: Objection to form, and I
 14 have to give some leeway but objection on the issue
 15 of the scope of the stay in this case which, as I
 16 understand it from discussions with Mr. Breakbill,
 17 doesn't concern the issue of whether any noncompete
 18 has been violated in the case; but, rather, concerns
 19 the meaning of the noncompete provision in the
 20 technology license agreement and APA.

21 Q. Did you, in fact, say that to the
 22 reporter?
 23 A. The exact words I said to the reporter, I
 24 don't recall. I expected I would have talked to him
 25 about sections in the APA that give us or gave us

1 protections against Novell competing against us.
 2 Q. When you --
 3 A. I'm not sure how I would have
 4 characterized it exactly, but I imagine I would have
 5 said something along these lines.
 6 Q. When you were speaking with the reporter,
 7 did you intend to convey that there was a noncompete
 8 separate from the question of whether Linux contained
 9 UNIX code?
 10 MR. NORMAND: Objection to form.
 11 A. Again, I don't remember the specifics of
 12 this interview. It has me quoted as talking about
 13 that. I don't have any reason to believe I wouldn't
 14 have talked about the noncompete provisions that are
 15 in the APA and the Technology License Agreement.
 16 Q. So my question is what did you intend to
 17 convey about how you interpreted those provisions and
 18 whether you interpreted them as barring Novell from
 19 competing with SCO, even if it were ultimately found
 20 to be the case that Linux did not contain SCO
 21 intellectual property?
 22 MR. NORMAND: Objection to form.
 23 A. Yeah, we felt like that if Novell was
 24 going to be going into the Linux business, which is
 25 essentially a knockoff of our UNIX, that they had

1 committed to us in writing in the agreement in 1995,
 2 that it was not something they were going to do. And
 3 we can get down to the granular level of what that
 4 means. But roughly, that was the covenant they had
 5 made to us, and I felt like if they were going into
 6 the Linux business and they were going to take that
 7 business on and take that out and push it into the
 8 marketplace, and Linux was going to be a substantial
 9 part of the product that they push in the market,
 10 yes, I thought that was absolutely violating the
 11 provisions we had in the competition section of the
 12 Technology License Agreement.

13 Q. And were you conveying or intending to
 14 convey that even if Novell did not rely on the TLA
 15 for any license rights, it was nonetheless barred
 16 from competing with SCO?

17 MR. NORMAND: Objection to form.
 18 A. I believe that Novell had the rights to
 19 use the UNIX technology inside of their company, and
 20 to use it with their products to the extent that it
 21 wasn't a substantial portion of something going out.
 22 But something that is a direct knockoff of our
 23 product, yes, I believed it was in direct violation
 24 of the competition clause.

25 Q. So what I'm distinguishing is let's

1 suppose that Novell had bought Windows NT from
 2 Microsoft and didn't need -- didn't, even under your
 3 view, need to rely on the TLA in order to market
 4 that. Would that have been a violation, as you were
 5 intending to convey your views to the outside world,
 6 would that have been a violation of some noncompete
 7 provision?
 8 MR. NORMAND: Objection to form and
 9 objection to the extent it calls for a legal
 10 conclusion.
 11 A. I'll have to look at the TLA, but my
 12 recollection is it was the technology, the licensed
 13 product; and to the extent that Windows NT was a
 14 knockoff of our stuff then we would have a concern
 15 with that. We don't see that as being the case, so I
 16 would say that's probably not the issue.
 17 If you didn't go into a bookstore and buy
 18 a book on how to program Linux and it says, "How to
 19 program in Linux/UNIX," and it's the exact same
 20 thing, then it would be something else.
 21 Q. But that's because you believe that
 22 programming the exact same thing results in an
 23 intellectual property violation of your rights in
 24 UNIX?
 25 MR. NORMAND: Objection to form.

1 A. That particular statement is not the basis
2 for me saying there's a competition clause. It's
3 just a metaphor as to the underlying issue. And the
4 underlying issue is major portions of Linux are taken
5 from UNIX against our rights. And that's the issue
6 that we have with Novell going into that business.

7 Q. And that remains the issue you have today
8 with Novell going into that business?

9 A. We have a number of issues with Novell.

10 Q. No. Just on this issue?

11 A. But as it relates to --

12 Q. On the noncompete issue.

13 A. Again, I haven't looked at all of the
14 noncompete provisions. It's been a long time since
15 I've looked at it specifically. But the way I just
16 testified is roughly what I recollect as being the
17 competition issues with Novell.

18 Q. Okay.

19 MR. NORMAND: Is now a natural time?

20 MR. JACOBS: Yeah.

21 (Break taken from 4:35 to 4:42.)

22 Q. Mr. McBride, earlier today when you were
23 discussing the back and forth with Novell about
24 ownership, you referred a few times to communications
25 Novell was placing into the marketplace; that it was,

1 in your words, changing course again and taking the
2 position that it owned the UNIX copyrights. Do you
3 recall that testimony?

4 MR. NORMAND: Objection to form.

5 A. Yes, I do.

6 Q. What were you referring to? What
7 information did you have about what Novell was doing
8 by way of making these assertions?

9 A. Well, the fact of the matter is we thought
10 we had the copyright issues with Novell resolved. We
11 thought that in the fall of 2002, when we looked at
12 the Asset Purchase Agreement, we thought that we
13 owned the copyrights in spite of the bad language.
14 Later, talking with Greg Jones, getting an agreement
15 from him that, in fact, this was something that
16 should have been part of the deal at the very
17 beginning and we all agreed that we were trying to
18 get it resolved, to the part where Jack Messman
19 finally says, upon showing him Amendment 2, "Okay,
20 you've got the copyrights. What do you want?" So
21 over this six, eight month period of time we think we
22 have this issue resolved.

23 It was some period of time before I
24 understood that Novell was taking a public stance
25 that they had reversed course, in spite of Jack's

1 statement to me and to the market that things were
2 swinging back our direction. It was sometime in late
3 2003, as an example, when someone called us and said,
4 "Did you realize that Novell has gone into the
5 copyright office and registered the copyrights to
6 UNIX?" I was not aware of that. Apparently that
7 happened in October. It was in the fall time frame
8 where HP and large customers we were talking to kept
9 bringing up the Novell ownership issue.

10 In the spring of -- the winter and spring
11 of 2004, it really reached a fever pitch and I would
12 say that maybe the death knell to our whole licensing
13 program around SCOSource came in the spring of '04
14 when Chris Stone, at an Open Source business
15 conference, stood in front of hundreds of people, and
16 across the internet the thing got carried as well,
17 and said Novell still owns UNIX. Those sort of
18 attacks made it very difficult, if not impossible, to
19 go out and try to get our licensing program in place
20 and any traction behind it when Novell was taking
21 these extraordinary positions in the market. They
22 still own UNIX? I mean, it was shocking to hear him
23 say that. But that's what was going on.

24 Q. If you look at Exhibit 212, the big thick
25 one. At 24152 there's another letter from Joe LaSala

1 to you about the ownership issue. So this follows
2 the letter in which the "raises as many questions as
3 it answers" formulation is used. And now on August
4 4, Novell is taking a position on ownership, right?

5 MR. NORMAND: Objection to form.

6 Q. I'm sorry. August 4.

7 A. Okay.

8 Q. So in this letter, Novell is taking a
9 position that ownership of the UNIX copyrights
10 remains with Novell, correct?

11 MR. NORMAND: Objection to form.

12 A. They say they dispute SCO's claim to
13 ownership of these copyrights. So yes, they seem to
14 be saying they think they still own them.

15 Q. Look at the last paragraph. "Unless and
16 until SCO is able to establish that some particular
17 copyright right is 'required' for SCO to enter its
18 rights under the APA, SCO's claim to ownership of any
19 copyrights in UNIX technologies must be rejected, and
20 ownership of such rights instead remains with
21 Novell." Do you see that?

22 A. Yes.

23 Q. Did you view this as just another piece of
24 legalese?

25 A. Yes, I did. To me it was such a

1 ridiculous position to be taking, it was hard to even
2 respond with a straight face. You have a company
3 that has acquired a product, and the product requires
4 you to make copies and to distribute the core source
5 code of that. And they do so for a number of years.
6 They do it in a source code arrangement with IBM,
7 they do it with many others. And from day one we
8 felt like we owned the copyrights. It wasn't just
9 because Amendment 2 came out. We didn't start
10 getting religion on our copyright ownership when
11 Amendment 2 came out. We thought, and all the
12 parties that negotiated the agreement thought, that
13 they transferred over in the beginning.

14 To me the breakthrough with Amendment 2
15 was Jack Messman's statement to me over the phone,
16 "Oh, okay. So you've got the copyrights. What do
17 you want?" That, to me, was more of a breakthrough
18 for Novell than for us. As we said in our press
19 release the next day, as we said all along, we felt
20 we own the copyrights. This puts it to bed once and
21 for all.

22 It is such an extreme position in this
23 letter here. This is Clintonesque speech to come in
24 and say, "Oh, well, we are not sure what is required
25 for SCO to use -- for the UNIX copyrights." Well,

1 the answer is all of it. It was obvious to anybody
2 who read this. And the fact that they were taking
3 that position made no sense at the time, and it makes
4 no sense now.

5 Q. My question to you is really why you seem
6 to be indicating that you were surprised that Novell,
7 for example in Chris Stone's presentation, said
8 Novell still owns the copyrights, in light of this
9 August 4, 2003 letter.

10 A. Chris Stone didn't say, "We still own the
11 copyrights." Chris Stone said, "Novell still owns
12 UNIX." That is bizarre and egregious behavior in any
13 interpretation of the circumstance. I mean, people
14 wonder why he is fired. The guy was making
15 statements that held no water.

16 Q. In January of 2004, Novell announced an
17 indemnification program for its Linux customers. Do
18 you recall that?

19 A. Yes, I do.

20 MR. NORMAND: Objection to form.

21 Q. And do you recall that Novell relied on a
22 variety of legal rights to back up its
23 indemnification program? Do you recall that?

24 MR. NORMAND: Objection to form.

25 A. I don't remember the specifics of their

1 program, but yes. Again, this is part of what I
2 think is bad faith dealing. The fact that they --
3 Novell has benefitted greatly by going out and
4 telling the world they own UNIX. They have
5 benefitted not just by shutting ours down, but by
6 propping themselves up. Their stock price goes up,
7 shoots up in the \$14, \$15 range. They do a \$600
8 million money raise against that. They get big
9 bonuses that come in against that. They've had a big
10 run by going out in the marketplace and purporting to
11 have never sold off UNIX, per se. And you know,
12 there's a certain point where what goes around comes
13 around and I think they have got some justice coming
14 their way on this. I think it's just egregious, bad
15 faith, underhanded dealing they have been doing in
16 the marketplace against us for a number of years.

17 Q. By asserting their legal rights, as Novell
18 sees it?

19 MR. NORMAND: Objection to form.

20 A. By putting up a sham of a legal case to
21 try and pretend that they had any rights around this,
22 is the way I would view it.

23 Q. So other than what you've testified to, do
24 you have any specific information about what Novell
25 was doing in the marketplace in the summer and fall

1 of 2003 to convey that it owned the UNIX copyrights?

2 A. We were hearing things like they were
3 getting together the Chicago 7 in the summer of 2003.
4 Chris Stone was in charge of rallying together seven
5 big vendors that had Linux interests, with the idea
6 of putting out an alternate distribution to Red Hat.
7 And part of this distribution came down to this legal
8 underpinning they were going to provide. And so the
9 fact that they are out there telling these big
10 vendors that they are bringing their legal rights to
11 the table, and not just in the Chicago 7 case but in
12 the actual Linux indemnification case, they are
13 bringing their -- what they would call legal rights,
14 what we would call a lack of rights, false rights, to
15 prop themselves up and to shoot us down. I mean,
16 that was clearly another issue.

17 Q. Anything else?

18 A. There were investors that brought up the
19 issue -- I don't know particularly how they got the
20 information. Again, I heard about Novell registering
21 the copyrights from an investor.

22 Q. And that was later in the year, right?

23 A. That was later in -- I bet it was in 2003.

24 Q. Anything else?

25 A. There may have been others, but I can't

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1 think of anything right now.
 2 (EXHIBIT-241 WAS MARKED.)
 3 THE WITNESS: This is privileged. We
 4 already went through this in the IBM case.
 5 MR. NORMAND: Okay. I'm not aware of
 6 that. We can do this two ways. Your understanding
 7 is this is prepared by counsel?
 8 THE WITNESS: Yes.
 9 MR. NORMAND: Okay. On that basis I'm
 10 going to object to the use of this potential exhibit
 11 and reclaim it as privileged.
 12 MR. JACOBS: So let's just be clear. This
 13 is SCO 1269675 and 76.
 14 MR. NORMAND: Correct.
 15 Q. (By Mr. Jacobs) And Mr. McBride, you know
 16 the circumstances of the creation of this document?
 17 A. Yes. It was absolutely prepared by one of
 18 our attorneys. I saw it, but it wasn't something
 19 that we did other than in conversation with him.
 20 MR. NORMAND: And you think, Mr. McBride,
 21 this has been claimed in the IBM case, as well?
 22 THE WITNESS: I know it has. We went
 23 through this with Marriott.
 24 Q. (By Mr. Jacobs) And when you say prepared
 25 by one of your attorneys, you mean someone at Boies

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1 Schiller?
 2 A. It was Kevin McBride.
 3 Q. I need to ask you about your personal
 4 financial interest in the outcome of this lawsuit.
 5 So I apologize in advance.
 6 MR. NORMAND: Let me just say, cleaning
 7 this up, that having reclaimed it, all copies should
 8 be destroyed, and any copies you have should be given
 9 to us, really.
 10 MR. JACOBS: We will check it out,
 11 obviously.
 12 MR. NORMAND: I understand Mr. Lundberg's
 13 interest in reading the document, but it has now been
 14 reclaimed.
 15 MR. JACOBS: He is part of the counsel
 16 team.
 17 MR. NORMAND: Right.
 18 MR. JACOBS: He can help us make a
 19 determination.
 20 MR. NORMAND: That's not the way a claim
 21 of privilege works. The document is to be returned,
 22 and if you want to contest the claim of privilege you
 23 can do it based on any recollection you have of the
 24 document. But you can't retain a copy of the
 25 document to do that.

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1 Q. (By Mr. Jacobs) I apologize in advance
 2 for the intrusion into your personal matters, but --
 3 A. It's okay.
 4 Q. How many shares of SCO stock do you own?
 5 A. Actually own or options?
 6 Q. We'll talk about own first.
 7 A. Own, I don't know the exact number. It
 8 would be less than 100,000 shares.
 9 Q. And just to be clear, that is shares that
 10 you own now?
 11 A. Yes.
 12 Q. When did you acquire them?
 13 A. Started at the IPO, bought some right when
 14 I joined. I have had a continual purchase program
 15 through the stock purchase program that SCO puts out.
 16 And I had some restricted shares that came my way a
 17 few years ago. A combination of things.
 18 Q. How about options?
 19 A. Options, a little over a million.
 20 Q. When did you acquire those?
 21 A. The majority of those, 600,000 or so, were
 22 granted on the day I joined. The others have been
 23 later grants that refreshed on somewhat of an annual
 24 basis.
 25 Q. So let's take the later grants first.

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1 A. Okay.
 2 Q. About 400,000?
 3 A. Post-hire grants?
 4 Q. Yeah.
 5 A. Over a period of four years, yes.
 6 Q. And what are the exercise prices on those?
 7 A. On the later 400?
 8 Q. Yeah.
 9 A. Oh, gosh, they range from two bucks and
 10 some change, up to four or five bucks and some
 11 change.
 12 Q. And then the 600,000, those were actually
 13 awarded to you on joining?
 14 A. They were granted, but had to be earned
 15 and vested over a period of time. Many of those have
 16 vested, but not all of them.
 17 Q. What's the exercise price on those?
 18 A. 76 cents.
 19 Q. So you continue to vest more of those at
 20 76 cents?
 21 A. As of June of this year, I will be fully
 22 vested in all of those shares.
 23 Q. And that will be how many?
 24 A. 600,000.
 25 Q. So you are almost fully vested in the

1 600,000 but they are all at an exercise price of 76
2 cents?
3 A. Correct.
4 Q. Was this part of your employment contract,
5 that you would get those?
6 A. I didn't really have an employment
7 contract. I had an offer letter, and it was subject
8 to that offer letter.
9 Q. Meaning it was included in the offer
10 letter --
11 A. Yes.
12 Q. -- that you would receive this set of
13 options?
14 A. I would receive those options, and it
15 would be with the strike price of the day that I
16 joined.
17 Q. And then you receive your annual salary?
18 A. Yes.
19 Q. And that's publicly reported?
20 A. Yes.
21 Q. And then do you have any other financial
22 interest in SCO?
23 A. No.
24 Q. Do you have any other financial interest
25 in the outcome of the litigation?

1 A. No.
2 Q. No stated bonus, for example, if there's a
3 successful outcome?
4 A. No. I think our proxy statement just went
5 out like a month ago, so it would have all the
6 details in there.
7 Q. This deposition has been taken subject to
8 the stay of the SuSE Linux issues, so with that, I
9 have no further questions.
10 MR. NORMAND: I have a few questions.
11
12 EXAMINATION
13 BY MR. NORMAND:
14 Q. Sorry to make you go back through that
15 pile. Do you have Exhibit 214 in there?
16 A. Let's grab the bottom. Yes, I do.
17 Q. You say in the third paragraph in the
18 second sentence, "Darl pressed the matter, and argued
19 that Novell would surely be interested in the
20 potential increase of the declining \$8 million annual
21 revenue stream Novell receives from contracts that
22 license out older versions of UNIX." End quote. Do
23 you see that sentence?
24 A. Yes.
25 Q. Do you recall what you said on that issue

1 during the conversation, and what you meant?
2 A. Well, my recollection is that we were
3 talking about a declining revenue stream, and we felt
4 like we could somewhat arrest the decline, that it
5 would decline more slowly. And so as I said earlier,
6 there would be some benefit to Novell. And we felt
7 like that was going to be -- the primary benefit was
8 slowing down of the decline.
9 Q. You said in the course of one answer in
10 response to Mr. Jacob's questions this morning, if I
11 recall correctly, that the copyrights, quote, should
12 have gone over, or words to that effect. Do you
13 recall giving that answer?
14 A. We talked about that for a while. I may
15 have said something like that.
16 Q. If you had said something like that, what
17 did you mean?
18 MR. JACOBS: Objection. Vague.
19 A. The thing I remember saying this morning,
20 I'll be real clear about it now, was we felt from the
21 beginning, the middle, and the end, that SCO owned
22 the UNIX copyrights. When I contacted Mr. Jones
23 about that early on, he agreed with me. He tried to
24 put a plan in place to get the overhang of the bad
25 language in the contract resolved. We tried that a

1 couple of different ways. But the -- there was never
2 a point in time that we didn't think that they didn't
3 go over. And they went over at the point of time of
4 the transaction, which was in September of '95.
5 Q. Do you have Exhibit 219 in your pile?
6 A. Yes, I do.
7 Q. This is the e-mail that recounts
8 conversation between you and Dave Wright. Actually
9 recounts, it looks like, two conversations. Do you
10 recall being asked about this document?
11 A. Yes.
12 Q. And there's a sentence in the e-mail, I
13 think the third sentence that says, "Darl says the
14 Asset Purchase Agreement transfers the UNIX business
15 to SCO, and that SCO needs the copyrights to run its
16 business." The sentence goes on but that's the
17 language I wanted to ask you about. Do you recall
18 saying to Mr. Wright that SCO needs the copyrights to
19 run its business, or words to that effect?
20 A. No. The point was we always felt like we
21 owned the copyrights, and Mr. Jones had agreed with
22 that point. And the point -- I mean, the impression
23 as I read this is that we need to get them. We
24 always felt that we had them. What we needed to get
25 was clarity around the wording in the Asset Purchase

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1 Agreement around "excluded assets."
 2 Q. Was it your view at this time that
 3 ownership of the copyrights, ownership of the UNIX
 4 and UnixWare copyrights, was necessary for SCO to run
 5 its business?
 6 A. Absolutely.
 7 Q. Do you have Exhibit 222 in your pile, Mr.
 8 McBride?
 9 A. Yes, I do.
 10 Q. Exhibit 222 is an e-mail chain. Towards
 11 the middle of the first page William Warren says to
 12 you on May 28, 2003, "Thanks, Darl. I think you guys
 13 need to really drive this particular point home on
 14 your conference call today. There is a great deal of
 15 confusion out there on this topic, particularly from
 16 the folks at the Linux distributors and their
 17 customers." And if you look at the e-mail below
 18 that, Mr. Warren appears to be referring to certain
 19 points you've made regarding the copyrights issue.
 20 Do you recall being asked about this document?
 21 A. Yes, I do.
 22 Q. As you sit here today, do you agree with
 23 Mr. Warren's assessment at that time, that there was
 24 a great deal of confusion out there on the topic of
 25 the copyright ownership?

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1 A. Yes. There was a huge amount of
 2 confusion.
 3 Q. And do you think that confusion worked to
 4 SCO's detriment?
 5 MR. JACOBS: Objection. Leading.
 6 A. There was confusion in the marketplace and
 7 it was detrimental to our licensing program. It was
 8 detrimental to the view of the company at the time.
 9 Later it became detrimental to the licensing program,
 10 and continues to be detrimental to us today, the same
 11 issues.
 12 Q. You responded earlier to a question from
 13 Mr. Jacobs on the question of your view of the status
 14 of the UNIX business at the time you joined the
 15 company.
 16 A. Yes.
 17 Q. Do you recall the questions and answers?
 18 A. I remember roughly talking about that.
 19 Q. Was it your view when you joined the
 20 company that Linux was an unauthorized derivative of
 21 UNIX?
 22 A. Not when I joined. I came to that view
 23 later on, but certainly not when I joined.
 24 Q. You've referred a couple times today to
 25 the, quote, bad language in the APA. Do you recall

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1 using that phrase?
 2 A. Yes.
 3 Q. What do you mean by that?
 4 A. I'm talking about the language in the
 5 excluded assets of the APA where it includes
 6 copyrights. The title of the document itself is an
 7 Asset Purchase Agreement. It's not an agreement to
 8 copy and distribute someone else's product. And from
 9 day one it never made sense to us that the copyrights
 10 didn't follow, and we always had the position that we
 11 did. People at Novell, including Greg Jones and Jack
 12 Messman, at various times agreed that we did. And we
 13 believe that we do today.
 14 So the bad language was actually cleared
 15 up. We just hadn't seen the document. If you read
 16 the Asset Purchase Agreement today, there is not
 17 actually bad language in there, because Amendment 2
 18 replaces that bad language. I mean, it is kind of
 19 interesting to sit here and talk about it on and on
 20 and on as if it is still there. It's not there. We
 21 should strip it out of all the other documents and
 22 paste that other one in, because it is technically
 23 not there.
 24 Q. Why is the language bad? Why is that the
 25 adjective you choose?

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1 A. It's bad in two ways. One is it's bad --
 2 it has been very bad for us because people have
 3 interpreted that we did not get the copyrights, and
 4 that fire has been fueled by Novell. But once
 5 clearing up the copyrights, Novell has continued to
 6 fuel it by trying to put a spin on the Amendment 2
 7 language itself.
 8 It's also bad in that it's incorrect. It
 9 is incorrect in terms of what the transaction was
 10 about as witnessed by or evidenced by numbers of
 11 people on both sides of the Santa Cruz/Novell
 12 transaction. It is evidenced on its face that it
 13 isn't reasonable that that's the way this transaction
 14 would go down. And ultimately I guess the last thing
 15 I'd say about it is it's bad that it's still out
 16 there floating around. Again, it should be replaced
 17 because it is technically nonexistent.
 18 Q. I have no further questions.
 19
 20 FURTHER EXAMINATION
 21 BY MR. JACOBS:
 22 Q. You understand that the question whether
 23 the Asset Purchase Agreement effectuated a transfer
 24 of the copyrights is a legal question ultimately,
 25 correct?

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1 MR. NORMAND: Objection to form.
 2 A. My interpretation of it and my
 3 understanding from talking to the witnesses involved
 4 is that the copyrights went from day one in this
 5 transaction; that Amendment 2 was nothing more than
 6 an amendment which clarified that, in fact, those
 7 copyrights had already been transferred.
 8 Q. But you understand that that's a legal
 9 question.
 10 MR. NORMAND: Same objection.
 11 A. I'm not sure who is going to make the
 12 ultimate decision on this, but I think it is pretty
 13 clear to parties that are involved, whether you're an
 14 attorney or not, as to what happened in this case.
 15 And that is that the copyrights did, in fact,
 16 transfer over when Santa Cruz bought the property
 17 from Novell.
 18 Q. So are you disagreeing that it's a legal
 19 question?
 20 A. I'm saying that I'm not in a position to
 21 make that call. I'm saying as a person who is not a
 22 legal person, and after hearing all of the testimony
 23 that's come in, it seems to be pretty straightforward
 24 to me. Whether it's a legal question or not, it's
 25 not -- I don't have an opinion on that. I guess

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1 anything in the document you could view as a legal
 2 issue.
 3 Q. Well, I'm thinking by way of analogy to
 4 somebody who has lived in a house for a very long
 5 time and says, "This has to be mine. I've lived here
 6 for 50 years," and somebody else comes forward with a
 7 deed and says -- or the absence of a recorded deed,
 8 and says, "I never sold you the house." You would
 9 understand that there was a -- that both of those
 10 parties could hold that view, but ultimately the
 11 question of who owns the house is a legal question,
 12 right?
 13 MR. NORMAND: Objection to form.
 14 A. If the parties -- if the party that came
 15 and said, "I have this legal deed," had not done any
 16 diligence to understand if they own that, hadn't
 17 looked to their own records to see if they understood
 18 it and had not talked to the parties that were
 19 involved in the transaction and, in fact, weren't
 20 involved when the transaction happened, then I think
 21 it is hard to sit down and say, "This is just a legal
 22 issue." I think there's been a lot of bad faith on
 23 Novell's part to not sit down and do their basic due
 24 diligence on this point.
 25 Q. I think you are answering a different

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1 question. Because you don't know what due diligence
 2 Novell has done, do you?
 3 MR. NORMAND: Objection to form.
 4 A. I know what people in the marketplace that
 5 were involved in this transaction have said about it.
 6 And I know that Novell would not take the time to go
 7 through their files, at least that's what they told
 8 me. "That's UNIX's old stuff. I'm not even going to
 9 go look through those files." I mean, they are
 10 taking the position now that they own it, but they
 11 told me that they had stored all the files to it
 12 because it is old stuff and they didn't care about
 13 it. Now all the sudden, they are saying they never
 14 sold it? Why are they putting it in their archives
 15 if they thought they still owned it? It makes no
 16 sense.
 17 Q. You don't know -- your lawyers haven't
 18 taken Tor Braham's deposition, for example, have
 19 they?
 20 A. I don't know whose depositions they've
 21 taken.
 22 Q. And they haven't taken David Bradford's
 23 deposition?
 24 A. I don't know whose depositions they've
 25 taken.

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1 Q. And you don't know if Novell has spoken
 2 with those people about the intent of the drafters of
 3 the Asset Purchase Agreement, do you?
 4 A. The people who were involved in the Asset
 5 Purchase Agreement, they have talked to.
 6 VIDEOGRAPHER: Excuse me. Your mic.
 7 A. And have declaration after declaration
 8 after declaration of what was done here. And if you
 9 are saying that David Bradford is going to step up at
 10 the late date and say, "In spite of the testimony of
 11 all of these witnesses, I got together with Tor
 12 Braham after the fact and am putting in a separate
 13 little clause here that nobody knows about," I would
 14 view that as absolute fraud.
 15 Q. Okay.
 16 A. And in spite of the fact or on top of the
 17 fact that David Bradford told me that he didn't
 18 remember this stuff, was not involved in it; and, in
 19 fact, I worked with David Bradford at Novell and know
 20 that for a fact that he did not spend a lot of time
 21 in his office when he was there. So it doesn't
 22 surprise me that that was what he told me later. But
 23 yes, I'll look forward to seeing his testimony.
 24 MR. JACOBS: No further questions.
 25 (Discussion off the record.)

1 MR. JACOBS: Just so the archeologists
 2 will figure out what happened to the stack of
 3 evidence here, I'm returning Exhibit 227 to
 4 Mr. Normand, and I previously returned the document
 5 under SCO --

6 MR. NORMAND: I forget what that was.
 7 Exhibit 127. We did put that on the record.

8 MR. JACOBS: That I returned it?

9 MR. NORMAND: Yes. Because I had failed
 10 to mention the Bates number, and then you mentioned
 11 it. So that one is returned, too.

12 (The deposition concluded at 5:15 p.m.)

13
 14 -oOo-

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 25

1 Case: SCO v. Novell
 Case No.: 2:04CV00139
 2 Reporter: Diana Kent
 Date taken: March 27, 2007

3 WITNESS CERTIFICATE

4 I, DARL MCBRIDE, HEREBY DECLARE:
 5 That I am the witness in the foregoing
 transcript; that I have read the transcript and know
 6 the contents thereof; that with these corrections I
 have noted this transcript truly and accurately
 7 reflects my testimony.

8 PAGE-LINE	CHANGE/CORRECTION	REASON
9		
10		
11		
12		
13		
14		

15 No corrections were made.

16 I, DARL MCBRIDE, HEREBY DECLARE UNDER THE
 PENALTIES OF PERJURY OF THE LAWS OF THE UNITED STATES
 17 OF AMERICA AND THE LAWS OF THE STATE OF UTAH THAT THE
 FOREGOING IS TRUE AND CORRECT.

18

19 _____
 20 DARL MCBRIDE
 21 SUBSCRIBED and SWORN to this _____ day
 22 of _____, 2007, at _____

23 _____
 24 Notary Public
 25

1 REPORTER'S CERTIFICATE

2 STATE OF UTAH)
 3) ss.
 COUNTY OF SALT LAKE)

4 I, Diana Kent, Registered Professional
 Reporter and Notary Public in and for the State of
 6 Utah, do hereby certify:

7 That prior to being examined, the witness,
 Darl McBride, was by me duly sworn to tell the truth,
 8 the whole truth, and nothing but the truth;

9 That said deposition was taken down by me
 in stenotype on March 27, 2007, at the place therein
 named, and was thereafter transcribed and that a true
 and correct transcription of said testimony is set
 11 forth in the preceding pages;

12 I further certify that, in accordance with
 Rule 30(e), a request having been made to review the
 transcript, a reading copy was sent to Attorney
 Edward Normand for the witness to read and sign
 14 before a notary public and then return to me for
 filing with Attorney Michael Jacobs.

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

18 WITNESS MY HAND AND OFFICIAL SEAL this
 29th day of March, 2007.

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 Diana Kent, RPR, CRR
 Notary Public
 Residing in Salt Lake County