SCO Grp v. Novell Inc Doc. 756

1 IN THE UNITED STATES DISTRICT COURT

2 DISTRICT OF UTAH, CENTRAL DIVISION

3

4 THE SCO GROUP, INC., a Delaware)

5 corporation,)

6 Plaintiff,)

7 vs.) Case No. 2:04-CV-139TS

8 NOVELL, INC., a Delaware)

9 corporation,)

10 Defendant.)

11 _________________________________)

12 AND RELATED COUNTERCLAIMS.)

13 _________________________________)

14

15 BEFORE THE HONORABLE TED STEWART

16 --------------------------------

17 February 25, 2010

18 Motion Hearing

19

20

21

22

23

24 REPORTED BY: Patti Walker, CSR, RPR, CP

25 350 South Main Street, #146, Salt Lake City, Utah 84101

Dockets.Justia.com

1 A P P E A R A N C E S

2

3 For Plaintiff: Brent Hatch
HATCH JAMES & DODGE
4 10 West Broadway, #400
Salt Lake City, Utah 84101
5

6 Stuart Singer
BOIES SCHILLER & FLEXNER
7 401 East Las Olas Blvd. #1200
Fort Lauderdale, Florida 33301
8

9 Edward Normand
Jason Cyrulnik
10 BOIES SCHILLER & FLEXNER
33 Main Street
11 Armonk, New York 10504

12

13
For Defendant: Sterling Brennan
14 WORKMAN NYDEGGER
60 East South Temple, #1000
15 Salt Lake City, Utah 84111

16
Eric Acker
17 Michael Jacobs
MORRISON & FOERSTER
18 425 Market Street
San Francisco, California 94105
19

20

21

22

23

24

25

1 SALT LAKE CITY, UTAH; THURSDAY, FEBRUARY 25, 2010; 9:00 A.M.
2 PROCEEDINGS
3 THE COURT: Good morning. We are here in the case
4 of SCO Group vs. Novell, Inc., case 04-CR-139. Representing
5 the plaintiffs we have Mr. Brent Hatch, Stuart Singer, Ed
6 Normand, Jason Cyrulnik, and Mr. Ryan Tibbitts. On behalf
7 of defendants Mr. Michael Jacobs, Eric Acker and Sterling
8 Brennan.
9 Counsel, I hope this is not going to be a problem.
10 My intention is to go ahead and hear argument on the three
11 Daubert motions and then take a break and come back and do
12 the final pretrial conference. Is that agreeable with all
13 of you?
14 Mr. BRENNAN: It is for Novell, Your Honor.
15 MR. HATCH: For the two o'clock as originally
16 scheduled or just a break?
17 THE COURT: A break, 15 minutes.
18 MR. HATCH: We can handle that.
19 THE COURT: We do have three motions, Daubert
20 motions that have been filed by defendants.
21 Mr. Brennan, may I assume you will be making the
22 argument?
23 MR. BRENNAN: Your Honor, I was intending, if it's
24 agreeable to the Court, to argue one of them regarding
25 Christine Botosan. Mr. Acker was going to present argument

1 on the other two involving Pisano and Davis, if that's
2 agreeable.
3 THE COURT: That will be fine. I prefer we go
4 ahead and hear your side on all three of them and then give
5 plaintiffs the opportunity to respond. So if you'd like to
6 go ahead, please.
7 MR. BRENNAN: It is it agreeable if I start with
8 Botosan?
9 THE COURT: Absolutely.
10 MR. BRENNAN: May it please the Court, I wish to
11 present brief argument, Your Honor. I know the Court has
12 had the benefit of the papers. And absent suggestion I do
13 otherwise, I'll try not to repeat everything that was
14 already set forth in the brief.
15 THE COURT: Thank you.
16 MR. BRENNAN: Your Honor, I think really, cutting
17 through the arguments, there are probably two to three
18 critical issues that we believe would suggest that the Court
19 ought to grant the motion. And the first that I wish to
20 focus on is the so-called event study that is really the
21 linchpin of Dr. Botosan's analysis. We believe, as we have
22 described, there are at least two fundamental problems with
23 the event study.
24 The first is the lack of relevance to the event
25 study to the lost profits claim. This Court has already

1 ruled that a drop in stock price is not going to be a
2 subject of the claims in this case. It's already ruled on
3 that. The event study and the analysis that goes with it is
4 really intended to focus on a track or an attempted
5 correlation between NASDAQ and SCO's stock performance.
6 That's not at issue here. That's not a relevant inquiry for
7 purposes of lost profits.
8 What Dr. Botosan does attempt to do is to draw
9 some correlation between SCO's stock price and NASDAQ and
10 then adhere to that some sort of event study to suggest that
11 individuals who otherwise might have taken licenses under
12 the SCOsource programs chose not to do so because of
13 statements or events involving Novell's claim of ownership
14 in the UNIX copyrights.
15 So the event study analysis is fatally flawed, not
16 merely irrelevant but fatally flawed because it doesn't
17 focus on the real issue in a lost profits analysis, and that
18 is the question of whether or not SCO lost revenues and thus
19 profits from the sale of SCOsource licenses because of any
20 conduct by Novell. Instead, it's all attempted to track or
21 correlate to NASDAQ and the performance. And the problem
22 there, Your Honor, is there simply is not a correlation, as
23 we demonstrated in the papers.
24 The regression analysis shows that there simply is
25 not a predictability factor that would allow this Court to

1 allow this analysis to get past the gatekeeper function that
2 this Court performs.
3 Now we did not and our expert for Novell did not
4 have a chance, until very recently, to see really what the
5 output was by Dr. Botosan. Our expert did attempt to do
6 some sort of reverse engineering, as it were, to find out
7 really even what the so-called R2 measurement was, which is
8 the predictor of a correlation. And that reverse analysis
9 suggested that the correlation was so low as to have
10 absolutely no meaning.
11 In the declaration that was just submitted to this
12 Court, I believe this past Monday, it was suggested that the
13 predictability factor was a mere 14 percent. And so that
14 demonstrates by the authorities that we've cited that there
15 really is not a sustainable, reliable predictability factor
16 that's even built into the progression analysis that Dr.
17 Botosan did.
18 We've also referenced to the Court case law that
19 suggests that even a correlation factor as high as .45, or
20 45 percent, is not sustainable and should not be accepted
21 for purposes of statistical analysis to demonstrate a
22 purported correlation between the events at issue and the
23 claim.
24 So here we face a situation where not only is the
25 event study irrelevant to the issue of lost profits, but

1 even the regression analysis that was performed itself
2 demonstrates that there is no correlation between the events
3 that are being presented to the Court. And in Dr. Botosan's
4 late filed submission, she suggests that the correlation
5 factor, as I said, is a mere 14 percent, which is well below
6 the threshold that's been accepted by courts.
7 THE COURT: Mr. Brennan, isn't that simply your
8 expert's view of Dr. Botosan's conclusions? I mean isn't
9 that best dealt with by those two experts going toe to toe
10 and you, on your best behavior, cross-examining the expert
11 of plaintiff and so on? I just don't know whether or not --
12 I mean I'm not disputing your expert's calculation, but it
13 is something that the jury ultimately gets to decide,
14 doesn't it?
15 MR. BRENNAN: Well, I certainly do agree that
16 would and could be a battle between experts and we would be
17 able to, through cross-examination, demonstrate the failure
18 of Dr. Botosan to make any correlation that has any meaning.
19 No question about that. The issue here I believe, however,
20 is whether or not we should even get to that point because
21 the presentation and the analysis that's done is not limited
22 merely because of a weight issue but because it doesn't even
23 meet an acceptable standard. We were, in fact, dealing with
24 so-called junk science here.
25 As we demonstrated, the authorities show that in a

1 correlation factor as low as Dr. Botosan states, and I'm
2 going to rely upon her number in her declaration rather than
3 our expert's calculation of a much lower coefficient, with
4 an R2 as low as .14, it doesn't even get close to the
5 threshold that courts already have rejected as being too low
6 to allow the issue to even get to the jury for purposes of
7 weight analysis.
8 So I certainly do agree with the Court that the
9 experts could, in essence, battle it out and we could
10 diminish the weight of the argument by cross-examination,
11 but I'm suggesting to the Court that we need not and should
12 not get there because of the gatekeeper function. This jury
13 should not be required to, in essence, endure what I call is
14 junk science.
15 Your Honor, the other points that we raised I do
16 believe also could suggest to the Court that Dr. Botosan's
17 testimony ought not be allowed and we have the problem where
18 she is relying upon not mere inadmissible hearsay on its
19 own, but is being used as a conduit to pass through
20 information that is inappropriate. We've cited some of the
21 examples to the Court. For example, some of the projection
22 analysis, we've had no ability to analyze whether it's
23 reliable, nor does Dr. Botosan in her report suggest that
24 there has been any independent analysis by her on the
25 projections that she's relying upon.

1 Instead, her testimony is being offered, again, as
2 a mere conduit to pass through information where she's not
3 independently analyzed it. She has not independently
4 verified that it's reliable. Nor does she know or does she
5 purport to know whether or not those projects meet any sort
6 of rigor of reliability. That's another problem, Your
7 Honor. And I believe under the gatekeeper function, that
8 would be a basis for you to reject Dr. Botosan and her
9 analysis and it ought not to go to the jury.
10 Now, Your Honor, with those arguments, I think at
11 least those three points we suggest would be sufficient.
12 There other points we've raised that are in the papers.
13 Unless the Court has questions, I would not press them
14 further at this juncture.
15 THE COURT: Thank you, Mr. Brennan.
16 MR. BRENNAN: If I might turn it to Mr. Acker to
17 present argument on the other two motions.
18 THE COURT: All right.
19 MR. ACKER: Good morning, Your Honor.
20 THE COURT: Good morning.
21 MR. ACKER: I will start with Dr. Pisano. Much
22 like the argument with Dr. Botosan, I think the Court has
23 hit the nail on the head. The issue here is whether this is
24 something that simply goes to the weight or is something
25 that the methodology used by Dr. Pisano is so flawed that

1 the jury should not even get a chance to hear that evidence.
2 What we think is the critical point in our papers
3 obviously is this Yankee Group survey that Dr. Pisano relies
4 on. He relies on it and underlies all his analysis on what
5 the market penetration will be. That is of the entire Linux
6 world, what percentage may have taken a SCOsource license.
7 THE COURT: Mr. Acker, if I may, I realize the
8 disadvantage you all have of filing a response with no
9 reply. In their response, the plaintiffs argue that he did
10 not rely on just one Yankee Group study but rather on two
11 other studies, including another by Yankee Group. You did
12 not address that in your initial papers, so I would ask you
13 to, please, somewhere in the course of your presentation, to
14 get to that point.
15 MR. ACKER: I will do it right now, Your Honor.
16 The percentages that underlie his damages analysis
17 of 19-percent and 45-percent market penetration come from
18 the Yankee Group study that he says in his deposition he
19 knows virtually nothing about. He doesn't know how many
20 companies were surveyed. He doesn't know what companies
21 were surveyed. He doesn't know what questions were asked of
22 those companies. He doesn't know what responses were given.
23 He doesn't know what parameters or conditions were placed on
24 that survey to give it any indicia of reliability.
25 Attached as Exhibit B to our moving papers, Your

1 Honor, is a copy of the Yankee study. But really all he's
2 relying one is the one chart, the graph chart we put forward
3 in our papers. That's where he's coming up with this 19,
4 45 percent. The other two studies are what he uses as,
5 quote, checks. But the numbers in those studies, the
6 alleged market penetration numbers in those studies aren't
7 the same. They are within the range, but they are not the
8 same as the study he's relying on to come to his conclusion,
9 to come to his conclusion that there can be as high as a
10 45-percent market penetration.
11 In addition, there is actually no evidence from
12 Dr. Pisano that he knows anything about those studies
13 either, that he knows what companies were surveyed, how
14 those studies were conducted.
15 So I think we have really crossed the line, Your
16 Honor, from simply attacking or cross-examining Dr. Pisano
17 for the jury with the failings in his analysis where we have
18 an expert who is relying on methodology that simply can't be
19 sustained.
20 THE COURT: Mr. Acker, to that point, let me ask
21 you this. If he knew everything about these studies -- you
22 know, it's not uncommon for experts to rely on studies
23 conducted by others, as you well know. But if he knew
24 everything about it, if he knew who had been interviewed and
25 the nature of the questions, et cetera, et cetera, would you

1 not agree that in that case he should be able to rely upon
2 that?
3 MR. ACKER: Yes.
4 THE COURT: So this, then, is not really a matter
5 of reliability going to the method. It is the weakness in
6 that method; is that not correct? Let me be more precise.
7 You don't disagree with his methodology, you disagree with
8 the extent to which he undertook an analysis of his
9 underlying study? Isn't that really what we're talking
10 about? It's not the methodology, it's just you don't think
11 he did his own homework before he reached his conclusions?
12 MR. ACKER: I don't disagree with experts relying
13 on these sorts of market surveys when they have done their
14 homework to determine the reliability of those surveys. I
15 do believe and our position is that his methodology is
16 flawed because he's relying on a survey -- in fact, relying
17 to a certain extent on three surveys, which he knows
18 virtually nothing about other than what he reads on a piece
19 of paper. So I believe it does go to the methodology.
20 I understand the Court's point, but our point is a
21 diligent expert in this field conducting this sort of damage
22 analysis would undertake to determine what sort of rigor was
23 used in the market analysis upon which he's relying.
24 Unless the Court has other questions about Dr.
25 Pisano, I will turn now to Mr. Davis. And I think

1 Mr. Davis, unlike the two damages expert, is in a bit of a
2 different field, a different manner or different topic
3 obviously. But the issue there is whether or not this Court
4 will allow a paid lawyer to come into this courtroom to rely
5 on his own knowledge of copyright law and essentially to
6 tell the jury that he believes, based on his 30 or 40 years
7 of experience as a licensing lawyer and his knowledge of
8 copyright law, to say that the Amendment No. 2 transfers the
9 UNIX copyrights, because that is what his testimony purports
10 to be.
11 He will testify that SCO either needed a license
12 or they needed ownership of the UNIX copyrights in order to
13 exercise their rights with respect to the acquisition of the
14 UNIX and UnixWare technologies, which is the exact language
15 of Amendment No. 2. That's his first position.
16 He then says I look at this deal, I look at the
17 APA, and I don't see a license here. I don't see a direct
18 license and I don't see an exclusive license. Therefore, it
19 is my legal opinion that SCO must have had ownership of the
20 UnixWare and UNIX copyrights. That is his opinion.
21 His opinion is not based on any legal instructions
22 from this Court, any jury instructions from this Court, any
23 decisions by this Court. It is his understanding of the
24 legal standards based on his own legal practice. That comes
25 directly from page 9 of SCO's opposition, that he is going

1 to come into this court and give that opinion based on his
2 understanding of the relevant legal standards based on his
3 own legal practice.
4 And I think what is instructive to this Court is
5 the Tenth Circuit's opinion in Specht v. Jensen, which was a
6 Section 1983 case in which the underlying conduct was an
7 illegal search of a home. There the trial court allowed a
8 criminal defense lawyer to come into court and, based on his
9 knowledge of Fourth Amendment jurisprudence, to tell the
10 jury I believe this was an improper search and seizure. And
11 the Tenth Circuit reversed saying that was an improper use
12 of an expert opinion, that allowed a lawyer to give his own
13 opinion about the relevant law underlying a claim that
14 basically told the jury that the claim was valid.
15 The Tenth Circuit also instructed in no uncertain
16 terms that we need to be very careful when we have expert
17 testimony from lawyers. They are different than damages
18 experts, and they are different because jurors will tend to
19 give additional weight and stock to that testimony and
20 essentially usurp this Court's role to instruct the jury as
21 to what the relevant legal standards are.
22 So we submit that Specht is controlling, that
23 Mr. Davis should not be allowed to opine on his legal
24 understanding of the copyright law to support SCO's argument
25 that Amendment No. 2 transferred the UNIX copyrights. They

1 haven't cited a single case, Your Honor, which a lawyer has
2 been allowed to give such testimony. The cases that they
3 rely on, both Tenth Circuit and elsewhere, are totally
4 different factual situations.
5 In Phillips, Your Honor, it was a summary judgment
6 setting in which a court allowed testimony by not a lawyer
7 but by personnel, HR people about common uses of terms in a
8 contract. In Oakland Oil it was an expert in oil production
9 and in pipelines testifying about his opinion regarding why
10 certain fraud occurred in the case, but not the meaning of
11 contract by a lawyer. Finally, in U.S. v. Bedford, it was
12 an IRS agent testifying whether or not federal tax laws had
13 been violated. Not a single case, Your Honor, in which a
14 lawyer has been allowed to come in and opine to the legal
15 standards and essentially the jury that one side should win.
16 We think Specht controls and he should not be allowed.
17 THE COURT: Mr. Acker, let me ask you this. Let's
18 say Mr. Davis was not an attorney but rather was some person
19 who had developed an expertise in negotiating these
20 contracts and had for many years participated in the same
21 type of negotiations, and so on, that Mr. Davis asserts that
22 he has. Would that expert be permitted to testify? In
23 other words, is it really the fact that Mr. Davis is an
24 attorney that would disqualify him in your mind?
25 MR. ACKER: That's a big part of it, Your Honor.

1 But also I don't know what the relevance would be if he was
2 just someone who had been a businessman involved in
3 licensing that was not involved in any way with this deal,
4 and there's no dispute that he knows nothing about the APA
5 Amendment No. 2 other than what he's read. But I also think
6 we need to look at exactly what testimony is being proffered
7 and what testimony is being proffered is that that I laid
8 out, and that his underlying basis for that testimony is his
9 understanding of the relevant legal standards. I don't
10 think he can get to his opinion unless he does offer some
11 sort of legal opinion regarding what would be required in
12 his view for SCO to gain the benefit of the deal. I don't
13 know how he could give that testimony without treading into
14 this Court's province of being the determiner of what are
15 the legal standards of this court.
16 THE COURT: Mr. Acker, let me ask you this. My
17 understanding of his testimony would be that he had
18 participated in a large number of negotiations and
19 ultimately writing contracts dealing with the transfer of
20 copyrights. And his argument would be, first of all, there
21 either had to be a copyright or a license. And in this case
22 it's his conclusion that it was the transfer of a copyright.
23 Isn't that the essence of his testimony?
24 MR. ACKER: That is the essence of his testimony.
25 It goes beyond that, Your Honor. There had to be a license

1 or there had to be ownership. I don't see a license,
2 therefore there has to be ownership.
3 THE COURT: All right. Then you stated it much
4 better than I did.
5 The dilemma is that I don't see him speaking as an
6 attorney, I reached this conclusion. My understanding of
7 his testimony is he's speaking as someone who's participated
8 in similar transfers, that it had to be one or the other,
9 and based upon this language it's my opinion as an expert,
10 not as an attorney, but as someone with experience that it
11 was a transfer of the ownership.
12 MR. ACKER: It's pretty clear from the opposition,
13 Mr. Davis would testify that he reaches his conclusions
14 about what copyrights are required based on his
15 understanding of the relevant law. I mean he is going to
16 say based upon my 40 years of experience in the law
17 regarding copyright law.
18 THE COURT: If I were to rule that he could not
19 make reference -- or could not draw a conclusion, his
20 testimony could not make reference to legal conclusions but
21 rather his conclusions based upon his experience, would that
22 solve your concern?
23 MR. ACKER: The problem is he can't give that
24 opinion then, Your Honor, because his opinion is based on
25 his understanding of copyright law and what is required for

1 SCO to take certain actions, what rights they need to do
2 that. That by definition is giving a legal opinion.
3 THE COURT: All right. Anything else, Mr. Acker?
4 MR. ACKER: No. Thank you very much, Your Honor.
5 THE COURT: Thank you.
6 Mr. Hatch.
7 Mr. Brennan, Mr. Acker, I do intend to give you a
8 chance to reply.
9 MR. HATCH: Your Honor, like Novell, we took the
10 opportunity to split this up amongst the lawyers, so I will
11 handle the Botosan Daubert, Mr. Singer will handle the
12 Pisano, and Mr. Normand the Davis, if that's okay.
13 Novell didn't spend a lot of time on Dr. Botosan's
14 testimony regarding the damages analysis. And it's
15 understandable. I think if you look at the introduction in
16 their brief, it kind of gives us the whole flavor right
17 there and I don't think we really have to go a whole lot
18 further. They state in their introduction, to arrive at
19 lost profits, Dr. Botosan first calculates lost revenues by
20 subtracting SCO's actual licensing revenues from what they
21 were projected to be. She then deducts what she estimates
22 SCO's costs would have been to generate those revenues in
23 order to arrive at lost profits.
24 That's a true statement of the process that's in
25 the methodology that someone of the expertise of Dr. Botosan

1 would go through to reach that analysis. They acknowledge
2 that because they say the two basic flaws that infect this
3 part of her analysis both go to her starting point. They
4 say she cherry-picked the highest projections she could
5 find. And, second, instead of performing any meaningful
6 analysis of those cherry-picked projections, such as
7 applying discounts based on the recognized risk factors, she
8 just parrots them.
9 So what they are essentially saying here, Your
10 Honor, in going through the brief, we're not challenging her
11 expertise, we're not challenging her credentials, we're not
12 challenging her methodology, we're not even claiming she
13 used some novel methodology that couldn't be tested.
14 THE COURT: To be accurate, they are not
15 challenging her overall methodology. I think to be
16 accurate, they do challenge the application of some of her
17 methods.
18 MR. HATCH: But the application being what data
19 she's inputting. But nowhere did they say with this kind of
20 a calculation --
21 THE COURT: I agree. I didn't hear either from
22 Mr. Brennan nor in his written materials anything -- I agree
23 with you. All right.
24 MR. HATCH: They didn't say she was unqualified to
25 perform the analysis, and didn't challenge any of those

1 things. They basically came to the point that they said,
2 you know, we don't like the data she put in.
3 And ultimately that is the analysis, under
4 Daubert, the Liquid Dynamics we cited, the Loudermill case
5 we cited, the Subaru case we cited, that courts have
6 consistently said goes to the weight of the testimony, not
7 its admissibility.
8 In fact --
9 THE COURT: Mr. Brennan's argument is when the
10 methodology, the specifics of the methodology, not the
11 overall but some of the specifics of the methodology are so
12 out of line that this Court has an obligation to preclude
13 the reliance or testimony regarding that out of line method.
14 MR. HATCH: Well, let's talk about that for just a
15 second because one of the things they say, and we only have
16 a few minutes today and we filed, you know, the supplemental
17 declarations of Dr. Botosan that go point by point. It's
18 very interesting here because like in the Loudermill case,
19 they filed as an exhibit to their brief the report of Dr.
20 Musika -- excuse me, Mr. Musika, not doctor, Mr. Musika, who
21 has attacked Dr. Botosan in a classic battle of the experts.
22 As the court said in Loudermill, again, while Dr. Lowry's
23 opinions may have been subject to attack, as indeed they
24 were -- in other words, exactly what's going on here -- such
25 issues go to credibility, not admissibility.

1 Now this cherry-picking I think in and of itself
2 says that, it says we're attacking the credibility, we're
3 attacking, you know, her numbers.
4 Just to kind of give you a little bit of a flavor,
5 if you don't mind, I would like to give you two things that
6 I've derived from Dr. Botosan's report, if I may?
7 THE COURT: Yes.
8 MR. HATCH: Several of the things that they say
9 about this cherry-picking just aren't true. Again, I
10 believe this goes to weight. I don't think it goes to
11 admissibility. For instance, on the first bar graph that I
12 provided to Your Honor, Dr. Botosan looked at the Deutsche
13 Bank report. That's an independent report. It wasn't
14 something that SCO hired. And we can debate back and forth,
15 but they said we picked the highest numbers. Well, Dr.
16 Botosan's report in paragraphs 43 and 44, you see that she
17 actually chose scenario number two, which wasn't the lowest
18 and wasn't anywhere near the highest. And throughout her
19 report, she explains the basis for why she picked the
20 numbers she did and indicated that in virtually every
21 instance, she tried to pick very conservative numbers. As a
22 matter of fact, her report said that the damages that she
23 eventually came to could have been significantly higher, you
24 know, double what she ultimately opined on, which is
25 evidence she didn't pick the highest numbers.

1 The second is, again, you know, the methodology
2 they are not challenging that you have to take, you know,
3 these factors, and one of the factors is how much are you
4 going to -- the lost sales as a number, you have to multiply
5 that by the licensing price, at least in the case of the
6 RTUs, which were essentially the covenant not to sue. The
7 initial list price that SCO used was almost $1400. And the
8 Deutsche Bank, when they were doing an analysis for their
9 own people for independent means, they used a conservative
10 analysis, as you would if you were going to put money into
11 something. They said, we're going to attribute 100 to $300.
12 Even with those numbers, she picked the lowest. She picked
13 the hundred.
14 So if we go through -- when they are saying she's
15 cherry-picking, she's always using the largest numbers, they
16 are not really being fair about the way that she did her
17 studies.
18 And, again, weight, not admissibility. All these
19 things, if they want to attack her on it and cross-examine
20 at trial, we welcome that. I think Dr. Botosan is going to
21 handle that very well. She's extremely well qualified.
22 She's got a Ph.D in accounting. She's more qualified, at
23 least on that basis, than Novell's expert, the person who's
24 attacking her at this point. If you read the briefs, there
25 are many errors in his calculations as well, which we intend

1 to cross-examine him on.
2 Now the second point and one of the things they
3 are most concerned about here, and Mr. Brennan spent the
4 bulk of his time on, is what he calls the event study.
5 Novell really makes a classic error here because what they
6 are trying to do, and I will read again from their
7 introduction, and it's very similar to what Mr. Brennan
8 argued here today, he said in the introduction, Dr.
9 Botosan's causation analysis is even more deeply flawed.
10 First, she bases her opinion on an event study purporting to
11 show that Novell stock caused SCO's stock price to drop, but
12 the Court has already ruled that decline in stock price is
13 not an appropriate claim for special damages.
14 Now he said again today that it wasn't relevant,
15 he said the event study was to damages -- that's what he
16 said today, not relevant to lost profits. So it's fatally
17 flawed because of that reason.
18 Well, what that misses is that the event study was
19 only to causation. It has nothing to do with damages in
20 that it's not -- and I challenge on rebuttal, if they would
21 like to, is get up and show a single number -- damage
22 number, monetary number that was taken from the event study
23 that made it into Dr. Botosan's damages numbers. It's not
24 there. Because this is to show causation, which is an
25 independent element that we have to show a trial. It does

1 not figure into the damages number.
2 So they're attacking -- and they are setting up
3 the classic straw man, something they say, well, you're not
4 allowed to use this for damages based on the Court's ruling.
5 Therefore, you must be using it for damages, so guess what,
6 it should be out. We didn't do that. I would challenge
7 them to do that.
8 Now if Your Honor will allow me, I have one more
9 slide I would like to show. This particular slide comes
10 from Dr. Botosan's report. And what it shows is this is
11 just a snapshot from the data that she was able to provide.
12 This is the date of the -- the stock price of SCO on the day
13 of the May 28th slander statement. And the reason this goes
14 to show -- and they don't like it and they want this out, is
15 because, as you can see, the stock price is fairly flat
16 during the morning. Then at roughly one o'clock, when
17 Novell made its slander statement, it took a dramatic and
18 precipitous drop.
19 Now if we had just come to court and put this
20 piece of evidence in, and we didn't have Dr. Botosan's
21 study, they would have argued to keep this out because we
22 had not ruled out other potential causes for the precipitous
23 price drop. Well, that's the purpose for Dr. Botosan's
24 event study is to essentially rule out other causes for
25 this. And her studies do that on a very complex and

1 statistical analysis that shows that based on, you know,
2 standard accounting and statistical analysis, the reason for
3 that drop was Novell's slanderous statement. That goes
4 really to the heart of the case. But nowhere here does she
5 then extrapolate the drop from -- I'm looking here, and I'll
6 say from 8.50 down to $6, and nowhere does she take that
7 $2.50 drop and plug it into some formula, because this
8 merely shows causation, what's happening when they slander
9 the title of SCO.
10 The one thing they don't mention is that one of
11 the tests for reliability on this is the P-value. And as
12 Dr. Botosan's declaration -- I think it's Exhibit C in
13 paragraph 12 -- indicated, the P-value indicates there is
14 only a .21 of one percent chance that SCO suffered this 24.6
15 negative abnormal return on May 28th, 2003 by chance. Thus,
16 the event study provides exceedingly compelling evidence
17 that SCO's market value suffered an economically
18 statistically significant decline on the day it made its
19 slanderous statement. That's a causation analysis. So it's
20 not -- it's understandable that the attack is that we're
21 using this to show lost profits because, you know, that is
22 something they can argue, but they haven't argued this on
23 that basis.
24 The event studies -- even Dr. Musika admits that
25 event studies are generally used in the business.

1 The only other attack really that they make to
2 this event study is that somehow the R2 value -- and they
3 cite the Griffin case, they say the R2 value isn't a .45.
4 The problem is when you are looking at the Griffin case,
5 Griffin is not an event study case. There is no
6 corroborating evidence like Dr. Botosan provided throughout
7 her report. And Griffin did not hold and no cases ever
8 cited that .45 is a required threshold. There are no other
9 cases cited.
10 And, here, we're not trying to -- we're not trying
11 to look and explain all events over the two-year period of
12 Dr. Botosan's study. We're only looking at dates with
13 significant abnormal negative returns. And the only one
14 that was there and the most significant one is this May
15 28th, 2003 point, which I just spoke about.
16 And if we talk about how the professional deals
17 with it, if we go to the Litigation Services Handbook, it
18 says, one should not accept or reject in law based solely on
19 R-Squared. I understand that. If we look at the P-value,
20 this is a cinch.
21 Now there are challenges to each of these things
22 and all the other things in there go to the weight. They
23 can cross-examine and they can go after it that way, but it
24 isn't going to admissibility and they haven't cited a single
25 case that really says that.

1 The last thing is they talked about Dr. Botosan
2 being what they call a conduit for opinion hearsay. They
3 talk -- they use the pejorative saying she's just parroting
4 what other people say. That's not a fair reading of her
5 expert opinion.
6 If you look at her expert opinion, she, like most
7 experts, relied on a number of things. She relied on
8 studies. She relied on -- in every case I've been involved
9 in, I know Your Honor has, she looked at depositions. She
10 looked at testimony. She interviewed witnesses. Then they
11 believe she just repeated those things, what was good and
12 what was bad. That's not reality.
13 If you look at her report, she was very clear that
14 not only did she assess the projections, but she also
15 adjusted revenues for incremental costs in calculating lost
16 profits. Her calculations, methodologies are undisputed.
17 She used a regression analysis to estimate incremental costs
18 to SCO, including the cost of revenue, administrative cost,
19 marketing cost. It's undisputed that any of these
20 calculations are not contained in any of the so-called
21 parroted projections. In other words, they said she wasn't
22 doing an expert analysis.
23 The reality is none of these are in the so-called
24 parroted statements. She had to take those statements and
25 then do an expert analysis, which she did. Just the

1 citations in their brief to some of the math, I don't
2 pretend to understand, shows that she actually was doing
3 something that experts do.
4 Then she corroborated her opinion from multiple
5 sources. The damages calculations were corroborated by lost
6 profits determinations by Dr. Pisano. In other words, she
7 came to the damages from two different directions -- excuse
8 me, she used Dr. Pisano's and she also used the other
9 projections and, interestingly enough, they corroborated
10 each other. That's other evidence that her expert analysis
11 was not only an analysis but also was accurate. Her
12 causation study analysis is corroborated through interviews,
13 depositions and all the other things that I have talked
14 about.
15 So, Your Honor, they have not made -- they have
16 made a basis for the trial. Undoubtedly, we're going to
17 have a hotly disputed trial. We're going to have experts
18 that are going to be cross-examined. It's going to be real
19 exciting. But they certainly haven't created a basis for
20 saying we don't go to court here.
21 We'll turn the time over to Mr. Singer.
22 THE COURT: Thank you.
23 MR. SINGER: Good morning, Your Honor.
24 I would like to note at the outset that the
25 motion, while being styled one as to disqualify Dr. Pisano,

1 actually was more targeted at two of his specific opinions.
2 There is no challenge to Dr. Pisano's qualifications. There
3 is no challenge to a great deal of his report where he
4 discusses issues such as causation, the importance of this
5 issue to entities buying and operating a system, that demand
6 for indemnification would logically be high, his examination
7 of alternatives to SCO for that indemnification, and his
8 opinion regarding inability of SCO in the future to pick up
9 after all the dust settles along with this program.
10 I would like to turn to the two opinions they
11 specifically target. One of them was not addressed in the
12 oral argument. It's simply an argument of relevancy, not an
13 argument about his methodology and the size of the relevant
14 market. And it clearly is relevant for a jury to know this
15 is a large market this slander affected and that that
16 factors into their consideration of all the other evidence
17 they will hear in the case.
18 The balance of the attack by Novell is focused, as
19 I think the Court has apprehended, on his reliance on this
20 2004 Yankee study for the purpose of saying that in his
21 opinion the range of likely purchasers of SCO's product but
22 for the slander was between 19 and 45 percent.
23 Now they attack that on the basis that Dr. Pisano
24 didn't understand enough about the study. I would suggest
25 that, first of all, as I think the Court indicated in a

1 question to counsel, that doesn't go to the methodology.
2 That goes, we would submit, to weight.
3 But, second, what it really does is it goes to a
4 question of the memory test at the deposition. Dr. Pisano
5 recalled this was a Yankee study. He testified, as he
6 stated in his report, that Yankee studies are relied upon in
7 the industry, and that they had about a thousand people.
8 Now in his rebuttal report he references a further
9 document -- this is at footnote 34 of his rebuttal report,
10 which is the full study, not just the report of the graph
11 which is appended to the motion that Novell filed, but the
12 full study, which provides a section on methodology. This
13 is at page -- this is the Bates stamp SCO1668632, which
14 Novell has had and their experts have had, that says you had
15 a thousand plus respondents, that is conducted in March and
16 April 2004, that was an independent, non-sponsored,
17 Web-based survey of IT administrators and executives
18 worldwide, and it lists the specific questions and gives the
19 results.
20 Now match that up, if we could, with the only
21 source, the Federal Judicial Center, notes in the excerpt
22 that Novell quotes as to what an expert should know about a
23 study which he relies upon that was conducted by someone
24 else. They say that that individual should know the purpose
25 of the survey. That's known, the interest in buying

1 indemnification among Linux users. The survey methodology,
2 including the target population. We have that here,
3 companies with over 5,000 employees. The sampling design,
4 that it was an Internet response survey with a thousand
5 responses. The survey instrument, you have that. We have
6 exactly the questions asked, so that can be evaluated, along
7 with the four different potential responses. The results,
8 we have each of the breakdowns. Then the statistical
9 analysis. There is no statistical analysis here. We're not
10 trying to extrapolate these results statistically into some
11 other form. They are being used directly.
12 So all of the issues with respect to the 2004
13 study are matters for fair critique. Mr. Musika, their
14 expert, has certainly critiqued it and can play itself out
15 in front of the jury. And Dr. Pisano has answered those
16 critiques in his rebuttal report and would do so in front of
17 the jury. For example, one of the critiques is it doesn't
18 consider price. He says, number one, we're looking at this
19 for damages purposes at the lowest possible price of $100.
20 And, secondly, he says, one of the two other studies,
21 because he didn't rely just on this, he looked at two other
22 studies, the 2005 Yankee study actually asked people about
23 the price they would be willing to pay. And of the
24 20 percent that said they would be interested in buying
25 indemnification, you had a very sizeable percent, 40,000,

1 who would spend an incremental 25,000 to 100,000 annually,
2 and another 20 percent would spend 100,000 to 250,000. So
3 you do have information in the data he relied on that goes
4 to price as a factor and demand.
5 Now you have, as I note, three studies. Only one
6 of them has really been critiqued. The 2005 study is
7 consistent. As counsel indicated, it was within the range
8 of 19 to 24 percent. They are certainly able to argue it's
9 24 percent. Their expert, Mr. Musika, quotes a study saying
10 it's eight percent. This is what is appropriately relied
11 upon by experts in a field in addressing the issue of how
12 much demand would there have been for a product that SCO was
13 trying to sell when the slander occurred.
14 Now I would note that the case law here, Your
15 Honor, supports the view that this goes directly to weight
16 and not to admissibility. I would like to point to the
17 Tenth Circuit's opinion in Compton v. Subaru, which we've
18 cited in our papers, which says, as long as a logical basis
19 exists for an expert's opinion, the weaknesses in the
20 underpinnings of the opinion go to the weight and not the
21 admissibility of the testimony.
22 Novell's cases are quite distinguishable. The
23 Massey case was a criminal case where you had an
24 overenthusiastic prosecutor drawing some statistical
25 comparisons about the likelihood of misidentification, and

1 the court said that went too far for closing argument.
2 The Bogacki case, the expert didn't know the
3 nature and extent of the source at all from which his
4 statistics were gathered. Here there's quite a bit of
5 information in the record.
6 In the Sheats case, the testimony was actually
7 admitted.
8 I think the most relevant case is actually the
9 decision of the Eleventh Circuit, which we quoted -- cited
10 to in our brief, that's the Jellibeans v. Skating Clubs
11 case, where the Eleventh Circuit talked about a situation
12 where you had a survey, where there were technical
13 deficiencies that were alleged by the other side regarding
14 sampling and the interviewers, and the Court said, quote,
15 these alleged technical deficiencies affect the survey's
16 weight and not its admissibility, citing a considerable
17 amount of other authority.
18 So we think this is fair ground for
19 cross-examination. It's similar to the information that Mr.
20 Musika relies on when he talks about surveys, and the motion
21 should be denied.
22 THE COURT: Mr. Singer, before you go to
23 Mr. Davis, I want to ask Mr. Acker a question. I had meant
24 to ask you this, so I can get this on the record so Mr.
25 Singer doesn't have to get back up.

1 In your written memorandum you challenged Mr.
2 Davis's qualifications asserting as a software attorney he
3 has a very limited expertise and he has no expertise in the
4 running of a company. Are you still asserting that as a --
5 are you still challenging his qualifications?
6 MR. ACKER: We're certainly challenging his
7 qualifications if he is going to opine as to what is
8 required in order to run a software company, yes, Your
9 Honor.
10 THE COURT: Thank you.
11 MR. SINGER: Your Honor, with the Court's
12 permission, I would like to turn it over to my colleague,
13 Mr. Normand, who will address Mr. Davis's motion.
14 THE COURT: All right.
15 MR. NORMAND: Good morning, Your Honor.
16 May it please the Court, Mr. Davis is well
17 qualified and he would offer relevant admissible testimony
18 that would be helpful to the jury here. I don't think
19 Novell's arguments, either in their brief or today, do
20 justice to the nature and scope of his testimony or to the
21 controlling law. Let me start with the controlling law.
22 As Your Honor's own opinions are reflected, as
23 Novell's papers and argument frankly fail to reflect, a
24 qualified expert who has specialized knowledge and whose
25 testimony would be helpful to the jury is permitted to speak

1 to the ultimate issues in the case and, in doing so, is
2 permitted to speak to his understanding of the law.
3 Even the Specht case that Novell cites and relies
4 upon makes that clear. And the cases cited therein that we
5 pointed to in our brief underscore that point, that an
6 expert is permitted to speak to his understanding or her
7 understanding of the law.
8 Probably the closest analogy, the line of cases
9 that we also cite in our brief, that Novell did not address,
10 come from the expert testimony that is permitted on discrete
11 and technical issues in the area of intellectual property,
12 particularly patent law. In the patent law context, an
13 expert is permitted to speak not only to the question of
14 obviousness, which is a question that by definition involves
15 some consideration of the law of obviousness, but experts in
16 that context are also permitted to testify to the issue of
17 whether one patent infringes another patent, which, again,
18 by definition has to involve some consideration by the
19 expert of the law, his or her understanding of the law.
20 In this case the Tenth Circuit, as Your Honor
21 knows, has remanded on the issue of what copyrights were
22 required for SCO to exercise its rights with respect to the
23 technology it had required under the amended APA. And in
24 this respect, I think Novell fails to do justice to
25 Mr. Davis's opinions in the following ways. He can offer

1 two kinds of testimony with respect to that issue. One,
2 based on his extensive experience, he can speak to custom
3 and practice in the industry and, two, he can speak to his
4 understanding of why that custom and practice exists.
5 Let's start with the first one, custom and
6 practice. He's been doing this for over 40 years. He's
7 negotiated thousands of licenses. He's advised hundreds of
8 executives on how to do this. He's never seen an implied
9 license that would allow a software company to operate a
10 sophisticated software business. He's never seen one. In
11 his view, there's a custom and practice whereby you, as the
12 title of the APA suggests, transfer assets. Now that's
13 factual testimony. That's testimony that has nothing to do
14 with his view of the law. It's testimony on which,
15 consistent with Your Honor's opinion in Slicex, they can try
16 to cross-examine. They can try to tear away at the
17 foundation of that factual testimony. Maybe there is no
18 such custom and practice. He's convinced there is and he
19 has the experience to testify to.
20 Now he can also testify to his explanation for why
21 that custom and practice exists. Why would it have been
22 that in 40 years of doing this he's never seen an implied
23 license of this sort. Why would that be. First, he has a
24 practical explanation, which he offers in his opinion.
25 There is a complete lack of transparency for the licensee if

1 all he has is an implied license. He can't be sure what the
2 scope of his rights are.
3 Second, there is lack of transparency for third
4 parties. They don't know what the scope of the licensee's
5 rights are either. They can't have confidence that that
6 licensee is purporting to grant them certain rights, the
7 licensee actually has those rights. Again, that's factual
8 testimony. That has nothing to do with his understanding of
9 the law. That is simply his practical explanation for why
10 he thinks the custom and practice exists and why it is that
11 in 40 years of doing this, he's never recommended to anyone
12 that they do an implied license and he's never seen one.
13 THE COURT: Mr. Normand, would you slow down a
14 bit, please.
15 MR. NORMAND: The third point would be, and this
16 is where the rubber meets the road on Novell's motion, to
17 some extent his testimony would involve his understanding of
18 the law consistent with what the Tenth Circuit has said is
19 appropriate. He would offer the explanation for the custom
20 and practice based on his understanding of the law. The
21 reason it has always worked this way is because you either
22 have to own the copyrights or you have to have a clear
23 license to them in order to operate a sophisticated software
24 company, such as SCO has.
25 He would explain in that context, I'll tell you

1 why I think you have to have one of those rights, it's my
2 understanding of the law that if you don't own and if you
3 don't have a license, you can't -- literally can't make
4 copies of the software from day to day, which is how a
5 operating software company works, and you can't bring claims
6 in court to enforce your rights. So he says I've never seen
7 an implied license like this. And if it's not an implied
8 license, then SCO has to have the copyrights. The
9 copyrights are required.
10 He would not tell the jury I have concluded that
11 under the APA it must be that the parties intended for SCO
12 to acquire the copyrights. He would say, I think the
13 copyrights are required. I'm not commenting on what the
14 parties meant by using the word required, but as I interpret
15 it, I think they are required. He wouldn't instruct the
16 jury on the law they have to apply in making that decision.
17 He wouldn't tell them what kind of extrinsic evidence is
18 relevant. He wouldn't tell them how to interpret a
19 contract. He would explain this is my understanding of 40
20 years of doing this.
21 Now Novell argues about his lack of experience and
22 Your Honor asked the question about experience. I think the
23 fact that he's an attorney is irrelevant. They cite to a
24 case suggesting that as a threshold matter, an attorney
25 can't be an expert in this kind of context. I think without

1 fixating on the point, the argument that his testimony is
2 not merely less relevant or less probative, their argument
3 that his testimony is altogether inadmissible because he
4 hasn't owned or operated a software company runs sharply up
5 against one of the themes of the trial, which will be that
6 attorneys played significant roles with respect to the
7 amended APA in deciding what rights were and were not
8 necessary.
9 So I think, for all those reasons, Mr. Davis
10 offers admissible, relevant helpful testimony to the jury
11 that has nothing to do with his understanding of the law.
12 And even with respect to that testimony that involves his
13 understanding of the law, none of the concerns in the Tenth
14 Circuit cases are implicated. He will not be instructing
15 the jury on what law they will apply.
16 Thank you, Your Honor.
17 THE COURT: I will say, Mr. Normand -- thank
18 you -- it strikes the Court as you are arguing that had you
19 tried to use an expert to proffer the same type of
20 testimony, that probably he or she would have been --
21 proffered a witness to offer the same type of testimony
22 covering the same areas and he or she was not an attorney,
23 there probably would have been a challenge to them
24 testifying in the absence of them being an attorney. So
25 it's kind of a -- there's a catch-22 here.

1 You didn't understand my point, and I apologize.
2 When you think about it, you'll see that I'm supporting your
3 position.
4 MR. NORMAND: Then I will sit down.
5 THE COURT: Mr. Brennan.
6 MR. BRENNAN: I was hoping that he would snatch
7 defeat from the jaws of victory, Your Honor.
8 Just a few points back to Dr. Botosan. Yes, there
9 are two opinions that Dr. Botosan offers. One is the amount
10 of alleged damages and the other is causation. But here's
11 the fundamental problem again, that, first, with causation,
12 the basis for the analysis is on an entirely irrelevant
13 measure of yardstick. I think that point can be illustrated
14 by what Mr. Hatch provided to the Court. If I can make
15 brief reference to the diagram that shows SCO entered a
16 crisis of May 28th, 2003, I think this will illustrate the
17 fundamental problem in the methodology offered by Dr.
18 Botosan.
19 First of all, according to the diagram that's been
20 offered, at the start of the day on May 28th, 2003, SCO's
21 stock price was between ten and I think 10.50 per share. If
22 that's rounded, say about ten and a quarter. And even
23 before the alleged slanderous statement had even been
24 uttered or made or released, SCO's stock prices already
25 dropped below $8.50.

1 Then after the alleged statement is made, it
2 dropped less than the amount that it had already dropped
3 that day, and the suggestion is made, well, that must
4 somehow be evidence of what? Not just of a stock price
5 drop, but that somehow potential licensees out in the market
6 made a conscious decision premised on any statement by
7 Novell not to enter into a license agreement with SCO.
8 That's the fundamental problem.
9 First of all, there is not a correlation that's
10 been demonstrated between the stock price and the market.
11 And, secondly, there's been absolutely no demonstration that
12 whatever correlation might exist between the stock price and
13 the market price or performance has anything to do with
14 respect to predicting whether or not a potential licensee
15 would have acquired the SCOsource license. There is this
16 huge gap between the two.
17 Somehow what Dr. Botosan is seeking to present or
18 argue is that if I can somehow demonstrate through an event
19 study some relationship between stock performance and the
20 market, that I thereby can read on to whether or not a
21 licensee in the market would decide to buy a license. And
22 it's already been demonstrated that there is not a reliable
23 correlation between SCO's stock performance and the market.
24 That's why, again, we turn to the correlation
25 coefficient that's even identified in Dr. Botosan's report

1 as being .14, or 14 percent. In other words, there is only
2 a potential of a 14-percent chance in looking for a
3 correlation in these events to get it right. The obvious
4 converse is there's an 86-percent chance you would get it
5 wrong.
6 And so in the Griffin case that we cited to the
7 Court in our papers, the court undertook an analysis of
8 whether or not the statistical evidence that was being
9 presented to create a correlation met a sufficient threshold
10 to allow that testimony to be presented to the jury. In
11 that case, the relationship had a .45, or 45-percent chance
12 under statistical analysis of predicting a relationship, and
13 the court rejected that as not sufficient to meet the
14 gatekeeper function to allow it to go to the jury.
15 Here we're dealing with a predictability ratio of
16 only .14, according to Dr. Botosan. And we still have to
17 jump over that very broad chasm when we don't have a
18 correlation between stock price and the market to reach the
19 conclusion that a licensee made a decision as to whether or
20 not to enter into a license agreement. That is the
21 fundamental problem with the methodology. It isn't just
22 weight. There is a fundamental flaw.
23 And the jury otherwise, without the Court
24 performing this gatekeeper function, would be exposed to
25 seeking to make some determination where we have not

1 established fundamental correlations either between SCO's
2 price, which is very volatile, unrelated to the market, and
3 no connection that Dr. Botosan creates or provides in terms
4 of a decision being made by a potential licensee. All she
5 does in her report is says, well, whatever SCO's stock is
6 doing must be somehow a function of what a licensee is
7 doing. But her report provides no connection. There is no
8 connective tissue between those two concepts. They are
9 unrelated. They are not correlated. That's the problem.
10 In terms of --
11 THE COURT: Mr. Brennan, let me ask you this. Did
12 the Griffin case have to do with testimony on causation or
13 damages?
14 MR. BRENNAN: It had to do with causation. It was
15 an issue of discrimination and whether or not looking at a
16 broad scope of employees and hiring decisions, whether there
17 was a discriminatory animus or decision making based on
18 decisions.
19 THE COURT: All right. Thank you.
20 MR. BRENNAN: Now, Your Honor, if I might briefly
21 turn to the other point of the analysis, and that has to do
22 with the projections regarding damages. Now, again, Dr.
23 Botosan's projections are a function of some sort of
24 projection as to what number of potential licensees would
25 have entered into a SCOsource license, which, again, as I've

1 already gone through, somehow is supposed to be correlated
2 to stock price. We've talked about that.
3 Here's the fundamental problem with the
4 projections. First of all, if I might borrow Mr. Hatch's
5 diagram, at least submission to the Court, the estimates
6 being conservative and Dr. Botosan, not in every instance
7 but in several instances, relies upon the Deutsche Bank
8 analysis and projections. Here's the problem. The Deutsche
9 Bank analysis, which is never analyzed by Dr. Botosan in her
10 report or testimony, it's just naked numbers presented, what
11 we can tell from the Deutsche Bank analysis is that it was
12 looking at potential revenues to SCO from license
13 agreements. And they had two license agreements to look to.
14 One was Sun Microsystems and one was Microsoft.
15 But there's a problem with that and, as we
16 submitted, even the testimony of SCO's chief executive
17 officer, the license agreements that SCO did enter into with
18 Sun Microsystems and did enter into with Microsoft were not
19 SCOsource license agreements. We've attached his testimony
20 for the Court. They were not even the sort of license
21 agreements that are at issue here. They were fundamentally
22 different licenses than a SCOsource license.
23 So the Deutsche analysis is not some sort of
24 measurement or projection as to how SCO would have performed
25 with the SCOsource licensing program. It's only data points

1 for license agreements that are not even at issue here. So
2 the projections are themselves fundamentally flawed. Why is
3 it more than a weight issue? Because Dr. Botosan engages in
4 no analysis to determine even what the Deutsche Bank
5 projections purport to measure.
6 Now one last point that ties these together. We
7 did submit this in the papers, but it was not presented in
8 opposition. One might ask if Novell made a so-called
9 slanderous statement on May 28th, 2003, and the correlation
10 that is attempted to be drawn here is that caused a drop in
11 SCO's stock price and somehow we can bridge the chasm, which
12 there is no evidence to suggest, or we can go from stock
13 price to a decision by a potential licensee, one would
14 expect that if, in fact, SCO had been harmed, that the stock
15 price would continue to trail down. But exactly the
16 opposite occurred. In fact, SCO's price rebounded
17 significantly and remained volatile throughout the period.
18 That simply demonstrates there is not a correlation.
19 So in taking just a one-day snippet and trying to
20 bridge this huge gap and suggest this one day indicates
21 intent on the part of licensees to resist SCOsource licenses
22 because of a statement by Novell is belied by SCO's stock
23 performance, which continued to go up and down and was
24 extraordinarily dynamic and volatile, uncorrelated to the
25 market throughout the period of the damage analysis.

1 So we have these fundamental flaws that, again,
2 yes, Novell could demonstrate the inadequacy and
3 incompleteness on cross-examination, but we ought not get to
4 that point. It's junk science.
5 Thank you, Your Honor.
6 Do you have any questions?
7 THE COURT: I don't, Mr. Brennan. Thank you very
8 much.
9 MR. ACKER: Your Honor, let me start with Dr.
10 Pisano. Mr. Singer's point, I think, the nub here is really
11 this Yankee study and whether or not Dr. Pisano had any
12 knowledge about that before he came to his opinion. And
13 Mr. Singer now is pointing to a fuller explanation of that
14 study in trying to rehabilitate Dr. Pisano. The fact is Dr.
15 Pisano came to his opinion with no knowledge of that study,
16 and he testified to that under oath.
17 At his deposition he was asked, do you know who
18 responded, how many, who at the various companies, anything
19 like that. I don't have details on who responded. He was
20 asked, do you know anything about what procedures, though,
21 were employed here. I don't know the specific procedures,
22 no. Do you know what checks were employed to make sure that
23 this survey was done on a sound basis, what kind of
24 procedural mechanisms. I don't have details on that, no.
25 So the sworn testimony of the expert is I didn't

1 know anything about this study, but that's what I based my
2 opinion on. We submit to you that goes beyond simply fodder
3 for cross-examination and that is an improper method this
4 Court should not allow to go to the jury.
5 With respect to Mr. Davis, I want to make a couple
6 of points. First of all, I didn't hear Mr. Normand point to
7 a single case from this circuit or any circuit in which a
8 lawyer was allowed to testify as an expert on a law that
9 would control the outcome of a case. I would urge the Court
10 to go back and look at the Specht case because the Tenth
11 Circuit was extremely clear, and they said, however, when
12 the purpose of testimony is to direct the jury's
13 understanding of the legal standards upon which their
14 verdict must be based, the testimony cannot be allowed. In
15 no instance can a witness be permitted to define the law of
16 the case.
17 Mr. Normand in a slight of hand tried to divide up
18 Mr. Davis's testimony and say one was going to be this
19 custom and practice testimony. Well, we submit to you what
20 Mr. Davis has done in his legal career and whether he's ever
21 seen a contract like this, whether he's ever done a contract
22 like this is irrelevant. I mean the Court should not permit
23 him to come in here and say I've been a licensing lawyer for
24 40 years and I've never seen a contract like this. That's
25 irrelevant to the fact that there is a contract like this

1 and this jury is going to have to wrestle with what that
2 contract means. So I would submit that part of his
3 testimony is wholly irrelevant.
4 The second part of his testimony, and I think it's
5 pretty clear from Mr. Normand's argument that he's saying
6 he's going to use his knowledge of copyright law and he's
7 going to tell this jury, based on his knowledge of copyright
8 law, looking at the exact language of Amendment No. 2, the
9 UNIX copyrights must have transferred. At base level, that
10 is what his testimony will be. That's why they want his
11 testimony, but that is usurping the function of this Court
12 and we think it's wholly in violation of Specht and Tenth
13 Circuit law. And they haven't cited a single case to give
14 this Court comfort that that sort of testimony should be
15 allowed.
16 The cases that they rely on, other than the cases
17 I distinguished earlier, the patent law cases on invalidity
18 and noninfringement, that's a wholly different method. That
19 was where a technical expert is informed by the court as to
20 what the laws are in infringement, what the laws are on
21 invalidity, and that expert -- that technical expert takes
22 that knowledge from the court, that law, and then applies it
23 to the technical expertise that he or she brings to the
24 courtroom.
25 That's not what is going to happen here.

1 Mr. Davis is going to come in here and look at the jurors
2 and tell them all about copyright law and tell them why his
3 understanding of copyright law means that SCO must win. At
4 base, that is wholly improper testimony. We think it
5 violates clear Tenth Circuit law and simply should not be
6 allowed.
7 So unless the Court has questions, I will submit
8 it on that.
9 THE COURT: I don't, Mr. Acker. Thank you.
10 Mr. Hatch, Mr. Singer, Mr. Normand, I'll give you
11 each 30 seconds if you want to stand right there and say
12 something.
13 MR. HATCH: Your Honor, real quickly, you know,
14 Mr. Brennan put up our snapshot, and one of the things he
15 didn't do, you'll notice that he never gave any other
16 explanation. He pointed to a couple outliers, beginning of
17 the stock prices, pretty level, dropped, gave no other
18 explanation. He then goes into R-Squared, which even the
19 Griffin case, and I can quote from that, says, we agree that
20 R-Squared alone cannot determine the validity of the model.
21 He mixes up concepts with the P-value that's important, and
22 Dr. Botosan said the P-value shows .21 of one percent chance
23 that this drop could have been for anything other than this
24 statement. She says it couldn't have been by chance.
25 He talked about the stock coming back. What he

1 doesn't bother to tell the Court is, yeah, it rebounded
2 because they retracted -- for a period of time they
3 retracted and said, yeah, it looks like SCO does own the
4 copyright, and it immediately went up. So if we go -- and
5 Dr. Botosan deals with each of those points in her report.
6 But as I listened to Mr. Brennan, all it again
7 shows me is that there is going to be a strong debate. They
8 are going to say she was out there on the ledges and being
9 too aggressive. We're going to say she was way too
10 conservative. That's a matter for the jury to decide and
11 that's a factual issue.
12 Thank you, Your Honor.
13 THE COURT: Mr. Singer.
14 MR. SINGER: Your Honor, very briefly, the
15 comments by Mr. Acker went to one of the three studies that
16 Mr. Pisano relies upon and I think illustrate that this was
17 questions -- snippets of testimony from a deposition where
18 he says, no, I don't know the details of this, but not even
19 confronting him at the deposition with the document that's
20 attached to his rebuttal report before the deposition that
21 lays out it's a thousand respondents, which he did know at
22 the deposition. There is no question about Yankee being
23 biased. There is no argument that the questions were
24 unfair. These are things that mostly go to
25 cross-examination.

1 Thank you.
2 THE COURT: Thank you.
3 Mr. Normand, anything?
4 MR. NORMAND: Your Honor, two things.
5 One, although Novell and I continue to disagree
6 whose burden it was to show an attorney by definition
7 somehow could not testify as an expert, it's a simple matter
8 of a jury instruction. Ladies and gentlemen, although this
9 man is an attorney, he is not telling you the law. I will
10 tell you the law in the case. That would resolve that
11 concern. One.
12 Two, Mr. Acker acknowledges that part of the issue
13 on remand has to be what copyrights are required. It cannot
14 be that the only witnesses who are permitted to testify as
15 to what is required are percipient witnesses who
16 participated in the negotiations. We could put someone on
17 who's an engineer at SCO who will say, here's why I think
18 they are required. Mr. Acker's objection to such testimony
19 would be, well, he can't tell the jury what the parties
20 intended. That's not the issue. The issue is the flat
21 actual question, independent of what the parties may have
22 intended in using the word, taking the word required, what
23 is required and what is not. He's not going to be telling
24 the jurors what the parties intended or how they should
25 decide what the parties intended.

1 Thank you, Your Honor.
2 THE COURT: Counsel, thank you. Your arguments
3 today have been very helpful to the Court. I appreciate
4 your brevity and focusing in on those things of most
5 importance. We'll take a ten-minute recess and then we'll
6 come back and conduct final pretrial conference.
7 (Recess)
8 THE COURT: Counsel, let me deal with a couple of
9 preliminary matters before we get to the typical final
10 pretrial conference checklist.
11 First of all, as you well know, in the trial order
12 that was submitted to the Court, there is a paragraph that
13 points out the dispute between the parties over what the
14 uncontroverted facts are. And today there was a filing from
15 the defendants requesting this Court to take judicial notice
16 of prior factual findings, findings of either Judge Kimball
17 or the Tenth Circuit. I would request from the plaintiffs
18 that they submit a response to that by Tuesday at five
19 o'clock and I'll deal with it in an order.
20 Also, in your trial order you indicate that there
21 is a dispute between the parties over those things that are
22 to be decided by the Court and those by the jury. And, to
23 my knowledge, neither of you have supplied anything to the
24 Court by way of written memorandum addressing those issues.
25 I would ask that be submitted to the Court by Tuesday as

1 well. If either of you wishes to respond to the other side,
2 I would ask that that be to the Court by Thursday at
3 five o'clock.
4 I do want to say this. As a general matter, I
5 want both of you to avoid reference to the prior decision by
6 Judge Kimball or the Tenth Circuit. And if you have
7 something that you think needs to be brought to the jury's
8 attention that makes reference to either of those prior
9 decisions, I want you to make it known to the Court in
10 advance. And I want to give the other side an opportunity
11 to respond to it. I do want you to know, as a general rule,
12 I'm going to be very hesitant to allow reference to those
13 things because I believe that it would be confusing to the
14 jury and also very prejudicial. That is speaking just very
15 generally, however.
16 Again, if either of you during the course of the
17 trial see that you need to, in addressing a witness or
18 cross-examination of a witness, anticipate making reference
19 to Judge Kimball's decision or the Tenth Circuit decision, I
20 want that brought to my attention. We can deal with it in a
21 side-bar or before the trial begins or after the trial ends
22 on any given day.
23 Do any of you have any questions about those
24 items?
25 MR. ACKER: No, Your Honor. Thank you.

1 THE COURT: Let's then go to the typical checklist
2 that the Court has. First of all, this matter is scheduled
3 to begin for trial on Monday, March 8th. The Court has
4 scheduled three weeks, 15 trial days. Is there any reason
5 why either side believes that three weeks is not going to be
6 a sufficient amount of time?
7 MR. HATCH: No, Your Honor.
8 MR. ACKER: No, Your Honor.
9 In that regard, we have, between the parties,
10 agreed to split the time evenly down the middle. I don't
11 know how the Court would like to handle the keeping of the
12 time. Would you like the parties to do that?
13 THE COURT: Yes.
14 MR. ACKER: So we'll keep each other abreast of
15 where we think we are.
16 My understanding is the Court runs its trials from
17 8:30 to 1:30 with two 15-minute breaks; is that correct?
18 THE COURT: Roughly.
19 MR. ACKER: So about four and a half hours of
20 trial a day. We'll calculate that and divide it amongst
21 ourselves.
22 THE COURT: Mr. Acker, I need to ask you, have I
23 been mispronouncing your name?
24 MR. ACKER: My German relatives pronounce it Acker
25 and we in southern California pronounce it Acker, so Acker.

1 THE COURT: So I have been doing it right?
2 MR. ACKER: You've been right. They've been
3 wrong.
4 THE COURT: Thank you. I'll take judicial notice
5 of that.
6 I would ask, counsel, that you be here at eight
7 o'clock the first morning so we can deal with any
8 last-minute matters that we need to before we begin jury
9 selection.
10 I want to stress a couple of things. I do not
11 like surprises, particularly surprises about major
12 evidentiary rulings, and so I would ask you to anticipate
13 those. Bring them to the Court's attention out of the
14 hearing of the jury whenever possible.
15 I do like to minimize side-bars. I will indicate
16 that we have -- just recently had a rather major investment
17 made in this courtroom's facilities, and we have the ability
18 to conduct a side-bar without it being overheard by the jury
19 because we have a white noise system that apparently works
20 very well. So my hesitance to have side-bars that I've had
21 in the past is diminished somewhat because we can do it
22 without the jury hearing everything we're saying. But,
23 still, I think it's awkward, and I would ask you to try to
24 anticipate those matters that can be dealt with at breaks,
25 before and after trial, instead of having to have a side-bar

1 whenever possible.
2 The Court received the proposed pretrial order
3 yesterday and will plan to sign it today.
4 I believe we have now dealt with all the motions
5 in limine. There are the three Daubert motions we've just
6 heard argument on that remain. We'll try to get you an
7 order on those as soon as we can. I'm not aware of any
8 other motions -- I guess technically we do have the motion
9 by the defendant that I referred to a moment ago asking the
10 Court to take judicial notice of certain facts. Other than
11 that, I'm not aware of anything else.
12 Is there something, Mr. Singer? Is that what you
13 were going to address?
14 MR. SINGER: I think in addition to the judicial
15 notice motion, there is one motion on the motions in limine
16 which was taken under advisement?
17 THE COURT: Correct.
18 MR. SINGER: That was our motion regarding the
19 commentary on the outside legal sources that are following
20 the litigation.
21 THE COURT: That I think we'll just have to deal
22 with during the course of trial. Is that the one?
23 MR. SINGER: That's the one which we reserved on.
24 And I think our interest there is simply that unless perhaps
25 it's cleared with the Court in advance, we don't see there

1 to be a need to make known to the jury the name of one of
2 these Web sites which are devoted to following the case,
3 that probably everything can be said substantively without
4 mentioning the name of the particular Web sites in question.
5 THE COURT: The Court will -- is your concern --
6 tell me your concern.
7 MR. SINGER: Our concern is that by mentioning,
8 let's say, Groklaw, which is a site following and
9 criticizing SCO's position in this case, it makes it that
10 much easier -- despite the instructions that the jury will
11 receive not to do any outside investigation, that it makes
12 it more tempting and easier to go and put Groklaw into a Web
13 browser and come upon that site. We don't think we need to
14 mention the name of Groklaw or something like that to make
15 any arguments that are relevant in this trial.
16 THE COURT: I would agree. I do want there to be
17 no temptation for these jurors to be doing research on their
18 own. You are right, Mr. Singer, the Court may be as
19 specific as possible, but it doesn't always work. I will
20 just briefly recount I had one case involving a lawsuit
21 against Wal-Mart, a major lawsuit, took a long time. The
22 reason I remember this is because it happened in September
23 of 2001. And at the end of the trial it was revealed to the
24 Court that a juror was going home at night, despite the
25 instructions that were repeated most days at trial, and was

1 getting on the Internet and investigating other lawsuits
2 against Wal-Mart for similar conduct. I ended up having to
3 declare a mistrial, which was most unfortunate because
4 thereafter they declared bankruptcy. It wasn't Wal-Mart, it
5 was Kmart. They declared bankruptcy. It was a horrific
6 experience for everybody.
7 So I am very sensitive to that, and I do not want
8 to do anything that would make it any easier for a juror in
9 a three-week trial becoming really interested and trying to
10 find out something on their own. So I would agree with
11 that, Mr. Singer. Thank you.
12 MR. SINGER: Thank you, Your Honor. We intend to
13 tell our witnesses to not inadvertently or otherwise make
14 reference to those sites in their testimony.
15 THE COURT: All right. Mr. Acker, I would ask
16 that you instruct your witnesses as well.
17 MR. ACKER: We will, Your Honor, with just one
18 caveat, and we can bring this to the Court's attention
19 during the course of trial. As the Court pointed out in its
20 ruling, there are issues, with respect to damages and what
21 was the causation of any reluctance on behalf of the
22 licensee to take a license, that do involve commentary out
23 there on these Web sites. So we can sanitize those
24 documents and we can sanitize the way we ask questions, but
25 we think that line of inquiry should be allowed. We're

1 happy to bring that to the Court's attention before we dive
2 into it.
3 THE COURT: Well, I hear nothing from Mr. Singer
4 that would indicate he's trying to make this very broad
5 ruling and you can't make reference to those sources, at
6 least not the specifics of the sources. In other words, if
7 you can ask about a Web site that may contain information
8 without showing the Web site's address or something that
9 would make it easier for the jury, the Court would
10 appreciate it.
11 MR. ACKER: I understand. Thank you.
12 THE COURT: Those facts that have been stipulated
13 to that are reflected in the pretrial order the Court does
14 intend to read to the jury at the outset of the case.
15 I know that you are concerned about the jury pool,
16 and we've instructed our office here to give us as many
17 jurors as we can seat in this courtroom to select from.
18 How many would that be, Sandy?
19 THE CLERK: 56 or 54.
20 THE COURT: So that would be how many jurors we
21 hope will be here. There are always a couple that don't
22 show up.
23 Do you want an alternate in this case, counsel?
24 MR. ACKER: I understand the Court will seat 12
25 and 12 will deliberate?

1 THE COURT: Yes.
2 MR. ACKER: Yes, we would ask for one.
3 THE COURT: Do you understand that under local
4 rule we can have as few as ten?
5 MR. ACKER: I'm aware of that.
6 THE COURT: You still want one?
7 MR. ACKER: Yes.
8 MR. HATCH: I agree, Your Honor.
9 THE COURT: All right. We'll plan to have one
10 alternate, then.
11 Let me instruct you on that right now. It would
12 be my intention not to tell the jurors who the alternate is
13 because I want us to have some flexibility. During the
14 course of any trial, but in particular a three-week trial,
15 it may become evident that one of the jurors has lost
16 interest and is not paying attention. I would like the
17 opportunity, with your agreement, to dismiss any juror that
18 we think may be not appropriately conducting themselves
19 during the course of the trial.
20 MR. ACKER: That's fine, as long as there is an
21 agreement between the parties at the time with respect to --
22 THE COURT: That's what the Court would rely on.
23 At the end of the trial, I would suggest that though juror
24 13 was the alternate, would you not both agree that juror
25 number two ought to go. If you both agree with me, then I

1 will do that. Otherwise, it will be the number 13 juror.
2 MR. HATCH: As long as we have an opportunity to
3 talk about it at the end.
4 THE COURT: We certainly would, yes. But I don't
5 want us or anyone else to intimate the juror seated on the
6 bottom of that side is the alternate juror from the
7 beginning so they are paying attention thinking they will
8 not deliberate.
9 MR. HATCH: They will already feel bad they don't
10 have nice little chairs.
11 THE COURT: They will. We'll give them one. We
12 don't discriminate.
13 Let me ask you, as to your expert witnesses,
14 counsel, I appreciate the fact that you understand I request
15 a vitae that will be attached and will be submitted to the
16 jury, and I would request that when you on direct set the
17 qualifications for the witness, that you keep it to five or
18 ten minutes, that you do not go into lengthy, detailed
19 qualifications because the jurors will have the vitae that
20 will be submitted to them.
21 I believe you had discussions with Ms. Malley
22 about your exhibit lists. If I may --
23 MR. HATCH: Your Honor, just on the vitae
24 question, you know, I mean do you have any limitations on
25 what is included in that? Do you just want the ones that

1 are submitted as part of the reports?
2 THE COURT: I don't want the reports submitted. I
3 want the vitae that would have -- I've never had that
4 question asked before. I think it's pretty much understood
5 what a vitae consists of.
6 MR. HATCH: I understand. The vitae should be
7 probably the one that was submitted with the report,
8 correct?
9 THE COURT: Unless I hear otherwise, I would --
10 Mr. Hatch, don't speak over me. I would say the answer to
11 that is yes unless I hear objection from the other side.
12 MR. HATCH: Thank you.
13 THE COURT: Mr. Acker, do you object?
14 MR. ACKER: No, Your Honor.
15 THE COURT: The exhibit list, any questions about
16 the exhibit lists?
17 MR. SINGER: No, Your Honor. The parties are
18 working out a process of exchanging objections over the next
19 few days and resolving as many of those issues as possible.
20 THE COURT: All right. Thank you.
21 Trial briefs will be due on this coming Monday.
22 You already submitted your proposed voir dire questions. I
23 understood, based on a conversation that one of you had with
24 my law clerk, that you were contemplating perhaps suggesting
25 or requesting an agreement between you as to what questions

1 ought to be asked of the jury. Is there anything further on
2 that?
3 MR. ACKER: We can talk during the week and over
4 the next few days and see if we can come to an agreement
5 between the two competing questions and see if we have
6 objections.
7 MR. SINGER: We'll try our best to reach
8 agreement.
9 THE COURT: If not, I will just make my best
10 judgment of what ought to be asked. Please understand that
11 after I've asked the questions, I will always have a
12 side-bar. If you think there is something that needs to be
13 asked that I did not, I will give you the opportunity to
14 make that argument.
15 The one thing that I do want to add here, counsel,
16 I believe it's been requested of you that you submit your
17 exhibits to me in a DVD form. I like to put them on my
18 computer so I have the opportunity to refer to them, even if
19 you are not. So if you would do that and get them to the
20 Court as soon as you can.
21 How are you doing on jury instructions?
22 MR. ACKER: Would you like hard copy as well for
23 Your Honor or just the electronic?
24 THE COURT: Just the electronic.
25 MR. ACKER: On jury instructions we've exchanged.

1 We're in the meet and confer process. We hope to have to
2 the Court on Monday those that are agreed upon and those
3 which there is dispute, which we'll give the Court competing
4 versions.
5 THE COURT: All right.
6 MR. ACKER: Does the Court want -- I've seen the
7 Court's standard instructions. My operating assumption was
8 that you just want the substantive instructions in addition
9 to standard or do you want a complete set that includes your
10 standard instructions as well from us?
11 THE COURT: Just give us those substantive ones
12 that you agree on and those you disagree on and we'll
13 incorporate our own standard, okay?
14 MR. ACKER: Very well.
15 THE COURT: You say we'll have that by Monday, Mr.
16 Acker?
17 MR. ACKER: Yes, Your Honor.
18 THE COURT: My understanding, you both have your
19 evidence experts coming here on Friday to go through our
20 system. Do you have any other special needs that we need to
21 be aware of, counsel?
22 MR. SINGER: Does the Court have any objection to
23 the use of a laptop at counsel table from time to time
24 during the trial?
25 THE COURT: No. Apparently one of you requested

1 that we have a screen that would show the audience, if you
2 will, what is being displayed. I will not permit that. If
3 I may just generally say, this trial has the potential of
4 becoming a little bit of a circus, and I will do anything I
5 can to avoid that. And I think that we've managed to get by
6 for a long time without having those types of demonstrations
7 made to those sitting in the courtroom, and I would avoid
8 that in this case unless there is a really compelling reason
9 for it.
10 MR. ACKER: I understand, Your Honor.
11 Just on experts, again, I assume there's a
12 standing rule on witnesses that are not experts. Will the
13 Court permit experts to sit and listen to other witnesses'
14 testimony?
15 THE COURT: Yes.
16 MR. ACKER: There is a standing order as to any
17 other percipient witness?
18 THE COURT: Traditionally I would ask the first
19 day do either of you want to invoke the exclusionary rule.
20 Always they do, and the witnesses are excluded. I'll assume
21 you are invoking it by asking the question, and so the
22 exclusionary rule will apply and no witness can be in the
23 courtroom until he or she is called to testify.
24 MR. ACKER: Very well, Your Honor.
25 THE COURT: Counsel, in the trial order that you

1 would have received, there is a section entitled courtroom
2 conduct. And it's just a brief listing of things that the
3 Court would like you to comply with. I would encourage all
4 of you to read it between now and the 8th so you remind
5 yourself of those little peculiarities that I may have in
6 the way I conduct the trials.
7 Counsel, that is my checklist. Do you have
8 anything else?
9 MR. ACKER: I have been briefed a bit on your voir
10 dire procedures, Your Honor. If I could tell you what I
11 understand and then you correct me where I've got it wrong.
12 THE COURT: Why don't you just let me tell
13 everybody here.
14 MR. ACKER: That will be great.
15 THE COURT: Based on what you have submitted, I
16 will -- let me first back up. We do have a questionnaire
17 that we give the potential jurors that they fill out before
18 they come down here. If you don't have a copy of that,
19 please get it from Ms. Malley before you leave here today.
20 Basically, after a few preliminary matters, we'll
21 have the jurors go one by one and answer that questionnaire.
22 It just goes to the issues about their employment, their
23 kids, what they like to read, their hobbies, and things like
24 that. After that I then will ask a series of questions. I
25 will rely on primarily on what you have submitted, and I

1 will try to include those that I think appropriately should
2 be asked.
3 After I have done that, I will ask a series of
4 questions -- let me back up. All those are answered here in
5 the courtroom in the presence of everybody.
6 Towards the end of that process, I then ask a
7 series of questions that I don't want the jurors to respond
8 to here. They deal with matters of prejudice, or something
9 else that I don't want them to be expounding on in front of
10 other jurors.
11 After I've asked those questions, I will then have
12 a side-bar, give you the opportunity to suggest other
13 questions, generally of a personal nature. We'll then bring
14 the jurors that want to answer the personal questions back
15 into the conference room behind me here with each of you.
16 We'll have them come in one at a time, answer the questions.
17 I'll give you the opportunity to ask them what you think
18 needs to be asked.
19 After we've done that, I will then tell you those
20 jurors I intend to dismiss for cause. We'll then come back
21 here and you'll exercise your three preemptories.
22 Does that answer your question?
23 MR. ACKER: It does. Just a couple of questions,
24 Your Honor. I understand that the preemptory strikes are
25 blind strikes, in other words, both sides will strike at the

1 same time, we'll excuse those jurors and move on to the next
2 round, as opposed to plaintiffs striking, we see who they
3 struck and then we strike?
4 THE COURT: The second is what we do. We'll have
5 a sheet of paper with all the jurors on it and it will
6 indicate those that are dismissed for cause based on what
7 happens back behind us. We'll then bring it out and we'll
8 have three preemptories exercised. Normally I think
9 plaintiff goes first. They will strike it. Ms. Malley will
10 then show you that sheet, you will see who they struck, you
11 will do yours, and just go back until the three have been
12 done.
13 MR. ACKER: Then the strikes, are we allowed to
14 strike into the panel or just who is in the box with the
15 three preemptories?
16 THE COURT: Anybody in the courtroom.
17 MR. ACKER: I assume they will be in order so we
18 will know who's coming up next in the box?
19 THE COURT: Once people come in here, once the 50
20 of them come in here, they don't go out except for the break
21 we have when we bring the jurors in one at a time back here.
22 There is nothing in the box.
23 Does that answer your question?
24 MR. ACKER: I understand.
25 THE COURT: Mr. Hatch.

1 MR. HATCH: Your Honor, I would assume at some
2 point you'll ask us to introduce ourselves and our client?
3 THE COURT: That all happens in the preliminaries
4 before we begin the jury selection.
5 MR. HATCH: One question, you know, my client is
6 in bankruptcy, and we will have the trustee, Judge Cahn,
7 here or one of his representatives I assume at the beginning
8 of the trial and probably throughout. I don't have any
9 intention to introduce him. And it seems to me, I don't see
10 any reason why the bankruptcy should be mentioned at any
11 point during the proceedings, unless you -- I don't know if
12 you ever intend to reference it. It maybe seems like that
13 ought to be -- if you have some reason to be, you ought to
14 bring it to us in advance.
15 THE COURT: I would agree.
16 Mr. Acker, think about it. If you contemplate
17 that you intend to, I want you to bring it to my attention
18 before the -- during the break, the morning of the trial,
19 whatever the case may be, whenever that may happen. All
20 right?
21 MR. ACKER: Very well.
22 THE COURT: I would agree with you, Mr. Hatch, do
23 not introduce the bankruptcy trustee.
24 MR. HATCH: I'm happy to introduce him to Your
25 Honor, but we'll do that early on.

1 THE COURT: That's fine.
2 Before we begin questioning the jurors, I will
3 have, as Mr. Hatch indicated, an introduction by you and all
4 those who will be sitting at your tables. I will also ask
5 you to identify those individuals that you intend to call as
6 witnesses. I would ask that you would just, in addition to
7 their name, have some identifying characteristics, something
8 as simple as who they work for, or where they live, anything
9 like that because we do want to briefly provide some context
10 for the potential jurors because the whole purpose of this
11 is to see whether or not any of them know those individuals
12 you intend to call as witnesses.
13 Mr. Singer.
14 MR. SINGER: Your Honor, I just wanted to note
15 that Mr. Jacobs and I had discussed before trial a few
16 things which we reached agreement on, people who may be with
17 us during the jury selection process who would not be
18 identified. I think one on each side.
19 THE COURT: Jury selection experts?
20 MR. SINGER: Yes, Your Honor.
21 MR. HATCH: My intention would be we would
22 introduce the lawyers and the client and just ignore them,
23 if that's okay.
24 THE COURT: I would rather they at least be
25 introduced, but just give a name.

1 MR. HATCH: Just give a name?
2 THE COURT: Just a name.
3 Anything else?
4 The reason why I don't want some mysterious person
5 sitting at the table and the jurors wondering why was
6 everybody else introduced except for him or her, unduly
7 speculating as to say what their role in this thing is.
8 Mr. Brennan.
9 MR. BRENNAN: Yes, thank you, Your Honor.
10 We are mindful of the rulings on the remaining
11 motions in limine this morning. There are, we think, some
12 important issues regarding the application and scope, for
13 example, First Amendment issues and privileges. We believe
14 it might be helpful to the Court, if the Court were to agree
15 with us, to have a hearing at some juncture between now and
16 the start of trial to more further explore those primarily
17 because of our view of the nature of the issues and the need
18 for the Court to make legal decisions regarding the scope
19 and application of those issues.
20 So I wanted to at least stand and see if that
21 might be something that we could schedule with the Court so
22 we could have a full presentation on these critical First
23 Amendment issues we've been grasping.
24 THE COURT: Mr. Brennan, the dilemma is that you
25 were given your best shot to provide case law. What I need

1 is case law. I don't need argument. I need case law. If
2 you can come up with some case law between now and the time
3 that this Court instructs the jury, then I would want it.
4 But other than that, I see no reason to have a
5 separate hearing on that issue. I think I will be curious
6 to see what jury instructions you come up with. And we'll
7 be doing the work we need to during the course of the trial
8 to help make those decisions. But let's just play that one
9 by ear. I don't want between now and the trial, because I
10 will have a very busy week next week, but until the Court
11 actually instructs the jury, I think this issue can wait.
12 MR. BRENNAN: I appreciate that. Perhaps stated
13 another way, although I may anticipate the Court's response,
14 is whether, in essence -- some of these issues, in essence,
15 ought to be bifurcated. I'm not suggesting that we continue
16 the trial for that purpose, but whether the Court believes
17 that in addition to legal authorities, there would need to
18 be some sort of evidentiary presentation to the Court so it
19 can make its determination?
20 THE COURT: On the question about the First
21 Amendment? Well, if you want to submit a motion to that
22 end, I would prefer that we deal with it on paper.
23 MR. BRENNAN: Thank you, Your Honor. I
24 understand. Appreciate the instruction.
25 THE COURT: If you intend to, then do it --

1 MR. BRENNAN: If we do it by Tuesday?
2 THE COURT: That would be very helpful.
3 MR. BRENNAN: Thank you, Your Honor. Appreciate
4 it.
5 THE COURT: Again, counsel, if you, Mr. Singer,
6 Mr. Hatch, if you would respond by Thursday.
7 Do you see a need for a hearing on the
8 constitutional issues?
9 MR. SINGER: No, Your Honor, we don't. We think
10 that the motions in limine briefed the issues. We'll
11 continue to work on the jury instructions. We think this is
12 appropriately dealt with in the framing of jury instructions
13 and verdict form.
14 THE COURT: Again, if any of you come up with any
15 additional law, you know, I would want it not only by next
16 Tuesday, but during the course of the trial if something
17 should come to your attention. It really is, to me, a
18 purely legal issue and it's a very intriguing issue, and all
19 the help you can give the Court would be appreciated.
20 All right. Mr. Singer, do you have anything else?
21 MR. SINGER: I think we may have one or two other
22 issues that Mr. Hatch was going to address.
23 THE COURT: Go ahead, Mr. Hatch, as long as you
24 don't talk when I'm talking. All right.
25 MR. HATCH: One is more administerial, opening

1 statements. I don't know if you want to address how long
2 each party will take. We also have an issue that we would
3 like during the course of ours, if it would be acceptable to
4 Your Honor, given the type of case, to be able to use two
5 different lawyers presenting our opening statement.
6 THE COURT: Because of the nature of the case, I
7 will allow two attorneys both for openings and closings on
8 either side. All right.
9 MR. HATCH: Okay. Do you have any care about the
10 length?
11 THE COURT: Well, I do, but tell me what you are
12 thinking. Tell me how much I have to care.
13 MR. HATCH: Well, I recall a conversation like
14 this with you once before, but we would suggest an hour each
15 side.
16 MR. ACKER: An hour is fine.
17 THE COURT: Let's plan on no more than an hour for
18 openings. I think it becomes more interesting when it comes
19 to the question of how long for closings. But we'll deal
20 with that at the end of the three weeks.
21 MR. HATCH: The other issue, there are some
22 witnesses that we would -- we've started discussions with
23 Novell. There are some issues that we believe are under
24 their control that we would like to be able to call in our
25 case in chief, particularly in the first week, so that we

1 don't have to read depositions and then they provide the
2 person live during the course of their case. I don't know
3 how Your Honor would prefer to handle that.
4 THE COURT: My preference is that you just work
5 with each other and show one another respect -- professional
6 respect and allow that to happen. I think it would be a
7 disadvantage to the jury for it to happen in the way that
8 you just described. So I would request that you try to work
9 that out. If you can't, then bring it to my attention, and
10 then I will order if I must.
11 MR. HATCH: Thank you, Your Honor.
12 I think we've handled everything else, Your Honor.
13 THE COURT: All right.
14 Mr. Acker, Mr. Brennan, do you have anything else?
15 MR. ACKER: Your Honor, given the procedure for
16 jury selection, can we anticipate openings not taking place
17 on the 8th and beginning on the 9th?
18 THE COURT: You know, I really don't know how well
19 this will go. This is not a typical trial in one respect,
20 and that is this case has such a long history and the
21 greatest concern I'm going to have is whether or not we find
22 jurors with some knowledge of the case. That to me is the
23 greatest dilemma. If we end up with a whole bunch of people
24 standing up and saying they want to come back and talk with
25 us, that takes a lot of time. But I would ask that you be

1 prepared in case we somehow whip through this thing and we
2 finish at 11:30, and that would give us two more hours and I
3 would like to not waste that time.
4 I need you to know that I am always very, very
5 sensitive to the jury time concerns. And I don't want us to
6 waste time. I don't want us to have the jury going home
7 early some days because a witness for some reason is not
8 available and stuff like that. If we're going to impose
9 three weeks on their lives, I want us to be as efficient as
10 we can.
11 To be specific, if we can, I would like to do
12 openings Monday. If, however, it's obvious that only one of
13 you can do it, then I probably will wait and let you both do
14 it at the same time. I think that's the only fair thing to
15 do.
16 MR. ACKER: Appreciate that, Your Honor. We don't
17 have anything else.
18 THE COURT: Counsel, I want to thank you because
19 of the level of cooperation that you have demonstrated to
20 this point. I think it was very wise for you to, for
21 example, have the motion in limine deadline when it was
22 instead of what would have been next Monday, which would
23 have been a nightmare. I hope you will continue to show
24 that level of professionalism and cooperation throughout the
25 course of this trial. And, again, I do want to thank you

1 for that which you have displayed to this point.
2 If there is nothing else, we'll be in recess until
3 eight o'clock on the 8th.
4 (Whereupon, the proceeding was concluded.)
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

2

3

4 I hereby certify that the foregoing matter is

5 transcribed from the stenographic notes taken by me and is a

6 true and accurate transcription of the same.

7

8

9

10

11

12

13

14

15

16 PATTI WALKER, CSR-RPR-CP DATED:
Official Court Reporter
17 350 South Main Street, #146
Salt Lake City, Utah 84101
18 801-364-5440

19

20

21

22

23

24

25