

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

--oOo--

THE SCO GROUP, INC.,

Plaintiff/Counterclaim Defendant,

vs.

No. 2:04CV00139

NOVELL, INC.,

Defendant/Counterclaim Plaintiff,

_____ /

Videotaped Rule 30 (b)(6) Deposition of

AARON J. ALTER

Friday, April 27, 2007

Reported by:

Leslie Rockwood

CSR No. 3462

Job No. 193580B

1 APPEARANCES:
2
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5 -and-
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23 For The Witness:
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The Videographer: Marty Majdoub

1 BE IT REMEMBERED that on Friday, April 27, 2007,
2 commencing at the hour of 1:03 p.m., at the law offices
3 of Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road,
4 Palo Alto, California, before me, LESLIE ROCKWOOD, a
5 Certified Shorthand Reporter in the State of California,
6 personally appeared
7 AARON J. ALTER
8 called as a witness by the Plaintiff-Counterclaim
9 Defendant in the above-entitled action, who, having been
10 duly sworn, by the Certified Shorthand Reporter to tell
11 the truth, the whole truth and nothing but the truth,
12 testified under oath as follows:
13
14 --oOo--
15 THE VIDEOGRAPHER: Good afternoon. Here
16 begins Videotape Number 1 in the deposition of Aaron
17 Alter in the matter of SCO Group versus Novell, Inc., in
18 the United States District Court for the District of
19 Utah, case number 2:04CV00139.
20 Today's date is April 27th, 2007. The time
21 is 1:04 p.m. This deposition is being taken at 650 Page
22 Mill Road, Palo Alto, California. The videographer is
23 Marty Majdoub, here on behalf of Esquire Deposition
24 Services, 505 Sansome, Suite 502, San Francisco,
25 California.
Would all counsel please identify yourselves

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20
21 --oOo--
22
23
24
25

1 and state whom you represent.
2 MR. NORMAND: Ted Normand from Boies,
3 Schiller & Flexner, for The SCO Group.
4 MR. TIBBITTS: Ryan Tibbitts, general counsel
5 for The SCO Group.
6 MR. BRAKEBILL: Ken Brakebill, Morrison &
7 Foerster, for Novell.
8 MR. PARNES: Mark Parnes, Wilson Sonsini
9 Goodrich & Rosati, on behalf of the witness, Aaron Alter.
10 THE VIDEOGRAPHER: Would the court reporter
11 please swear in the witness.
12 THE REPORTER: Raise your right hand, please,
13 Mr. Alter.
14 You do solemnly state that the evidence you
15 shall give in this matter shall be the truth, the whole
16 truth and nothing but the truth, so help you God.
17 THE WITNESS: I do.
18 EXAMINATION BY MR. NORMAND
19 Q. Good afternoon, Mr. Alter. I'm going to hand
20 you what's previously been marked as Exhibit 1066.
21 Exhibit 1066 is SCO's Notice of Subpoena to Wilson
22 Sonsini dated February 9th, 2007. And the last page is
23 titled Exhibit A, Topics for Deposition. And I want to
24 ask if you are prepared to address Topics 1 and 2 listed
25 in that Exhibit A.

13:05:47 1 A. I am.

13:05:51 2 Q. And can you tell me what you did to prepare

13:05:55 3 yourself to testify to Topics 1 and 2?

13:05:58 4 A. I met with Mark Parnes and with counsel for

13:06:09 5 Novell, Ken. I viewed the declarations of Tor Braham and

13:06:21 6 David Bradford. And I reviewed certain documents that

13:06:30 7 were executed and prepared contemporaneously with the

13:06:35 8 timing of the transaction.

13:06:38 9 Q. Is there anything else that you did to

13:06:40 10 prepare?

13:06:41 11 A. No.

13:06:49 12 Q. Can you tell me what you and Mr. Brakebill

13:06:52 13 and Mr. Parnes discussed?

13:06:54 14 MR. PARNES: Well, I'll instruct not to

13:06:56 15 answer based on attorney-client privilege and the theory

13:06:59 16 being, one, discussions with me is being privileged as

13:07:02 17 his counsel, and two, the privilege with respect to with

13:07:04 18 Novell is that they reflected communications concerning a

13:07:07 19 former client of the firm.

13:07:10 20 MR. NORMAND: Well, wasn't Mr. Brakebill part

13:07:11 21 of the discussion?

13:07:12 22 MR. PARNES: He was.

13:07:13 23 MR. NORMAND: You don't regard him as a third

13:07:16 24 party?

13:07:16 25 MR. PARNES: No.

13:07:17 1 MR. NORMAND: And that's because he

13:07:19 2 represents Novell?

13:07:20 3 MR. PARNES: Correct.

13:07:21 4 Q. BY MR. NORMAND: And did any of the documents

13:07:22 5 that you reviewed refresh your recollection as to Topics

13:07:27 6 1 and 2?

13:07:27 7 A. To a certain extent.

13:07:30 8 Q. And could you identify any of those

13:07:32 9 documents?

13:07:35 10 A. So the declarations, primarily, and the asset

13:07:43 11 purchase agreement and the portions of the schedules

13:07:50 12 thereto.

13:08:03 13 Q. Did you speak with anyone else in preparation

13:08:06 14 for your deposition today?

13:08:07 15 A. I did not.

13:08:08 16 Q. How were you employed in 1995?

13:08:11 17 A. I was an employee of Wilson Sonsini at that

13:08:16 18 time.

13:08:16 19 Q. Were you an associate at that point?

13:08:19 20 A. I was a partner already. I --

13:08:26 21 Q. And when had you become a partner?

13:08:28 22 A. So I became a partner in 1993.

13:08:32 23 Q. What year did you graduate from law school?

13:08:35 24 A. In 1985.

13:08:37 25 Q. And how are you employed now?

13:08:42 1 A. As a partner here at Wilson Sonsini.

13:08:47 2 Q. What was your involvement with respect to the

13:08:52 3 asset purchase agreement or APA?

13:08:55 4 A. I assisted the senior partner on the

13:08:59 5 transaction, Tor Braham, in the transaction. And with

13:09:04 6 respect to the agreement, Tor was the primary negotiator.

13:09:12 7 And I attended, I believe, most of the negotiating

13:09:18 8 sessions concerning the agreement and helped prepare the

13:09:22 9 ancillary agreements and review the exhibits, et cetera.

13:09:31 10 Q. Is there anything else that you can recall

13:09:33 11 that you did with respect to your involvement with the

13:09:35 12 APA?

13:09:35 13 A. No.

13:09:40 14 Q. With respect to the employees of the company,

13:09:42 15 who were the principal negotiators of the APA from Santa

13:09:46 16 Cruz?

13:09:46 17 A. My recollection is the process from start to

13:09:53 18 finish was quite accelerated. It took a couple of weeks

13:10:00 19 from when a determination was made to proceed. Most of

13:10:05 20 the negotiations took place in the offices of Brobeck

13:10:10 21 Phleger & Harrison, counsel to SCO. And it was almost

13:10:13 22 exclusively between lawyers and outside lawyers at that.

13:10:19 23 Q. You're saying that -- I guess you called it a

13:10:24 24 two-week process; is that right? Or a couple of weeks, I

13:10:26 25 think you said?

13:10:28 1 A. So this was September of '95, and I think the

13:10:34 2 document drafts started in early that month, and as you

13:10:41 3 know, got signed up by the third week of that month.

13:10:43 4 Q. Do you recall whether there were negotiations

13:10:52 5 before September of '95 with respect to what became the

13:10:55 6 asset purchase agreement?

13:10:59 7 A. I do not.

13:11:00 8 Q. From the Brobeck side, who do you recall

13:11:04 9 being involved in the negotiations regarding the APA?

13:11:07 10 A. Jeff Higgins, primarily, who was, I think, a

13:11:12 11 junior partner at that time, about my vintage, and a

13:11:16 12 senior partner named Ed Leonard.

13:11:21 13 Q. Anyone else that you can recall from the

13:11:24 14 Brobeck side?

13:11:24 15 A. No.

13:11:30 16 Q. Can you recall whether there were any

13:11:32 17 participants in these negotiations from Santa Cruz

13:11:35 18 itself?

13:11:36 19 A. I don't recall the involvement of any

13:11:38 20 executives nor in-house counsel from the Santa Cruz

13:11:41 21 operation being present when I was involved.

13:11:47 22 Q. And when did your involvement begin?

13:11:50 23 A. I would say those last -- those two, two and

13:11:53 24 a half weeks in September.

13:11:54 25 Q. So if I told you the APA was signed

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13:11:58 1 September 19, 1995, does that help you better estimate
 13:12:02 2 when you think your involvement began?
 13:12:04 3 A. I'm not sure what you mean by "involvement,"
 13:12:06 4 Ted. What is it that you're --
 13:12:08 5 Q. I thought what you had said was -- and I may
 13:12:12 6 have misunderstood -- but your involvement coincided with
 13:12:17 7 the time when the attorneys were primarily at Brobeck
 13:12:21 8 negotiating the language of the APA.
 9 A. Right.
 13:12:22 10 Q. Is that not right?
 13:12:23 11 A. That's my recollection given the passage of
 13:12:25 12 time, was that that was when I was most involved in the
 13:12:31 13 transaction.
 13:12:31 14 Q. Okay. Do you recall whether you had any
 13:12:34 15 involvement prior to that time when there was mostly
 13:12:39 16 negotiation in the Brobeck offices?
 13:12:45 17 A. I don't -- I don't recall.
 13:12:50 18 Q. And do you know whether anyone from Wilson
 13:12:53 19 Sonsini was involved in the negotiations leading up to
 13:12:57 20 the APA prior to the time when the attorneys were mostly
 13:13:00 21 in the Brobeck office negotiating the language?
 13:13:04 22 MR. BRAKEBILL: Foundation.
 13:13:05 23 You can answer.
 13:13:06 24 MR. PARNES: He's objecting. You can answer
 13:13:08 25 the question unless there's an instruction.

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13:13:10 1 THE WITNESS: Okay. Sorry.
 13:13:11 2 MR. BRAKEBILL: From time to time, there
 13:13:13 3 might be objections for the record.
 4 THE WITNESS: Okay.
 13:13:14 5 MR. BRAKEBILL: And unless there's an
 13:13:15 6 instruction from Mark, you can answer the question.
 13:13:17 7 THE WITNESS: Okay.
 13:13:19 8 My understanding and recollection is that
 13:13:22 9 that would have been Tor Braham.
 13:13:24 10 Q. BY MR. NORMAND: And do you know when
 13:13:26 11 Mr. Braham's participation began in the discussions that
 13:13:31 12 led up to the APA?
 13:13:32 13 A. I do not.
 13:13:33 14 Q. But I take it from your answer that you know
 13:13:38 15 it was before your involvement; is that right?
 13:13:41 16 A. I would suggest that would be likely. Tor
 13:13:48 17 was the primary point of contact in the transaction, and
 13:13:52 18 when I got called, it was to assist him with the deal.
 13:14:00 19 Q. With respect to the employees of Novell, who
 13:14:02 20 were the principal participants from the Novell side?
 13:14:06 21 MR. BRAKEBILL: Foundation.
 13:14:08 22 MR. PARNES: You can answer.
 13:14:09 23 THE WITNESS: Novell's primary offices were
 13:14:17 24 in Utah, were in Provo. And during the intense period of
 13:14:26 25 negotiation of the APA, I don't recall any Novell

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13:14:32 1 principals being present. However, I do know that we
 13:14:41 2 were in constant contact with David Bradford, the general
 13:14:45 3 counsel, and most of those communications were between
 13:14:48 4 Tor and David.
 13:14:51 5 Q. BY MR. NORMAND: When you say "most," do you
 13:14:53 6 know if they were communications between Tor and anyone
 13:14:55 7 other than Mr. Bradford at Novell?
 13:14:57 8 A. I wouldn't know.
 13:14:59 9 Q. Do you know, this is a bit redundant of what
 13:15:03 10 I asked you earlier. I asked you with respect to Santa
 13:15:06 11 Cruz earlier. Do you know whether there were discussions
 13:15:09 12 between the business people at Novell and Santa Cruz at
 13:15:13 13 any time in 1995 prior to your involvement?
 13:15:16 14 A. I would just be speculating, and I don't have
 13:15:23 15 a -- I don't have a sense of the nature and extent of any
 13:15:27 16 communications between the principals.
 13:15:31 17 Q. And what was Mr. Bradford's role after you
 13:15:36 18 became involved?
 13:15:37 19 A. Well, he was a senior VP, general counsel,
 13:15:43 20 was involved in all of the transactional work that Novell
 13:15:49 21 did, and I believe that he was in fairly constant
 13:15:56 22 communication with Tor on the course of the discussions.
 13:16:02 23 Q. And why do you believe that?
 13:16:04 24 A. Because there would be -- my recollection is
 13:16:08 25 that there would be updates and reports given at the end

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13:16:12 1 of a day or that we copied him on everything. We'd get
 13:16:17 2 feedback from him, is my recollection.
 13:16:24 3 MR. NORMAND: I take it the nature of
 13:16:28 4 Mr. Alter's discussions with Mr. Bradford is privileged
 13:16:30 5 territory; is that right?
 13:16:31 6 MR. PARNES: Well, I will assert the
 13:16:34 7 privilege. Obviously, Counsel, to the extent there's a
 13:16:38 8 waiver, we can talk about that. And I don't know what
 13:16:41 9 discussions you all have had about waiving any
 13:16:44 10 communications with David Bradford, for example. But I
 13:16:47 11 need to assert it, and then I can let counsel waive it,
 13:16:49 12 if he wants.
 13:16:51 13 MR. BRAKEBILL: I'll state for the record
 13:16:53 14 that we believe that there may be some discussions
 13:16:55 15 between Mr. Bradford and Mr. Alter or Mr. Braham or
 13:16:59 16 Wilson Sonsini that may not be privileged, and to the
 13:17:02 17 extent that Mr. Bradford was operating in a business
 13:17:05 18 capacity and no advice was being transmitted back and
 13:17:09 19 forth, just for the record.
 13:17:11 20 Q. BY MR. NORMAND: Let me ask if you have a
 13:17:13 21 view as to whether during this time, the time leading up
 13:17:18 22 to the execution of the APA, Mr. Bradford was acting in a
 13:17:21 23 business capacity or a legal capacity for Novell?
 13:17:29 24 A. So I don't have a specific recollection. I
 13:17:40 25 would say that David -- David was the senior in-house

13:17:45 1 lawyer at Novell, and he was the one who hired us. And
 13:17:48 2 we talked to him as a lawyer. He was a senior business
 13:17:54 3 guy in the sense that he was our client. But I don't
 13:17:58 4 know how better to answer that, Ted.
 13:18:06 5 Q. To what extent was Mr. Bradford involved in
 13:18:09 6 the drafting of the APA, if at all?
 13:18:13 7 A. I would speculate that he wasn't involved in
 13:18:17 8 the drafting at all, but was involved in the review of
 13:18:20 9 the document before it went over and would then review
 13:18:24 10 revisions. We wouldn't have -- I would -- I would submit
 13:18:28 11 that we wouldn't have sent off revised versions
 13:18:33 12 without -- without having reviewed them with David first.
 13:18:38 13 Q. Let me just ask for the record: Can you
 13:18:41 14 recall what the topics regarding the APA that you
 13:18:47 15 discussed with Mr. Bradford were?
 13:18:50 16 A. I don't recall discussing any specific topics
 13:18:52 17 with David.
 13:18:53 18 Q. And what were the topics that Mr. Bradford
 13:18:55 19 and Mr. Braham discussed with respect to the APA?
 13:18:59 20 A. I don't recall being in -- on meetings or
 13:19:02 21 telephone conversations where I could tell you the
 13:19:05 22 specific topics that were discussed.
 13:19:11 23 Q. So if there were discussions between
 13:19:14 24 Mr. Bradford and Mr. Braham regarding the APA, you can't
 13:19:17 25 tell me about them today; is that right?

13:19:19 1 A. That's correct.
 13:19:24 2 Q. Would it surprise you if Mr. Bradford had
 13:19:28 3 told several people that he wasn't really involved with
 13:19:30 4 the transaction and recalls almost nothing about it?
 13:19:33 5 MR. BRAKEBILL: Foundation.
 13:19:35 6 MR. PARNES: You can answer the question.
 13:19:37 7 THE WITNESS: Okay. Would it surprise me?
 13:19:45 8 It's been 12 years. He did a lot of deals with Tor and
 13:19:50 9 with me at the firm. So I guess the answer would be no.
 13:20:07 10 Q. BY MR. NORMAND: Have you had occasion to
 13:20:09 11 discuss with Tor Braham the subject matter of what you're
 13:20:12 12 testifying to today? I mean apart from 1995?
 13:20:17 13 A. Yeah. So when the litigation first arose, I
 13:20:27 14 was called by counsel for Novell.
 13:20:34 15 MR. BRAKEBILL: I would say stop there. To
 13:20:38 16 the extent that you're going to veer into the substance
 13:20:41 17 of those discussions, we believe those are privileged.
 13:20:44 18 THE WITNESS: Okay. And this would have been
 13:20:46 19 a couple of years prior. There was a -- nothing since
 13:20:53 20 initial word, there was a dispute ongoing. Tor had left
 13:20:58 21 the firm in -- I forget exactly when, but he was no
 13:21:05 22 longer at the firm. So I didn't talk with him about
 13:21:09 23 anything, really, for a long time.
 13:21:11 24 Q. BY MR. NORMAND: So you were beginning to
 13:21:12 25 allude to a conversation you had with Mr. Brakebill, I

13:21:15 1 think.
 13:21:15 2 A. I don't think it was Ken.
 13:21:17 3 Q. I'm sorry. Another counsel for Novell?
 13:21:20 4 A. Yeah, we were saying, hey, this is going on,
 13:21:23 5 we may need to talk to you -- okay.
 13:21:25 6 Q. My question was, apart from that, and I think
 13:21:27 7 you've answered it, but you didn't speak with Mr. Braham?
 13:21:31 8 A. Correct.
 13:21:31 9 Q. Have you had occasion, apart from counsel for
 13:21:34 10 Novell, to speak with anyone else -- and apart from your
 13:21:37 11 counsel today -- to speak with anyone else regarding the
 13:21:40 12 subject matter of what you're testifying to today --
 13:21:41 13 A. No.
 13:21:42 14 Q. -- apart from 1995?
 13:21:43 15 A. No.
 13:21:48 16 Q. Did James Tolonen have any role with respect
 13:21:53 17 to the negotiation of the APA?
 13:21:57 18 A. I don't recall.
 13:22:09 19 THE WITNESS: Could I have a minute, a second
 13:22:11 20 with you.
 13:22:11 21 MR. PARNES: Sure.
 13:22:12 22 THE WITNESS: Talk about something. Will you
 13:22:14 23 excuse me.
 13:22:15 24 MR. NORMAND: Of course.
 13:22:15 25 THE VIDEOGRAPHER: We are now going off the

13:22:17 1 record. The time is 1:22 p.m.
 13:23:43 2 (The witness and his counsel confer off
 13:23:43 3 the record.)
 13:23:43 4 THE VIDEOGRAPHER: We are now back on the
 13:23:45 5 video record. The time is 1:23 p.m.
 13:23:48 6 Q. BY MR. NORMAND: Mr. Alter, you've alluded a
 13:23:52 7 couple of times to Tor Braham's role. Let me just ask
 13:23:55 8 you what, in the firm's view, was Tor Braham's role in
 13:24:01 9 connection with negotiation and drafting of the APA?
 13:24:03 10 A. I would say he was the primary negotiator and
 13:24:07 11 primary drafter.
 13:24:08 12 Q. On the Novell side, you mean?
 13:24:10 13 A. Correct.
 13:24:19 14 Q. And apart from yourself, was there anyone
 13:24:22 15 else on the Novell side involved in drafting the APA?
 13:24:26 16 A. Not to my recollection. There was one other
 13:24:30 17 attorney, a junior attorney named Shannon Whisenaut who
 13:24:35 18 was on the team.
 13:24:37 19 Q. And do you know whether she did any drafting?
 13:24:40 20 A. I don't recall.
 13:24:48 21 Q. Did the business people or the attorneys set
 13:24:51 22 the terms of the deal under the APA?
 13:24:54 23 MR. BRAKEBILL: Vague and ambiguous.
 13:24:55 24 MR. PARNES: Join in the objection.
 13:24:57 25 You can answer the question.

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13:24:58 1 THE WITNESS: I think the terms of the APA
 13:25:04 2 came out of a term sheet that had been discussed and
 13:25:12 3 negotiated, and that formed the basis for the asset
 13:25:17 4 purchase agreement's preparation. So I would submit it
 13:25:21 5 was a joint effort and exercise.
 13:25:28 6 **Q. BY MR. NORMAND: Do you know who negotiated**
 13:25:32 7 **the terms of the term sheet?**
 13:25:34 8 **A. I do not. I would -- I would submit that it**
 13:25:41 9 **was -- if it was -- if the firm was involved, it was**
 13:25:44 10 **primarily Tor, and I suspect we were involved.**
 13:25:49 11 **Q. And do you have a view as to who set the**
 13:25:54 12 **terms of the term sheet on the Santa Cruz side?**
 13:25:58 13 **A. I do not.**
 13:26:00 14 **Q. You don't know if it was Mr. Higgins or**
 13:26:06 15 **Mr. Leonard or someone else?**
 13:26:10 16 **A. Well, I do not know that. Brobeck was**
 13:26:16 17 **brought in as counsel for the transaction. I don't know**
 13:26:19 18 **when they were. It's possible the term sheet was**
 13:26:22 19 **negotiated before their involvement, but I'm not sure.**
 13:26:25 20 **Q. Was the question of which assets would**
 13:26:31 21 **transfer one of the principal aspects of the deal?**
 13:26:34 22 **A. That's my recollection.**
 13:26:39 23 **Q. How did Wilson Sonsini keep Novell informed**
 13:26:43 24 **as to the developments in the negotiation of the APA?**
 13:26:47 25 **A. I believe that Tor communicated with David**

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13:26:51 1 **and perhaps others at Novell on a regular basis, but I**
 13:26:56 2 **believe his primary point of contact would have been**
 13:27:00 3 **David Bradford.**
 13:27:01 4 **Q. You say perhaps others at Novell. Do you**
 13:27:04 5 **know of anyone in particular that he might have been in**
 13:27:06 6 **touch with?**
 13:27:07 7 **A. No.**
 13:27:07 8 **Q. And why do you say that? Is it surmise?**
 13:27:11 9 **A. I'm just surmising that -- yeah.**
 13:27:22 10 **Q. Was Santa Cruz a client of Wilson Sonsini**
 13:27:25 11 **prior to the APA?**
 13:27:26 12 **A. That's my recollection, yes.**
 13:27:29 13 **Q. And do you know whether a waiver was obtained**
 13:27:32 14 **for purposes of negotiating the APA?**
 13:27:34 15 **A. I believe a waiver, conflict waiver was**
 13:27:39 16 **obtained from both. Notice was given and a waiver was**
 13:27:42 17 **obtained.**
 13:27:42 18 **Q. And do you know who was involved in that**
 13:27:45 19 **issue of the waiver?**
 13:27:45 20 **A. I don't recall.**
 13:27:46 21 **Q. Were you involved?**
 13:27:47 22 **A. If I was, I don't recall.**
 13:28:02 23 **Q. Do you know whether Novell owned a position**
 13:28:04 24 **in Santa Cruz's stock during the negotiation of the APA?**
 13:28:15 25 **MR. BRAKEBILL: Did you say negotiation?**

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13:28:18 1 **MR. NORMAND: I said during the negotiation**
 13:28:20 2 **of the APA.**
 13:28:22 3 **MR. BRAKEBILL: I thought you said**
 13:28:22 4 **acquisition. Okay.**
 13:28:22 5 **THE WITNESS: You're asking before the**
 13:28:24 6 **transaction closed and the consideration was granted, did**
 13:28:28 7 **Novell have a position at SCO?**
 13:28:30 8 **Q. BY MR. NORMAND: Correct. We'll start with**
 13:28:32 9 **that.**
 13:28:32 10 **A. I'm not aware if they did.**
 13:28:34 11 **Q. How about after the execution?**
 13:28:37 12 **A. Because a portion of the consideration was**
 13:28:40 13 **equity, yes.**
 13:28:41 14 **Q. Do you know when Novell sold that position in**
 13:28:46 15 **Santa Cruz's stock?**
 13:28:47 16 **A. I do not.**
 13:28:47 17 **Q. Was Larry Sonsini on the Novell board of**
 13:28:52 18 **directors during the negotiation of the APA?**
 13:28:54 19 **A. I know he was on Novell's board for a period.**
 13:28:56 20 **I don't recall whether that was contemporaneous with this**
 13:28:59 21 **transaction.**
 13:29:00 22 **Q. Do you know whether Mr. Sonsini was on the**
 13:29:03 23 **Novell board of directors in 2001? I know we're off**
 13:29:06 24 **topic, but --**
 13:29:07 25 **A. I don't.**

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13:29:08 1 **Q. Was Novell involved in litigation against**
 13:29:11 2 **Santa Cruz during the course of the negotiation of the**
 13:29:13 3 **APA?**
 13:29:14 4 **A. Not that I'm aware of.**
 13:29:16 5 **Q. And was Novell contemplating litigation**
 13:29:20 6 **against Santa Cruz during the course of the negotiation**
 13:29:22 7 **of the APA?**
 13:29:23 8 **A. Not that I'm aware of.**
 13:29:24 9 **Q. I understand there's probably --**
 13:29:26 10 **MR. PARNES: It's all right. He doesn't**
 13:29:28 11 **know.**
 13:29:29 12 **MR. NORMAND: -- an objection there.**
 13:30:01 13 **Q. I'm handing you, Mr. Alter, what's previously**
 13:30:05 14 **been marked as Exhibit 1, which is titled "Asset Purchase**
 13:30:08 15 **Agreement," which I think we've already been calling the**
 13:30:11 16 **APA today.**
 13:30:12 17 **I take it you recognize the document?**
 13:30:14 18 **A. I do.**
 13:30:16 19 **Q. In the APA, did Novell intend to transfer to**
 13:30:21 20 **Santa Cruz any intellectual property rights in the UNIX**
 13:30:24 21 **source code?**
 13:30:37 22 **A. I'm not sure how to answer that question in a**
 13:30:40 23 **granular fashion. I mean, I think the agreement's clear**
 13:30:44 24 **on what was transferred, in my judgment.**
 13:30:52 25 **Q. And in your judgment, does the APA transfer**

13:30:58 1 any intellectual property rights in the UNIX source code
 13:31:02 2 to Santa Cruz?
 13:31:04 3 A. My recollection of what the APA transfers is
 13:31:18 4 Novell's -- the Novell UnixWare business, that asset, and
 13:31:31 5 rights to -- certain rights that Novell had acquired from
 13:31:42 6 USL Bell Labs a couple years earlier as well as the right
 13:31:57 7 to collect in an agency capacity the royalties from the
 13:32:04 8 revenue streams from the licenses that related to the
 13:32:12 9 UNIX operating system.
 13:32:18 10 Q. And in your view, in acquiring the Novell
 13:32:21 11 UnixWare business, did Santa Cruz acquire any
 13:32:24 12 intellectual property assets in that business?
 13:32:26 13 A. I think they acquired the -- the entire
 13:32:38 14 business, including the intellectual property associated
 13:32:40 15 with the UnixWare business. UnixWare was itself a
 13:32:44 16 derivative of the UNIX operating system that they had
 13:32:48 17 bought from USL, and I don't know how else to
 13:33:00 18 characterize the assets that were transferred other than
 13:33:03 19 I've already said.
 13:33:04 20 Q. What's the basis for your view that UnixWare
 13:33:07 21 was a derivative of UNIX, if I've said that correctly?
 13:33:11 22 A. Well, my understanding is that the UNIX
 13:33:17 23 operating system back in the early '90s was developed in
 13:33:21 24 Bell Labs at AT&T, was its own business, USL, and that
 13:33:27 25 business was what was acquired by Novell in 1993. Novell

13:33:33 1 was a licensee from Bell Labs before they acquired that
 13:33:38 2 business from them, and once they acquired it, they were
 13:33:42 3 licensed -- licensed to themselves. So that they
 13:33:45 4 transferred that -- their -- their version of UNIX, if
 13:33:49 5 you will, UnixWare, as a business, to SCO. SCO was a
 13:33:55 6 UNIX operating system company with their own version.
 13:34:07 7 Q. What was the intellectual property associated
 13:34:09 8 with the UnixWare business that you understood Santa Cruz
 13:34:12 9 to have acquired?
 13:34:16 10 A. Isn't that what's set out at -- in
 13:34:19 11 Schedule 1.1(a), the assets that were transferred?
 13:34:25 12 Q. Is that your view?
 13:34:26 13 A. My view is that the IP that was transferred
 13:34:29 14 as part of this transaction was set out with specificity
 13:34:36 15 in the schedule of assets.
 13:34:43 16 Q. I don't know if you've turned to it. Is it
 13:34:46 17 the Schedule 1.1(a)?
 13:34:48 18 A. Yes.
 13:34:48 19 Q. And let me read, with your indulgence, the
 13:34:52 20 first paragraph of Schedule 1.1(a) into the record. It
 13:34:56 21 says: "All rights and ownership of UNIX and UnixWare,
 13:35:00 22 including but not limited to all versions of UNIX and
 13:35:03 23 UnixWare and all copies of UNIX and UnixWare (including
 13:35:08 24 revisions and updates in process) and all technical
 13:35:13 25 design, development, installation, operation and

13:35:16 1 maintenance information concerning UNIX and UnixWare,
 13:35:20 2 including source code, source documentation, source
 13:35:23 3 listings and annotations, appropriate engineering
 13:35:27 4 notebooks, test data and test results, as well as all
 13:35:31 5 reference manuals and support materials normally
 13:35:33 6 distributed by seller to end-users and potential
 13:35:37 7 end-users in connection with the distribution of UNIX and
 13:35:39 8 UnixWare, such assets to include without limitation the
 13:35:43 9 following."
 13:35:44 10 Do you see that language?
 13:35:45 11 A. I do.
 13:35:47 12 Q. Is it your view that this language in
 13:35:53 13 Schedule 1.1(a) includes the intellectual property
 13:35:56 14 relating to UNIX and UnixWare?
 13:35:58 15 A. Well, I don't -- I'm not sure it says -- the
 13:36:06 16 term "intellectual property," I think, is too broad. I
 13:36:08 17 think this sets out -- this is an asset purchase. And
 13:36:11 18 these are the assets, and there's a schedule of excluded
 13:36:15 19 assets which were not transferred, and I think those need
 13:36:20 20 to be read together in determining what assets are
 13:36:22 21 transferred.
 13:36:24 22 Q. When I've been asking questions about
 13:36:27 23 intellectual property, do you have an understanding what
 13:36:29 24 I meant?
 13:36:30 25 A. I think it can mean -- it's a very generic

13:36:36 1 and broad term. So if you want to be more specific, I'm
 13:36:40 2 happy to -- I'm happy to respond. I -- I'm not quite
 13:36:47 3 sure -- I'd respond that I do understand what
 13:36:50 4 intellectual property is at a general level.
 13:37:20 5 MR. NORMAND: Handing Mr. Alter what's
 13:37:22 6 previously been marked as Exhibit 1028, which is a press
 13:37:26 7 release dated September 20th, 1995.
 13:37:44 8 Q. Now, if you turn to Section 4.7 of the APA,
 13:37:50 9 which is on page 22 of the APA. Section 4.7 titled
 13:38:06 10 "Public Disclosure," says, "Buyer and seller shall issue
 13:38:09 11 a joint press release with respect to the subject matter
 13:38:12 12 of this agreement."
 13:38:13 13 Do you see that language?
 13:38:16 14 A. I do.
 13:38:16 15 Q. Do you know whether Santa Cruz and Novell did
 13:38:20 16 issue a joint press release subsequent to the execution
 13:38:23 17 of the APA?
 13:38:24 18 A. I don't recall.
 13:38:25 19 Q. When you look at Exhibit 1028, does that
 13:38:30 20 refresh your recollection as to whether that was a joint
 13:38:34 21 press release from Santa Cruz and Novell?
 13:38:38 22 A. Well, it's clearly an SCO press release, and
 13:38:41 23 given that there's a quote from Bob Frankenberg in it, I
 13:38:47 24 don't have any reason to believe this is not a joint
 13:38:52 25 press release. Joint press releases often have two

13:38:57 1 logos, two different points of contact.
 13:38:58 2 This is not technically a joint release from
 13:39:01 3 a business lawyer's perspective, but I can't imagine they
 13:39:06 4 would have quoted Bob Frankenberg without running this by
 13:39:11 5 Novell.
 13:39:12 6 Q. The second page of Exhibit 1028, in the
 13:39:17 7 second full paragraph begins: "According to the terms of
 13:39:21 8 the agreement, SCO will acquire Novell's UnixWare
 13:39:24 9 business and UNIX intellectual property."
 13:39:27 10 Do you see that language?
 13:39:29 11 A. I do.
 13:39:29 12 Q. Do you think that language is accurate?
 13:39:31 13 A. SCO clearly acquired the UnixWare business
 13:39:39 14 from Novell and certain UNIX intellectual property.
 13:39:45 15 Q. And that's what I've been meaning to ask.
 13:39:49 16 What is the certain intellectual property that you have
 13:39:51 17 in mind, if any?
 13:40:02 18 A. The certain intellectual property would be
 13:40:04 19 the assets that are set out at Schedule 1.1(a) and
 13:40:09 20 excluding those assets that are set out in
 13:40:11 21 Schedule 1.1(b).
 13:40:12 22 Q. And apart from that answer -- and we can, I
 13:40:15 23 guess, look at that language, but do you have any
 13:40:17 24 particular intellectual property in mind when you say
 13:40:19 25 that?

13:40:20 1 A. I do not.
 13:40:26 2 Q. Now, let me make sure I understand what you
 13:40:29 3 mean by "intellectual property." Is the source code
 13:40:31 4 itself intellectual property?
 13:40:39 5 A. Is source code itself intellectual property?
 13:40:46 6 I would say yes.
 13:40:58 7 Q. Are trademarks intellectual property?
 13:41:00 8 A. Yes.
 13:41:01 9 Q. Are copyrights intellectual property?
 13:41:03 10 A. Yes.
 13:41:03 11 Q. Are patents intellectual property?
 13:41:05 12 A. Yes.
 13:41:05 13 Q. Are trade secrets intellectual property?
 13:41:09 14 A. Sure.
 13:41:11 15 Q. Is there any other category of intellectual
 13:41:15 16 property that you can think of that I haven't mentioned?
 13:41:18 17 A. Not off the top of my head.
 13:41:20 18 Q. Do you know whether the Wilson Sonsini firm
 13:41:26 19 reviewed and approved this press release?
 13:41:29 20 A. I don't recall.
 13:41:30 21 Q. Do you know whether Mr. Braham reviewed and
 13:41:33 22 approved it?
 13:41:34 23 A. I don't recall.
 13:41:37 24 Q. In the language from Schedule 1.1(a) that I
 13:41:53 25 read into the record, towards the end, the language says,

13:41:56 1 "Such assets to include without limitation the
 13:41:58 2 following."
 13:41:58 3 Do you see that language?
 13:41:59 4 A. I do.
 13:42:00 5 Q. What does "without limitation" mean in that
 13:42:08 6 paragraph?
 13:42:08 7 A. I would read it to mean that to the extent a
 13:42:14 8 specific intellectual property asset of a type that the
 13:42:24 9 parties intended to be included in these categories was
 13:42:29 10 not specifically called out, that either in this exhibit
 13:42:35 11 or Exhibit 1.1(b), that it would have been the intention
 13:42:38 12 to include those. So, for example, if there was an
 13:42:48 13 iteration of one of these products that's not
 13:42:52 14 specifically called out, there's a 2.04 maintenance
 13:42:56 15 release on UnixWare, for example.
 13:43:02 16 Q. You mentioned before the excluded asset
 13:43:05 17 schedule, I think was a phrase you used. Do you recall
 13:43:07 18 that?
 13:43:08 19 A. Yes.
 13:43:08 20 Q. So let me ask you: Putting aside the
 13:43:12 21 excluded asset schedule for a moment, do you believe that
 13:43:17 22 the asset schedule, Schedule 1.1(a) of the APA, includes
 13:43:22 23 the UNIX and UnixWare intellectual property?
 13:43:24 24 MR. BRAKEBILL: Vague and ambiguous.
 13:43:27 25 MR. PARNES: You can answer if you understand

13:43:30 1 the question.
 13:43:31 2 THE WITNESS: Could you repeat the question,
 13:43:33 3 please.
 13:43:33 4 Q. BY MR. NORMAND: In your view, does Schedule
 13:43:36 5 1.1(a) of the APA include the UNIX and UnixWare
 13:43:38 6 intellectual property?
 13:43:40 7 MR. BRAKEBILL: Vague and ambiguous.
 13:43:43 8 MR. PARNES: I'll join in the objection.
 13:43:44 9 You can answer the question.
 13:43:45 10 THE WITNESS: Okay. I'm struggling with how
 13:43:50 11 to answer that.
 13:43:52 12 Q. BY MR. NORMAND: Maybe I can clarify.
 13:43:54 13 Conceptually --
 13:43:57 14 MR. BRAKEBILL: Asked and answered in part,
 13:44:00 15 too.
 13:44:00 16 Q. BY MR. NORMAND: Conceptually you've
 13:44:02 17 mentioned the excluded asset schedule. Does the excluded
 13:44:06 18 asset schedule carve out from the included asset
 13:44:12 19 schedule?
 13:44:12 20 A. It does.
 13:44:12 21 Q. So to the extent that the excluded asset
 13:44:16 22 schedule carves out certain UNIX and UnixWare
 13:44:19 23 intellectual property, it carves it out from among the
 13:44:23 24 assets identified in Schedule 1.1(a); is that fair to
 13:44:28 25 say?

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13:44:35 1 A. I'm not sure about the significance of the
 13:44:37 2 term "carve out." I would say that there was a
 13:44:41 3 bargained-for set of assets that was acquired and a
 13:44:46 4 bargained-for set of assets that was retained. And if
 13:44:49 5 you characterize one as a carve-out from another, I
 13:44:53 6 suppose that's an accurate characterization.
 13:45:15 7 Q. I asked you earlier whether Wilson Sonsini
 13:45:19 8 read and approved the press release, and I think you said
 13:45:22 9 you don't recall. Would it have been the normal course
 13:45:26 10 for Wilson Sonsini to review a press release like this
 13:45:29 11 under the circumstances?
 13:45:31 12 MR. BRAKEBILL: Vague and ambiguous.
 13:45:32 13 MR. PARNES: It also lacks foundation, but
 13:45:35 14 you can answer the question.
 13:45:36 15 THE WITNESS: I think practice varies. I
 13:45:42 16 think some clients review these, some don't, some rely on
 13:45:47 17 in-house counsel. So -- so it wouldn't have been unusual
 13:45:57 18 to have reviewed it, and it wouldn't necessarily have
 13:46:01 19 been an outlier had we not -- had we not reviewed it.
 13:46:21 20 Q. BY MR. NORMAND: In the APA, did Novell
 13:46:22 21 intend to retain the UNIX and UnixWare copyrights?
 13:46:40 22 A. I believe that in order to -- well, so I
 13:46:44 23 don't -- I can't -- I don't know what Novell's intentions
 13:46:47 24 were, I mean, without looking through this and confirming
 13:46:51 25 my supposition, I think the copyrights or at least the

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13:46:56 1 right to use the names were transferred to SCO. Because
 13:47:00 2 they were going to be running the UnixWare business and
 13:47:03 3 they needed access to the name.
 13:47:12 4 Q. Now, if nothing else, to shortcut this,
 13:47:20 5 you've said the name. Did you mean the trademarks? Why
 13:47:24 6 are you associating the names with copyrights? Unless
 13:47:27 7 I've just misunderstood your answer.
 13:47:30 8 A. Well, I think maybe you have because I'm only
 13:47:31 9 speaking to the right to use the -- when I conceive of
 13:47:37 10 the transaction that occurred, the best that I can
 13:47:42 11 recall, there was a UnixWare business that Novell was
 13:47:46 12 transferring and there were certain rights in addition to
 13:47:51 13 that, that were also bargained for and transferred.
 13:47:57 14 So the -- because SCO was going to be running
 13:48:03 15 UnixWare, Novell, at that point, my recollection is that
 13:48:07 16 they were going to focus on NetWare and their core
 13:48:18 17 business, and the transfer of the UnixWare business had
 13:48:20 18 to include the ability of SCO to use the name UnixWare.
 13:48:25 19 So if that's what you mean by copyright,
 13:48:28 20 that's what I'm saying. To the extent you're talking
 13:48:32 21 about other intellectual property associated with it, I
 13:48:35 22 don't know what the intention was.
 13:48:37 23 Q. Let me try to rephrase the question. In the
 13:48:40 24 APA, did Novell intend to retain the copyright in the
 13:48:46 25 UNIX and UnixWare source code?

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13:48:57 1 A. Could you repeat the question, please? I'm
 13:48:59 2 sorry.
 13:49:00 3 Q. In the APA, did Novell intend to retain the
 13:49:03 4 copyright in the UNIX and UnixWare source code?
 13:49:06 5 A. I'm not sure I should be speculating as to
 13:49:14 6 what Novell's intention was. I mean, I can tell you that
 13:49:19 7 it's -- if those intellectual property rights were set
 13:49:22 8 out in Exhibit 1.1(a), then that was their intention, and
 13:49:27 9 if they were in 1.1(b), then that wasn't.
 13:49:31 10 Q. Is it something that you have an independent
 13:49:33 11 recollection of?
 13:49:34 12 A. I do not.
 13:49:38 13 Q. Can you recall whether at the time in the
 13:49:41 14 negotiation of the APA it was your view that Novell
 13:49:44 15 intended to retain the UNIX and UnixWare copyrights?
 13:49:49 16 A. I don't recall what my view was at the time.
 13:49:52 17 Q. And what was Tor Braham's view?
 13:49:56 18 A. I -- I don't recall what Tor's view would be
 13:50:07 19 with respect to these specific assets.
 13:50:09 20 Q. So is it fair to say that, as you sit here,
 13:50:12 21 given that you and Mr. Braham were the ones who
 13:50:15 22 negotiated the APA, you can't tell me the view of the
 13:50:18 23 Wilson Sonsini firm in 1995 as to whether Novell intended
 13:50:23 24 to retain the UNIX and UnixWare copyrights?
 13:50:27 25 A. I don't recall as to any one specific asset

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13:50:35 1 or copyright what the Novell intention was at the time.
 13:50:56 2 Q. Do you think you'd be better able to answer
 13:50:59 3 that question if you had spoken with Mr. Braham about the
 13:51:04 4 subject matter of the testimony today?
 13:51:06 5 A. Do I think -- I'm sorry, could you repeat the
 13:51:13 6 question, Ted?
 13:51:14 7 Q. Do you think you'd be better able to answer
 13:51:16 8 that question if you had spoken with Mr. Braham in
 13:51:21 9 connection with your preparation to address the topic of
 13:51:23 10 your deposition today?
 13:51:24 11 A. Likely.
 13:51:36 12 Q. Do you have any view as to why Novell
 13:51:40 13 retained, I think you said earlier at least some of the
 13:51:43 14 intellectual property rights in UNIX and UnixWare in
 13:51:45 15 connection with the APA?
 13:51:50 16 A. So, again, you -- I'm not sure you're
 13:51:53 17 characterizing, maybe I'm -- well, the UnixWare business
 13:51:59 18 was transferred. There were intellectual property rights
 13:52:03 19 retained by Novell in large part because the
 13:52:10 20 consideration that was -- that SCO was able to pay for
 13:52:13 21 these assets at the time didn't give them the right to
 13:52:17 22 the full set of assets that related to UNIX. Novell had
 13:52:25 23 two years earlier, in '93, bought this out of USL,
 13:52:31 24 purchased it out of AT&T, for in excess of \$300 million.
 13:52:36 25 And SCO couldn't -- was not in a position to buy that

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13:52:43 1 business.

13:52:44 2 **So the deal was structured in the way it was**

13:52:47 3 **to reflect a business transaction where SCO was going to**

13:52:56 4 **give equity that amounted to a fraction of the value of**

13:53:02 5 **the business, and that's why Novell retained -- it's my**

13:53:09 6 **recollection that's why Novell bargained for and retained**

13:53:12 7 **the royalty stream and certain rights as to the**

13:53:18 8 **intellectual property on a go-forward basis from that**

13:53:25 9 **time.**

13:53:26 10 **95 percent of the revenues flowing from those**

13:53:28 11 **contracts was retained. The right to buy out the**

13:53:36 12 **royalties from a licensee that said I want to have a**

13:53:41 13 **fully paid-up license, that was retained by Novell, and**

13:53:44 14 **other rights were retained.**

13:53:46 15 **So I believe it was the economic realities of**

13:53:49 16 **the value of the assets which dictated the retention of**

13:53:53 17 **the -- of substantial rights by Novell in this**

13:53:58 18 **intellectual property relating to the UNIX operating**

13:54:01 19 **system.**

13:54:05 20 **Q. So the reason Novell retained at least some**

13:54:09 21 **intellectual property rights in UNIX and UnixWare was**

13:54:13 22 **because Santa Cruz wasn't able to pay cash for the value**

13:54:16 23 **of those UNIX and UnixWare assets; is that right?**

13:54:19 24 MR. PARNES: Misstates the testimony.

13:54:22 25 You can answer the question.

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13:54:23 1 THE WITNESS: Okay.

13:54:25 2 They weren't able to pay any cash. I mean,

13:54:28 3 they -- I think -- my recollection is it was -- it was a

13:54:34 4 stock deal. Novell became a big stockholder. The deal

13:54:38 5 was stock consideration initially and retention of the

13:54:46 6 revenue streams going forward in consideration for the

13:54:50 7 transfer of the UnixWare business and certain IP rights

13:54:55 8 to the operating system generally.

13:55:11 9 **Q. BY MR. NORMAND: And do you have in mind any**

13:55:13 10 **particular IP rights of the operating system generally**

13:55:16 11 **that were transferred?**

13:55:17 12 **A. I do not.**

13:55:18 13 **Q. So I'm trying to understand your testimony.**

13:55:26 14 **I won't try to encapsulate it, but I've understood you to**

13:55:30 15 **draw a link between the nature of the structure of the**

13:55:35 16 **purchase and Novell's retention of at least some IP**

13:55:39 17 **rights in the UNIX and UnixWare; is that correct?**

13:55:41 18 **A. I drew such a link.**

13:55:44 19 **Q. And can you explain how that link worked?**

13:55:51 20 **Why was that linked? Was it Novell's intent to sell the**

13:55:56 21 **UnixWare business?**

13:55:58 22 MR. BRAKEBILL: Compound.

13:55:58 23 MR. PARNES: You can answer.

13:55:59 24 THE WITNESS: I'm -- without trying to

13:56:12 25 speculate about what Novell's intention was, and

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13:56:19 1 reviewing the APA, reviewing the declarations, it was --

13:56:28 2 it refreshed my recollection that Novell was looking for

13:56:38 3 a buyer who would go out and propagate a UNIX operating

13:56:45 4 system as a competitor to Microsoft, that Novell's

13:56:52 5 NetWare was a -- was distributed or a network operating

13:56:58 6 system. Microsoft's was a PC-based one. That getting

13:57:05 7 others out there who really focused on that PC-based

13:57:10 8 operating business, licensing them, having somebody who

13:57:14 9 was going to be their champion was in everybody's best

13:57:19 10 interest, and that was the driving force behind the

13:57:21 11 transaction.

13:57:22 12 There was insufficient consideration being

13:57:26 13 paid to transfer the entire business to SCO. And

13:57:37 14 moreover, Novell needed to retain certain rights with

13:57:53 15 respect to the license and royalty revenue streams that

13:58:00 16 were primarily theirs. They were retaining these. And

13:58:03 17 there was a great deal of concern about SCO's financial

13:58:08 18 viability.

13:58:09 19 I can recall inserting a provision in the

13:58:14 20 document that made it clear the nature of the interest of

13:58:19 21 SCO in these royalty streams so that in the event of a

13:58:24 22 bankruptcy or insolvency of SCO, the creditors or

13:58:29 23 successors couldn't claim that these revenue streams were

13:58:34 24 theirs, that the equitable interest was retained while

13:58:38 25 the title had been transferred.

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13:58:46 1 **Q. You say insufficient consideration was being**

13:58:50 2 **paid. Wasn't the Novell interest in the revenue stream**

13:58:56 3 **designed to bridge the price gap?**

13:58:58 4 MR. BRAKEBILL: Argumentative, foundation.

13:58:59 5 MR. PARNES: You can answer.

13:59:00 6 THE WITNESS: It was certainly intended to be

13:59:11 7 a -- a bridge. I don't know that it was a sufficient

13:59:20 8 bridge or that was viewed by Novell as sufficient.

13:59:25 9 **Q. BY MR. NORMAND: Do you have a view on that**

13:59:27 10 **front on behalf of the Wilson Sonsini firm?**

13:59:29 11 **A. My view is that the rights that were**

13:59:31 12 **retained, including but not limited to the revenue**

13:59:38 13 **stream, including the equitable title, including the**

13:59:42 14 **patents, including everything that's set out at Exhibit**

13:59:44 15 **1.1(b) was exactly what the intention of the parties was,**

13:59:51 16 **was to retain these rights on behalf of Novell.**

13:59:54 17 **Q. Was it Novell's view that owning the**

13:59:56 18 **copyrights in the UNIX and UnixWare source code would**

14:00:01 19 **permit Novell to continue to have rights in the revenue**

14:00:07 20 **stream if Santa Cruz were to go bankrupt?**

14:00:11 21 **A. I can't speculate, and I'm not sure I even**

14:00:14 22 **understand the question.**

14:00:17 23 MR. BRAKEBILL: By the way, I don't know if

14:00:20 24 it's intentional. You keep asking Novell's view. It's

14:00:26 25 clear, it is his view, not Novell's. We will be

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14:00:28 1 providing a Novell 30(b)(6) witness.
 14:00:32 2 MR. NORMAND: Well, I think I'm entitled to
 14:00:34 3 ask the Wilson Sonsini firm for its understanding of
 14:00:38 4 Novell's view.
 14:00:38 5 MR. BRAKEBILL: You are. True. I think the
 14:00:40 6 question reflects that. I think that's implicit. I just
 14:00:44 7 want to make the record clear.
 14:00:47 8 **Q. BY MR. NORMAND: I guess what I've understood**
 14:00:50 9 **you to say is Novell would be in a better position to**
 14:00:53 10 **claim the rights to the revenue stream if it retained**
 14:00:58 11 **certain intellectual property in UNIX and UnixWare than**
 14:01:01 12 **if it had not retained certain intellectual property**
 14:01:04 13 **rights.**
 14:01:04 14 **A. No, I don't think that's what I said. If I**
 14:01:07 15 **said that, I may have misspoken. I think Novell --**
 14:01:16 16 **Novell did retain the rights to the revenue stream and**
 14:01:21 17 **the royalty payments, and it did retain other**
 14:01:26 18 **intellectual property rights in the assets that were**
 14:01:31 19 **transferred. They -- that was done in -- I wouldn't tie**
 14:01:40 20 **the retention of the other intellectual property rights**
 14:01:44 21 **to the specific exigency of maintaining rights to the**
 14:01:52 22 **royalty stream in the event of a bankruptcy of SCO.**
 14:01:55 23 **It was there was consideration of stock in**
 14:02:03 24 **from SCO, of collection and payment of the royalty**
 14:02:10 25 **stream, and retention of rights as three different**

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14:02:16 1 **categories of assets retained and consideration paid by**
 14:02:23 2 **SCO in the transaction.**
 14:02:43 3 **Q. Was it the view of the Wilson Sonsini law**
 14:02:46 4 **firm that if Santa Cruz were to go bankrupt, that the**
 14:02:49 5 **rights to the revenue stream would follow the**
 14:02:54 6 **intellectual property that Novell had retained?**
 14:03:00 7 **A. I don't -- I don't know what our view was at**
 14:03:03 8 **the time, but I certainly don't -- I don't conceive now**
 14:03:07 9 **of the linkage of those two.**
 14:03:17 10 **Q. And why not?**
 14:03:18 11 **A. Because I don't understand the theory that's**
 14:03:22 12 **underlying the question.**
 14:03:36 13 **Q. Was there any link, in the view of the law**
 14:03:40 14 **firm, between Novell's decision to retain certain**
 14:03:45 15 **intellectual property rights, on the one hand, and on the**
 14:03:50 16 **other hand, the fact that the consideration being paid**
 14:03:56 17 **was not cash?**
 14:04:01 18 MR. BRAKEBILL: Vague and ambiguous.
 14:04:04 19 MR. PARNES: You can answer.
 14:04:05 20 THE WITNESS: Okay.
 14:04:10 21 I don't recall a distinction being drawn
 14:04:15 22 between cash versus stock consideration. So I guess the
 14:04:18 23 answer would be no.
 14:04:21 24 **Q. BY MR. NORMAND: So it wasn't cash. Let me**
 14:04:23 25 **say that to myself. Was there any link, in the view of**

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14:04:27 1 **the law firm, between Novell's decision to retain certain**
 14:04:29 2 **intellectual property rights, on the one hand, and the**
 14:04:33 3 **fact that the value of the consideration being paid was**
 14:04:41 4 **less than what Novell thought the value of the assets**
 14:04:45 5 **were?**
 14:04:46 6 MR. PARNES: I think that's been asked and
 14:04:48 7 answered, but you can answer.
 14:04:49 8 THE WITNESS: That is my recollection.
 14:04:52 9 **Q. BY MR. NORMAND: And this will be a question**
 14:04:53 10 **I guess I asked earlier. Let me try to make sure I**
 14:04:57 11 **understand or twist it a little bit.**
 14:04:59 12 **Is it the law firm's view that the Novell**
 14:05:01 13 **interest in the revenue stream was not sufficient to**
 14:05:13 14 **account for the full value of the assets as Novell saw**
 14:05:16 15 **them?**
 14:05:18 16 **A. I think my answer is "yes," that I view the**
 14:05:28 17 **deal structure as giving Novell three different forms**
 14:05:42 18 **of -- well, I don't know quite how to -- so the deal**
 14:05:45 19 **structure had three aspects of it for Novell. One was**
 14:05:49 20 **stock in from SCO; the second was retention of 95 percent**
 14:05:55 21 **of the royalty payments from the USL licenses; and the**
 14:06:06 22 **third was the underlying intellectual property assets**
 14:06:13 23 **that had been acquired, or a portion of them that had**
 14:06:16 24 **been acquired from USL. And that's why -- that's why**
 14:06:24 25 **there's a long list of assets being transferred and those**

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14:06:27 1 **being excluded and retained.**
 14:06:29 2 **Q. So is it fair to say that the Novell decision**
 14:06:39 3 **to retain certain intellectual property assets reflected**
 14:06:42 4 **the fact that there was insufficient consideration being**
 14:06:46 5 **paid to justify transferring all of the UNIX and UnixWare**
 14:06:49 6 **assets to Santa Cruz?**
 14:06:51 7 MR. BRAKEBILL: Asked and answered.
 14:06:56 8 MR. PARNES: You can answer.
 14:06:57 9 THE WITNESS: I mean, that was certainly a
 14:06:59 10 rationale. To the extent there was other rationale for
 14:07:03 11 wanting to keep the patents and copyrights that Novell
 14:07:07 12 had other strategic reasons for it, relationships with
 14:07:12 13 the licensees, ability to go into UNIX themselves in the
 14:07:17 14 future, it would be speculation on my part to say that
 14:07:23 15 that -- that those were factors.
 14:07:26 16 **Q. BY MR. NORMAND: And in terms of the view of**
 14:07:27 17 **the Wilson Sonsini law firm, were there other factors**
 14:07:30 18 **other than the consideration element that we've**
 14:07:32 19 **discussed?**
 14:07:32 20 **A. I don't recall.**
 14:07:41 21 **Q. In the firm's view, did Novell retain the**
 14:07:44 22 **trade secrets in UNIX and UnixWare?**
 14:07:47 23 **A. So you've asked me about copyrights and now**
 14:07:53 24 **you're moving on to trade secrets. I don't -- I don't**
 14:07:57 25 **recall with specificity a parsing of asset types other**

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14:08:06 1 than what was set out in the exhibits. I...

14:08:14 2 Q. So apart from the answer you've given, does

14:08:16 3 the firm have a view as to whether trade secrets in

14:08:20 4 particular were among the intellectual property that

14:08:23 5 Novell retained?

14:08:30 6 A. I don't recall what our view was at the time

14:08:32 7 of that specific asset class.

14:08:34 8 Q. How about the know-how in UNIX and UnixWare?

14:08:39 9 A. Well, I think the -- what's clear from the

14:08:48 10 agreement and the operating agreement is that there was

14:08:51 11 an intention to transfer to SCO the ability to run the

14:08:57 12 UnixWare business. There was -- there were ongoing

14:09:02 13 training obligations, there was an identity of interests,

14:09:07 14 if you will, in making sure that SCO had what it needed

14:09:13 15 to run the UnixWare business as well is as, if not better

14:09:19 16 than Novell had been running it, and to give SCO the

14:09:28 17 ability to develop on their own platform, a newer and

14:09:34 18 improved version, if you will, of their product.

14:09:38 19 And this efficiency, I think of the

14:09:44 20 intellectual property transfer to allow that to occur was

14:09:51 21 I think what is manifest in -- in the schedules and --

14:09:58 22 and -- I guess that's all I have to say about that.

14:10:01 23 Q. Was it the law firm's view in 1995 that Santa

14:10:06 24 Cruz did not need the copyrights in the UNIX and UnixWare

14:10:10 25 source code in order to run the UNIX and UnixWare

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14:10:13 1 business?

14:10:13 2 A. I don't recall with any specificity -- I

14:10:18 3 don't recall as to any specific asset class or specific

14:10:21 4 asset what our view was.

14:10:32 5 Q. Is it fair to say that in the view of the law

14:10:36 6 firm in 1995, Santa Cruz did not need all of the

14:10:38 7 intellectual property rights in the UNIX and UnixWare

14:10:41 8 source code in order to run the UNIX and UnixWare

14:10:44 9 business?

14:10:44 10 A. Well, to the extent that Schedule 1.1(b) sets

14:10:57 11 those assets out, the answer would be yes. I mean, I

14:11:14 12 think there were two businesses here who had concluded

14:11:16 13 that what got transferred was sufficient to run the

14:11:22 14 business as Novell had been running it.

14:11:43 15 MR. BRAKEBILL: Ted, when it's convenient for

14:11:45 16 you, would a break be okay?

14:11:47 17 MR. NORMAND: Why don't we take a break.

14:11:49 18 THE VIDEOGRAPHER: We are now going off the

14:11:51 19 video record. The time is 2:11 p.m.

14:11:56 20 (Recess.)

14:28:35 21 THE VIDEOGRAPHER: We are now back on the

14:28:47 22 video record. The time is 2:28 p.m.

14:28:54 23 Q. BY MR. NORMAND: Good afternoon, Mr. Alter.

14:28:56 24 I have a couple of questions. This may tread on

14:28:59 25 privilege, but if you can answer it without revealing the

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14:29:04 1 privilege, then go ahead.

14:29:05 2 Why didn't the law firm seek to retain all of

14:29:13 3 the intellectual property in the UNIX and UnixWare

14:29:15 4 businesses for Novell?

14:29:18 5 A. So as I think I tried to articulate earlier,

14:29:29 6 the intention in what was bargained for by SCO was to

14:29:35 7 acquire the Novell UnixWare business on a go-forward

14:29:42 8 basis. And it needed those rights that would enable it

14:29:49 9 to pursue that business, which was their primary

14:29:54 10 business, as opposed to the entire nexus of assets

14:30:00 11 relating to UNIX that Novell developed itself and

14:30:19 12 acquired from USL. So it was in Novell's best

14:30:23 13 interest --

14:30:26 14 Q. I think you were starting to say something

14:30:26 15 about Novell's best interest.

14:30:29 16 A. I think -- so I would submit that for SCO to

14:30:33 17 be able to take the business on a go-forward basis, to

14:30:39 18 develop its -- an enhanced version of the UnixWare

14:30:45 19 operating system, they had expertise in that, that was

14:30:48 20 their primary business, would enable them to be the -- I

14:30:57 21 think, in theory, a formidable competitor to Microsoft.

14:31:01 22 So this wasn't a purchase of a subsidiary and

14:31:09 23 all the stock that would come with all the assets and

14:31:13 24 liabilities. It was an asset purchase with specific

14:31:19 25 assets that were purchased, specific assets retained, and

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14:31:22 1 I think SCO was in a position to bargain for that which

14:31:25 2 it needed to conduct its business from the point of

14:31:29 3 acquisition forward.

14:31:34 4 Q. Do you have a view as to whether Santa Cruz

14:31:38 5 believed it was acquiring the UNIX and UnixWare

14:31:41 6 copyrights?

14:31:42 7 A. I don't have a view other than the plain

14:31:46 8 language of the exhibit that says it's excluded.

14:31:55 9 Q. What did Wilson Sonsini and Novell discuss in

14:31:59 10 1995 regarding the prospects of retaining intellectual

14:32:04 11 property in UNIX and UnixWare?

14:32:05 12 MR. PARNES: Well, I'll have to instruct not

14:32:07 13 to answer based on privilege. I don't know if you -- if

14:32:11 14 there's any waiver issue that you wanted to instruct us

14:32:15 15 on.

14:32:15 16 MR. BRAKEBILL: I would ask him whether he

14:32:18 17 knows, first of all, a foundational question and see

14:32:21 18 whether there's any issue of instruction.

14:32:25 19 THE WITNESS: I don't personally recall, and

14:32:27 20 while I am the Wilson designee here, I would suggest in

14:32:33 21 having read Tor's declaration that he was the primary

14:32:41 22 negotiator, and I believe he answers that question quite

14:32:45 23 specifically in his declaration.

14:33:08 24 Q. BY MR. NORMAND: Was there ever a time during

14:33:10 25 the negotiation of the APA that Novell intended to

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14:33:14 1 transfer the UNIX and UnixWare copyrights to Santa Cruz?
 14:33:19 2 MR. PARNES: I missed the question. Can you
 14:33:30 3 read it back.
 14:33:31 4 (The record was read by the reporter as
 5 follows:
 6 "QUESTION: Was there ever a time during the
 7 negotiation of the APA that Novell intended
 8 to transfer the UNIX and UnixWare copyrights
 9 to Santa Cruz?")
 14:33:32 10 MR. PARNES: You can answer to the extent it
 14:33:34 11 doesn't reveal privileged communication, if you recall.
 14:33:37 12 THE WITNESS: I don't recall.
 14:33:37 13 Q. BY MR. NORMAND: Was there ever a time during
 14:33:40 14 the negotiation of the APA that Novell communicated to
 14:33:44 15 Santa Cruz that Novell intended to transfer the UNIX and
 14:33:47 16 UnixWare copyrights?
 14:33:50 17 A. Not that I'm aware of. But, I mean, I'm
 14:33:56 18 assuming, I mean, this agreement has an integration
 14:33:59 19 clause and sets out the understanding between the
 14:34:02 20 parties. So...
 14:34:22 21 Q. Do you know whether, in Mr. Braham's view,
 14:34:26 22 there was a time during the negotiation of the APA when
 14:34:30 23 Novell communicated to Santa Cruz that Novell intended to
 14:34:34 24 transfer the UNIX and UnixWare copyrights?
 14:34:48 25 THE WITNESS: Mark?

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14:34:48 1 MR. PARNES: You can answer. I think he
 14:34:50 2 asked whether you knew about Tor's understanding --
 14:34:53 3 THE WITNESS: I don't know about Tor's
 14:34:56 4 understanding in this specific regard.
 14:34:58 5 Q. BY MR. NORMAND: So in order for you to speak
 14:35:00 6 on behalf of the law firm in that respect, you'd need to
 14:35:03 7 know Mr. Braham's views on that subject. Is that fair to
 14:35:05 8 say?
 14:35:05 9 A. Well, it would be fair to say, and also my
 14:35:08 10 only -- I would just reiterate that the asset schedules
 14:35:13 11 were negotiated, reviewed, there was an integration
 14:35:17 12 clause. Everybody was represented by counsel. On its
 14:35:21 13 face, it seems that the deal that was struck retained the
 14:35:28 14 copyrights and trademarks and patents as intellectual
 14:35:30 15 property on Schedule 1.1(b).
 14:35:33 16 Q. Just to be fair, what I was trying to figure
 14:35:36 17 out is if I could speak with you about if there ever was
 14:35:39 18 a change in intent, how that unfolded. But I take it
 14:35:43 19 that's not something you can speak to?
 14:35:45 20 A. It's not something that I recall or am aware
 14:35:48 21 of.
 14:35:48 22 Q. You mentioned, I think near the beginning of
 14:35:57 23 the testimony today, a term sheet. Do you recall using
 14:36:00 24 that phrase?
 14:36:01 25 A. Yes.

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14:36:01 1 Q. Do you know whether according to the term
 14:36:03 2 sheet, Novell would transfer the UNIX and UnixWare
 14:36:10 3 copyrights to Santa Cruz?
 14:36:14 4 A. I don't recall whether that was addressed in
 14:36:16 5 the term sheet.
 14:36:31 6 Q. Did Wilson Sonsini ever tell, other than
 14:36:38 7 Mr. Bradford, anyone from Novell that the copyrights in
 14:36:40 8 UNIX and UnixWare would not transfer?
 14:36:43 9 MR. PARNES: I'll instruct not to answer on
 14:36:46 10 the ground of attorney-client privilege.
 14:36:52 11 Q. BY MR. NORMAND: Now, in the APA, did Novell
 14:37:02 12 intend to give Santa Cruz the right to make copies of the
 14:37:05 13 UNIX and UnixWare source code?
 14:37:08 14 A. I can't imagine how they wouldn't. Without
 14:37:22 15 looking at it, I would speculate that -- or tell you that
 14:37:27 16 in order to run that business going forward, they would
 14:37:29 17 have to have use of those assets. So I think the
 14:37:33 18 distinction between ownership and use is one I would
 14:37:41 19 draw.
 14:37:52 20 Q. And just to cover the distinction, in the
 14:37:55 21 view of the law firm, did the APA give Santa Cruz the
 14:37:58 22 right to make copies of UNIX and UnixWare source code?
 14:38:08 23 A. So I -- the making copies part, I don't -- if
 14:38:14 24 you have the -- if you are able to use the software -- or
 14:38:18 25 excuse me, the code, I would imagine that the ability to

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14:38:26 1 make copies of it and sell it and license it and develop
 14:38:37 2 enhancements and new iterations of it, that would
 14:38:40 3 certainly be part of the rights that were transferred.
 14:38:50 4 Q. Where is Santa Cruz's right to make copies of
 14:38:52 5 the UNIX and UnixWare source code set forth in the APA?
 14:38:56 6 A. I don't know without pulling it out and
 14:38:59 7 taking a look at it. I think when you look at the
 14:39:02 8 reservation of rights and you look at what was granted, I
 14:39:05 9 think you read to me earlier in the deposition in Roman I
 14:39:26 10 what was being transferred. Does this not answer that
 14:39:34 11 question?
 14:39:37 12 Q. Is it the law firm's view that Roman I of
 14:39:41 13 Schedule 1.1(a) gives Santa Cruz the right to make copies
 14:39:46 14 of the UNIX and UnixWare source code?
 14:40:49 15 A. Well, I can't point to explicit language that
 14:40:53 16 says just that. That is what I would conclude from
 14:40:58 17 reading Section 1.1 together with Exhibit 1.1.
 14:41:07 18 Q. And why do you draw that conclusion?
 14:41:10 19 A. From the language of Roman I of Exhibit -- of
 14:41:44 20 Schedule 1.1(a) and from the language of Provision 1.1(a)
 14:41:49 21 of the asset purchase agreement.
 14:41:54 22 Q. Just so I understand when you say Provision
 14:41:56 23 1.1(a) --
 14:41:58 24 A. So, I mean on page 1 of the agreement, Ted.
 14:42:02 25 And right after the Section 1.1. Right after the

14:42:04 1 recitals.

14:42:11 2 Q. I see. And I guess a similar question or

14:42:19 3 series of questions. In your view or in the view of the

14:42:23 4 law firm, did the APA give Santa Cruz the right to

14:42:26 5 distribute copies of the UNIX and UnixWare source code?

14:42:29 6 A. Yes.

14:42:34 7 Q. And would you offer the same reasons for that

14:42:37 8 conclusion that you offered with respect to the right to

14:42:40 9 make copies of the UNIX and UnixWare source code?

14:42:42 10 A. I think that, and also relying on the --

14:42:51 11 Tor's declaration of what was intended.

14:42:59 12 Q. I think earlier you used the phrase "the

14:43:08 13 ability to run the UNIX and UnixWare business." Do you

14:43:12 14 recall using that phrase?

14:43:14 15 A. Yes.

14:43:14 16 Q. In the law firm's view, did Novell intend to

14:43:25 17 give Santa Cruz the right to develop the UNIX and

14:43:28 18 UnixWare source code?

14:43:29 19 A. I think that was a primary motivation in

14:43:33 20 doing the deal in that there's reference to a combined or

14:43:40 21 merged product that would be an enhancement to what

14:43:46 22 Novell had. And so the answer is "yes."

14:43:51 23 Q. And are Section 1.1(a) of the APA and the

14:43:55 24 language in Roman I of Schedule 1.1(a) of the APA at

14:44:00 25 least two of the sources you would point to as giving

14:45:32 1 Santa Cruz the right to develop the UNIX and UnixWare

14:45:35 2 source code?

14:45:43 3 A. I think reading the agreement in the

14:45:46 4 entirety, looking at the recitals as to the intention to

14:45:55 5 acquire certain of the assets comprising the business,

14:45:57 6 the definition of business, I mean, I -- I would say it's

14:46:02 7 the -- it's the agreement in its totality as opposed to

14:46:06 8 the specific language of any one section.

14:46:24 9 Q. Are Section 1.1(a) of the APA and Schedule

14:46:29 10 1.1(a) of the APA among the provisions that you would

14:46:34 11 point to as giving Santa Cruz the right to develop the

14:46:37 12 UNIX and UnixWare source code?

14:46:38 13 A. Yes.

14:46:54 14 Q. In the APA, did Novell intend to give Santa

14:46:57 15 Cruz a license to use the UNIX and UnixWare copyrighted

14:47:05 16 works in Santa Cruz's business?

14:47:10 17 A. Could you repeat the question, please.

14:47:12 18 Q. In the APA, did Novell intend to give Santa

14:47:15 19 Cruz a license to use the UNIX and UnixWare copyrighted

14:47:19 20 works in Santa Cruz's business?

14:47:22 21 A. I believe the answer to that is yes. There's

14:47:36 22 not specific license granting language that I recall, but

14:47:42 23 I believe the answer is yes.

14:47:46 24 Q. Let me make sure I understand. What I meant

14:47:49 25 to ask you, and what I think the transcript reflects that

14:47:52 1 I asked you is whether Novell gave Santa Cruz a license,

14:47:56 2 and then what I understood you to say is there's not

14:47:59 3 specific license granting language.

14:48:01 4 MR. BRAKEBILL: Mischaracterizes the

14:48:03 5 testimony.

14:48:04 6 MR. NORMAND: I'm reading quotes from the

14:48:06 7 transcript. So --

14:48:06 8 MR. BRAKEBILL: He said I believe the answer

14:48:08 9 to that is yes.

14:48:09 10 MR. NORMAND: But that followed his statement

14:48:11 11 that there's not specific license granting language.

14:48:14 12 That's why I'm confused.

14:48:16 13 THE WITNESS: I don't -- so I do not recall,

14:48:20 14 I'm not -- I haven't committed this to memory. I haven't

14:48:24 15 looked at it in a long, long time. It's an asset

14:48:28 16 purchase agreement, but the rights that are granted as

14:48:33 17 set out in Article 1 as specified in the schedule

14:48:39 18 constitute sufficient rights to provide a license to SCO.

14:49:01 19 Q. BY MR. NORMAND: So is it your testimony that

14:49:03 20 some part of the asset purchase agreement is a license of

14:49:06 21 rights to Santa Cruz?

14:49:23 22 A. Well, I think you're characterizing as to is

14:49:27 23 there a license, could one intuit a license in the rights

14:49:34 24 that were granted. It's my testimony that the assets

14:49:38 25 that were transferred are specified, and as that which

14:49:43 1 was transferred, the assets which were retained are

14:49:49 2 specified. And of the assets that were transferred, they

14:49:54 3 constitute a sufficient bundle of rights to give SCO the

14:50:01 4 ability to use the technology and develop enhancements

14:50:13 5 and run their business and run the UnixWare business

14:50:17 6 going forward.

14:50:18 7 If you characterize it as a license, I don't

14:50:29 8 see language saying it's not a license. I don't see

14:50:34 9 language saying it is a license. I think we can parse

14:50:36 10 what a license is. But I believe that the rights that

14:50:39 11 were granted were sufficient to enable SCO to run the

14:50:44 12 UNIX and UnixWare business going forward from the point

14:50:49 13 in time that the transaction was done.

14:50:51 14 You know, the only reference to a license I

14:50:54 15 recall -- and I'm just sort of refreshing my recollection

14:50:58 16 in 1.6 -- was that there was a specific license back of

14:51:02 17 the enhancements so that Novell wouldn't have to pay

14:51:07 18 additional consideration to the extent that SCO developed

14:51:14 19 additional improvements or enhancements on the UNIX and

14:51:18 20 UnixWare technology that was deemed licensed back to

14:51:24 21 Novell.

14:51:32 22 Q. And in the view of the law firm, were the

14:51:35 23 rights, bundles of rights that Santa Cruz acquired, ones

14:51:38 24 that constituted a license?

14:51:41 25 MR. PARNES: Objection. Lacks foundation,

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14:51:43 1 but you can answer.

14:51:44 2 **Q. BY MR. NORMAND:** Well, they acquired a bundle

14:51:46 3 of rights; correct?

14:51:47 4 A. Yes.

14:51:48 5 **Q. Okay. In your view, were those bundle of**

14:51:53 6 **rights ones that constituted a license?**

14:51:55 7 A. Well, I -- you've characterized it as a

14:51:59 8 license.

14:51:59 9 **Q. No, I'm asking you.**

14:52:00 10 A. Okay.

14:52:00 11 **Q. I don't have a view that I'm articulating**

14:52:04 12 **today. I just mean to ask you.**

14:52:05 13 A. Okay. So I understand, but you've framed it

14:52:11 14 in terms of it being a license per se, and I'm -- you're

14:52:17 15 asking me -- perhaps, why don't you ask me the question

14:52:19 16 again.

14:52:19 17 **Q. So I thought we had just agreed that there**

14:52:23 18 **was some bundle of rights.**

14:52:24 19 A. Yes.

14:52:25 20 **Q. Everyone can argue about that, but there is**

14:52:27 21 **some bundle of rights that Santa Cruz acquired.**

22 A. Yes.

14:52:30 23 **Q. And I am using a label in the form of a**

14:52:33 24 **question and asking you as an attorney or as someone**

14:52:36 25 **involved with this, would you describe the bundle of**

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14:52:39 1 **rights as a license to Santa Cruz?**

14:52:42 2 MR. BRAKEBILL: Vague and ambiguous.

14:52:43 3 MR. PARNES: You can answer.

14:52:44 4 THE WITNESS: I would describe it as a

14:52:47 5 transfer of assets to enable Santa Cruz to run a business

14:52:55 6 that Novell sought to sell.

14:53:02 7 **Q. BY MR. NORMAND:** And did Novell intend to

14:53:04 8 **retain the right to develop UNIX and UnixWare source**

14:53:11 9 **code?**

14:53:11 10 A. I don't know what the intention was in

14:53:13 11 **retaining these rights beyond what I've already testified**

14:53:18 12 **to. I'll stop at that.**

14:53:23 13 **Q. In the firm's view, following the execution**

14:53:26 14 **of the APA, would Novell have had the right to develop**

14:53:31 15 **the UNIX and UnixWare source code under the terms of the**

14:53:34 16 **APA?**

14:53:34 17 MR. BRAKEBILL: Calls for a legal conclusion.

14:53:39 18 MR. PARNES: Also calls for speculation. But

14:53:41 19 you can, if you understand the question, you can --

14:53:43 20 THE WITNESS: Could I ask you to repeat the

14:53:46 21 question, please.

14:53:46 22 **Q. BY MR. NORMAND:** The question is whether

14:53:48 23 **following the execution of the APA, in the view of the**

14:53:50 24 **Wilson Sonsini law firm, would Novell have been within**

14:53:55 25 **its rights in developing the UNIX and UnixWare source**

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14:53:59 1 **code?**

14:53:59 2 A. Yes, insofar as they retained those as

14:54:05 3 assets.

14:54:05 4 **Q. But you don't know whether that was**

14:54:07 5 **specifically part of Novell's intent?**

14:54:09 6 A. That's right. I do not know. I have no

14:54:12 7 reason to believe that was an intention in retaining

14:54:16 8 those rights.

14:54:17 9 **Q. And similarly, after the execution of the**

14:54:36 10 **APA, in the view of the law firm, would Novell have been**

14:54:41 11 **within its rights in making copies of the UNIX and**

14:54:43 12 **UnixWare source code?**

14:54:44 13 A. Yes.

14:54:48 14 **Q. And do you know whether that was among the**

14:54:50 15 **reasons that Novell intended to retain certain of the**

14:54:53 16 **intellectual property in UNIX and UnixWare?**

14:54:56 17 A. I don't know.

14:55:01 18 **Q. And similarly, in your view or the view of**

14:55:05 19 **the firm, following execution of the APA, would Novell**

14:55:08 20 **have been within its rights in distributing copies of the**

14:55:11 21 **UNIX and UnixWare source code?**

14:55:13 22 A. I don't recall a prohibition against their

14:55:23 23 **doing that in the asset purchase agreement.**

14:55:34 24 **Q. And do you know whether the right to**

14:55:36 25 **distribute copies of the UNIX and the UnixWare source**

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14:55:39 1 **code was among the reasons that Novell intended to retain**

14:55:43 2 **certain intellectual property?**

14:55:46 3 A. I do not know that.

14:56:05 4 **Q. In 1995, did Novell convey to Santa Cruz its**

14:56:09 5 **intent to retain the UNIX and UnixWare copyrights?**

14:56:22 6 MR. PARNES: I'm sorry.

14:56:23 7 (The record was read by the reporter as

14:56:24 8 follows:

14:56:24 9 "QUESTION: In 1995, did Novell convey to

14:56:24 10 Santa Cruz its intent to retain the UNIX and

14:56:24 11 UnixWare copyrights?")

14:56:24 12 THE WITNESS: It's -- on the face of the

14:56:29 13 agreement they are retained. So absent that, I don't

14:56:34 14 know what else -- how else to answer. Or aside from

14:56:40 15 that, I should say.

14:56:56 16 **Q. BY MR. NORMAND:** In 1995, did Wilson Sonsini

14:57:00 17 **convey to Santa Cruz Novell's intent to retain the UNIX**

14:57:05 18 **and UnixWare copyrights?**

14:57:06 19 A. I would answer the same way, Ted, that

14:57:09 20 it's -- in my judgment, clear on its face and evidenced

14:57:15 21 in the document.

14:57:16 22 **Q. And apart from that, if there were some other**

14:57:20 23 **manner in which Novell's intent was communicated, you're**

14:57:25 24 **not aware of that; is that what you would say?**

14:57:27 25 A. That's correct.

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14:57:38 1 **Q.** I'd like to direct your attention to
 14:57:40 2 **Section 1.7 of the APA, and in particular 1.7 C, which is**
 14:57:54 3 **on page 6 of the APA. That section is titled "Taking of**
 14:57:59 4 **Necessary Action; Further Action," and states: "If at**
 14:58:03 5 **any time after the closing date any further action is**
 14:58:06 6 **necessary or desirable to carry out the purposes of this**
 14:58:10 7 **agreement, the parties agree to take and will take all**
 14:58:13 8 **such lawful and necessary and/or desirable action."**
 14:58:18 9 **Do you see that language?**
 14:58:18 10 **A. I do.**
 14:58:19 11 **Q. Do you have a view as to the purpose of**
 14:58:21 12 **Section 1.7 C of the APA?**
 14:58:31 13 **A. I would say that it's a fairly standard**
 14:58:36 14 **provision in asset transactions and mergers where if**
 14:58:42 15 **there was a loose end or something that clearly was**
 14:58:51 16 **intended by the parties to be -- to be done prior to the**
 14:58:57 17 **closing date, but subsequent to the transaction, there**
 14:59:01 18 **was no binding obligation, this would -- this would spur**
 14:59:06 19 **the parties to take such actions to the extent that there**
 14:59:11 20 **was an agreement between the parties to do so.**
 14:59:15 21 **Q. If you look at page 22 of the APA, there's a**
 14:59:27 22 **Section 4.9. And let me just ask you to read that to**
 14:59:36 23 **yourself. And let me know when you're done.**
 14:59:39 24 **A. Okay. I'm done.**
 15:00:25 25 **Q. Same general question. I know it's a general**

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15:00:28 1 **one. What is the purpose of that section?**
 15:00:33 2 **A. So that section is part of Article 4, and the**
 15:00:38 3 **covenants relate primarily to obligations between signing**
 15:00:43 4 **and closing and then to certain ongoing obligations like**
 15:00:51 5 **bulk sales filing under the commercial code or tax --**
 15:00:56 6 **who's going to do the tax returns and taking positions on**
 15:00:59 7 **the tax returns that are consistent.**
 15:01:04 8 **That is also meant as a fairly standard**
 15:01:10 9 **catchall provision to capture that which is not**
 15:01:21 10 **specifically set out as a covenant. And from the**
 15:01:30 11 **language, you can see it extends to obtaining consents**
 15:01:36 12 **and approvals from third parties as well.**
 15:01:40 13 **Q. There's a Section 4.12 as well.**
 15:01:46 14 **A. Yes.**
 15:01:55 15 **Q. Do you see any difference between 4.9 and**
 15:01:57 16 **4.12, or what is the purpose of 4.12?**
 15:02:02 17 **A. I think 4.12 refers with some specificity to**
 15:02:13 18 **the execution of instruments and documents to effect the**
 15:02:18 19 **purposes whereas I read 4-9, which may be a superset of**
 15:02:24 20 **4-12 to be focused on taking actions and obtaining**
 15:02:32 21 **documents from third parties as opposed to agreements**
 15:02:36 22 **between the two parties in 4-12.**
 15:02:40 23 **Q. Do you think the sections we've just looked**
 15:02:44 24 **at, 1.7 C, 4.9, 4.12, would apply in a situation where**
 15:02:50 25 **the agreement did not reflect the intent of the parties?**

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15:03:03 1 **MR. BRAKEBILL:** Calls for a legal conclusion,
 15:03:05 2 speculation.
 15:03:06 3 **MR. PARNES:** You can answer.
 15:03:15 4 **THE WITNESS:** Ted, can I ask you to
 15:03:18 5 clarify -- so is it -- I would say that if the parties
 15:03:25 6 had an agreement and there were actions that needed to be
 15:03:32 7 taken to reflect that agreement, one could -- one party
 15:03:35 8 could turn to the other party and say take these
 15:03:40 9 provisions, we'd like you to execute this document, the
 15:03:44 10 certification, send us a copy of the tax return to carry
 15:03:51 11 out the intention as manifest in this agreement. So if
 15:03:56 12 that's -- is that responsive?
 15:03:59 13 **Q. BY MR. NORMAND:** It is. And it is, you know,
 15:04:04 14 a hypothetical so there is some speculation involved, but
 15:04:07 15 I'm just asking your view as to if the parties had come
 15:04:10 16 to a landing and decided that the agreement didn't
 15:04:14 17 reflect something they had agreed on, would these
 15:04:20 18 provisions apply where the parties were trying to now
 15:04:28 19 have that agreement reflected?
 15:04:32 20 **MR. BRAKEBILL:** Same objections.
 15:04:33 21 **MR. PARNES:** I'll join.
 15:04:35 22 If you understand the question.
 15:04:44 23 **THE WITNESS:** I think I do. I -- I should --
 15:04:51 24 I have to respond.
 15:04:52 25 **MR. PARNES:** I mean, if you understand what

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15:04:54 1 he's talking about.
 15:04:56 2 **Q. BY MR. NORMAND:** If you have anything to add.
 15:04:58 3 **A. I don't have anything to add.**
 15:05:00 4 **Q. Yeah. I understand.**
 15:05:07 5 I'm looking, Mr. Alter, at Attachment E of
 15:05:10 6 the APA, which begins on the page with the Bates number
 15:05:13 7 on the bottom right ending 979. Attachment E is titled
 15:05:36 8 "Selling Copyrights in Product(s) of Business."
 15:05:44 9 Do you see that language?
 15:05:46 10 **A. I do.**
 15:05:47 11 **Q. And then do you see there are lists of**
 15:05:51 12 **copyrights in Attachment E?**
 15:06:42 13 The question was whether you saw that there
 15:06:45 14 were lists of copyrights.
 15:06:46 15 **A. I'm sorry, yes, I have it open to that**
 15:06:49 16 **document.**
 15:06:50 17 **Q. Would you agree that the title of**
 15:06:52 18 **Attachment E suggested that the listed copyrights are**
 15:06:55 19 **being sold?**
 15:06:56 20 **A. I would not agree. I don't -- I don't really**
 15:07:01 21 **know -- I guess I would ask where in the agreement is**
 15:07:05 22 **Attachment E referenced?**
 15:07:09 23 **Q. I think we can go through that. I think my**
 15:07:13 24 **question was the title of Attachment E.**
 15:07:17 25 **MR. BRAKEBILL:** Asked and answered.

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15:07:17 1 THE WITNESS: In other words, selling -- I
 15:07:20 2 don't understand what that means, selling copyrights and
 15:07:23 3 products of business.
 15:07:26 4 **Q. BY MR. NORMAND: Do you have a view as to why**
 15:07:30 5 **these copyrights were listed in Attachment E to the APA?**
 15:07:35 6 **A. I would once again ask for time to identify**
 15:07:39 7 **where in the agreement Attachment E is referenced so I**
 15:07:41 8 **could look at the context.**
 15:07:42 9 **Q. But you don't have an independent view, as**
 15:07:45 10 **you sit here --**
 15:07:45 11 **A. I do not.**
 15:07:45 12 **Q. -- without going through the agreement?**
 15:07:47 13 **A. I do not.**
 15:07:48 14 **Q. Is the firm aware of testimony that Novell**
 15:08:14 15 **executives like Robert Frankenberg, Duff Thompson and Ty**
 15:08:19 16 **Mattingly have given regarding their understanding and**
 15:08:24 17 **intent under the APA that Novell was transferring the**
 15:08:26 18 **UNIX and UnixWare copyright to Santa Cruz?**
 15:08:32 19 MR. BRAKEBILL: Foundation.
 15:08:33 20 MR. PARNES: It does lack foundation, but you
 15:08:35 21 can answer if you have an understanding.
 15:08:37 22 THE WITNESS: I do not have an understanding.
 15:08:39 23 **Q. BY MR. NORMAND: I'm going to represent to**
 15:08:40 24 **you that Novell employees, including the ones I've just**
 15:08:44 25 **identified, have given such testimony. How does the firm**

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15:08:46 1 **account for such testimony?**
 15:08:48 2 MR. BRAKEBILL: Calls for speculation.
 15:08:49 3 MR. PARNES: It's also argumentative.
 15:08:52 4 You can answer.
 15:08:52 5 THE WITNESS: What is the antecedent? They
 15:08:54 6 testified to what?
 15:08:56 7 **Q. BY MR. NORMAND: To their understanding and**
 15:08:58 8 **intent, that under the APA, Novell intended to transfer**
 15:09:02 9 **the UNIX and UnixWare copyrights to Santa Cruz.**
 15:09:07 10 MR. BRAKEBILL: Same objections.
 15:09:08 11 MR. PARNES: And then can you read the
 15:09:10 12 question that started this.
 15:09:51 13 (Record read.)
 15:09:52 14 THE WITNESS: Well, I can't speak for Bob
 15:09:57 15 Frankenberg, but Duff Thompson is on the board of SCO.
 15:10:06 16 Isn't he on the other side of this dispute? So I guess
 15:10:10 17 I -- without -- I have respect for him, having worked
 15:10:15 18 with him, and I don't want to say anything other than I
 15:10:19 19 can tell you what my recollection was at the time and
 15:10:24 20 what our charge was from our client. So I don't have any
 15:10:33 21 independent understanding why they would testify to that.
 15:10:40 22 **Q. BY MR. NORMAND: Do you have any reason to**
 15:10:44 23 **disbelieve their good faith in offering that testimony?**
 15:10:52 24 THE WITNESS: Do I have to comment on other
 15:10:54 25 people's good faith?

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15:10:55 1 MR. PARNES: Well, it calls for speculation
 15:10:56 2 one as to what the testimony was, but --
 15:10:58 3 THE WITNESS: I don't know what the testimony
 15:10:59 4 was. I'll take it at face value that you say they
 15:11:03 5 testified that that was the intention.
 15:11:04 6 MR. BRAKEBILL: Asked and answered, too.
 15:11:05 7 MR. PARNES: It lacks foundation.
 15:11:07 8 But do you have any -- he's asking do you
 15:11:09 9 have any basis to question what his representation is.
 15:11:11 10 THE WITNESS: I have no basis to question
 15:11:13 11 the -- I have no basis to question the basis of your
 15:11:17 12 representation.
 15:11:18 13 **Q. BY MR. NORMAND: Do you have any basis to**
 15:11:20 14 **question their good faith in offering that testimony?**
 15:11:26 15 MR. BRAKEBILL: Asked and answered.
 15:11:27 16 MR. PARNES: You can answer.
 15:11:28 17 THE WITNESS: Other than the obvious conflict
 15:11:34 18 of interest on the part of some of these executives who
 15:11:36 19 are now -- have a great deal to gain by virtue of being
 15:11:42 20 owners of and executives with SCO, no.
 15:11:47 21 **Q. BY MR. NORMAND: Do you think to the extent**
 15:11:55 22 **I've represented that Duff Thompson has given the**
 15:11:57 23 **testimony he has, do you think he's lying?**
 15:12:00 24 MR. PARNES: Counsel, you know, I'm allowing
 15:12:03 25 you to ask these questions, one, you want to show the

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15:12:06 1 testimony? Because, I mean, this is very unfair --
 15:12:09 2 MR. NORMAND: We could, but I mean to save
 15:12:11 3 time.
 15:12:12 4 MR. PARNES: It's unfair to a witness say
 15:12:16 5 accept my word as to "X." There's no foundation as to
 15:12:20 6 what "X" is and whether -- then you're asking a second
 15:12:24 7 question is do you have any basis to question his
 15:12:26 8 credibility, I think it's been asked and answered.
 15:12:31 9 You can answer it again.
 15:12:35 10 THE WITNESS: Yeah, all I would say is I
 15:12:37 11 would refer you to Tor's declaration, and there was no
 15:12:42 12 lack of clarity in that on the part of the firm's primary
 15:12:49 13 negotiator of what our charge was from our client at that
 15:12:54 14 time.
 15:13:13 15 **Q. BY MR. NORMAND: Do you have a view as to**
 15:13:15 16 **whether there was any lack of clarity as to**
 15:13:16 17 **communications to Santa Cruz as to Novell's intent to**
 15:13:21 18 **retain the UNIX and UnixWare copyrights?**
 15:13:29 19 **A. I think rather than speculate on what was**
 15:13:34 20 **conveyed, I would submit that there was a very clear**
 15:13:38 21 **agreement that sets out with particularity what the**
 15:13:41 22 **transaction was. And each party was sophisticated,**
 15:13:46 23 **represented by sophisticated counsel, and I think it**
 15:13:49 24 **speaks for itself.**
 15:13:54 25 **Q. When you say "it," you mean the APA?**

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15:13:58 1 A. The document, the agreement.
 15:14:02 2 Q. I probably did ask you this before, but do
 15:14:06 3 you know whether the specific issue of the retention of
 15:14:07 4 the UNIX and UnixWare copyrights was something that any
 15:14:11 5 representative of Santa Cruz and any representative of
 15:14:12 6 Novell discussed? I mean apart from the exchange of
 15:14:16 7 drafts, do you know whether it was something that was
 15:14:18 8 discussed?
 15:14:19 9 A. I do not.
 15:14:20 10 Q. Are you aware of the use of the phrase "SVRX
 15:14:34 11 license" in the APA?
 15:14:36 12 A. I am after having refreshed my recollection,
 15:14:40 13 yes.
 15:14:44 14 Q. And -- let's look at Section 4.16(a) of the
 15:14:50 15 APA, if you would. That's on page 24 of the APA.
 15:15:08 16 MR. NORMAND: And I guess we should take a
 15:15:11 17 break to change the tape.
 15:15:12 18 THE WITNESS: Okay.
 15:15:14 19 THE VIDEOGRAPHER: This is the end of
 15:15:16 20 Videotape Number 1. We are now going off the video
 15:15:19 21 record. The time is 3:15 p.m.
 15:15:25 22 (Recess.)
 15:20:31 23 THE VIDEOGRAPHER: This is the beginning of
 15:20:32 24 Videotape Number 2. We are now back on the video record.
 15:20:35 25 The time is 3:19 p.m.

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15:20:38 1 Q. BY MR. NORMAND: Mr. Alter, I heard you say
 15:20:41 2 earlier -- correct me if I'm wrong -- that it was a
 15:20:44 3 go-forward business that Santa Cruz was acquiring. Do
 15:20:48 4 you recall using a phrase like that?
 15:20:50 5 A. Yes.
 15:20:50 6 Q. And what did you mean by that?
 15:20:54 7 A. I meant that while certain assets, i.e., the
 15:21:06 8 patents and copyrights were being retained by Novell in
 15:21:10 9 the transaction, that on a going-forward basis, it was
 15:21:13 10 the intention to enable SCO to have the ability to
 15:21:20 11 develop, enhance, and grow and exploit the business on a
 15:21:28 12 go-forward -- on a go-forward.
 15:21:31 13 They were, to the extent that patents or
 15:21:34 14 copyrights or other intellectual property was developed,
 15:21:38 15 from the point of transfer on, those would be SCO's, and
 15:21:44 16 but for a license back for Novell's own use, that would
 15:21:52 17 be SCO intellectual property.
 15:21:59 18 Q. But -- and I don't mean to exclude the
 15:22:02 19 excluded asset schedule, but Santa Cruz was acquiring the
 15:22:08 20 UNIX and the old UnixWare assets; correct?
 15:22:15 21 MR. BRAKEBILL: Vague and ambiguous.
 15:22:16 22 THE WITNESS: They were acquiring assets
 15:22:19 23 sufficient to enable them to run the business on a
 15:22:21 24 going-forward basis. I mean, they presumably knew what
 15:22:25 25 they needed, and that's what they bought.

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15:22:30 1 Q. BY MR. NORMAND: I've been using the phrases
 15:22:36 2 UnixWare and then UNIX, UNIX being, as I think you said,
 15:22:40 3 the precursor to the derivative UnixWare?
 15:22:44 4 A. I don't think I said that specifically, but
 15:22:47 5 my understanding was UnixWare was Novell's version of
 15:22:50 6 UNIX.
 15:22:55 7 Q. Independent of whether Novell expected Santa
 15:23:00 8 Cruz to develop the UNIX business, the old version of
 15:23:04 9 UNIX, Santa Cruz did acquire the UNIX assets; correct?
 15:23:09 10 MR. BRAKEBILL: Vague and ambiguous, asked
 15:23:12 11 and answered.
 15:23:12 12 Q. BY MR. NORMAND: Apart from the UNIX, they
 15:23:15 13 acquired the UNIX assets?
 15:23:17 14 A. They acquired the UNIX assets set out on
 15:23:21 15 Schedule 1.1(a).
 15:23:22 16 Q. Did Novell expect Santa Cruz to develop the
 15:23:24 17 old UNIX technology?
 15:23:26 18 A. I don't know. I don't really understand the
 15:23:30 19 question.
 15:23:30 20 Q. Well, I've heard you to say that Novell did
 15:23:32 21 expect Santa Cruz to develop the UnixWare business. Is
 15:23:36 22 that right?
 15:23:36 23 A. So I may -- it may be a semantic error that
 15:23:46 24 I'm making, but I think SCO had its own UNIX business
 15:23:51 25 prior to the transaction with Novell and that they were

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15:23:54 1 in fact a licensee of UNIX. And they were -- that was
 15:24:01 2 their primary business, and they were a logical buyer of
 15:24:07 3 a business that Novell was not going to be investing in,
 15:24:16 4 if you will, going forward. That notwithstanding having
 15:24:19 5 purchased it recently, it wasn't going to be a focus
 15:24:22 6 going forward.
 15:24:23 7 So it was a strategic decision to sell, and
 15:24:27 8 SCO was a logical buyer. I -- I don't -- I don't know
 15:24:33 9 more that I can say about what the expectation was
 15:24:38 10 vis-a-vis UnixWare or another flavor of UNIX or a
 15:24:44 11 then-current UNIX platform. I don't know what SCO's
 15:24:51 12 intentions were with respect to the business going
 15:24:54 13 forward.
 15:24:54 14 Q. Maybe I've got the foundation wrong. Novell
 15:24:57 15 before the APA had a UnixWare line of business; correct?
 15:25:01 16 A. That's right.
 15:25:02 17 Q. Did Novell have a UNIX line of business? Was
 15:25:04 18 that phrasing you would use?
 15:25:05 19 A. No, not that I'm aware of. I guess that
 15:25:08 20 encapsulates the operating -- the UNIX operating system
 15:25:13 21 itself which was acquired from USL in '93.
 15:25:24 22 Q. Before the break, we had turned to Section
 15:25:27 23 4.16(a) of the APA. The first sentence of that section
 15:25:33 24 says: "Following the closing, buyer shall administer the
 15:25:37 25 collection of all royalties, fees, and other amounts due

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15:25:39 1 under all SVRX licenses (as listed in detail under item 6
 15:25:45 2 of Schedule 1.1(a) hereof and referred to herein as SVRX
 15:25:51 3 royalties)."
 15:25:54 4 Do you see that sentence?
 15:25:55 5 A. I do.
 15:25:56 6 Q. And then if you look at item 6 of Schedule
 15:26:02 7 1.1(a), which is on or against on the page ending with
 15:26:08 8 the Bates-stamp 952?
 15:26:10 9 A. Yes.
 15:26:11 10 Q. Item 6 says: "All contracts relating to the
 15:26:16 11 SVRX licenses listed below."
 15:26:19 12 A. Yes.
 15:26:19 13 Q. Do you see that language?
 15:26:21 14 A. I do.
 15:26:22 15 Q. In the APA, what did Novell intend a "SVRX
 15:26:26 16 license" to be?
 15:26:32 17 A. I don't know what Novell intended a SVRX
 15:26:42 18 license to be. I mean, so...
 15:26:47 19 Q. In the view of the Wilson Sonsini law firm,
 15:26:50 20 what are the SVRX licenses as that term is used in the
 15:26:54 21 APA?
 15:26:55 22 A. They are, as you just read to me in the
 15:27:07 23 parenthetical, the licenses as listed in detail in the
 15:27:11 24 schedule under item 6.
 15:27:13 25 Q. Now, the list in item 6 is a list of

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15:27:17 1 products; correct?
 15:27:18 2 A. It's a list of contracts relating to the
 15:27:23 3 licenses listed below.
 15:27:29 4 Q. Let me take the first entry in the list. It
 15:27:32 5 says: "UNIX System 5 release 4.2 MP, Intel 386
 15:27:44 6 implementation."
 15:27:45 7 Do you see that language?
 15:27:47 8 A. I do.
 15:27:48 9 Q. What is UNIX System 5 release 4.2 MP Intel
 15:27:54 10 386 implementation?
 15:28:00 11 A. I don't know.
 15:28:02 12 Q. Is it a product?
 15:28:16 13 A. So I don't know what the implementations are.
 15:28:21 14 These look like releases of the software product.
 15:28:35 15 Q. So is it the firm's view that an SVRX license
 15:28:38 16 is any contract relating to any of the releases of the
 15:28:42 17 software products listed in item 6?
 15:28:50 18 A. If -- could you repeat the question, please.
 15:29:01 19 Q. Is it the firm's view that a SVRX license in
 15:29:05 20 the APA is any contract relating to any of the releases
 15:29:08 21 of the software products listed in item 6 of Schedule
 15:29:14 22 1.1(a)?
 15:29:14 23 A. That appears to be what Schedule 1.1(a) says.
 15:29:18 24 It says all contracts relating to the licenses of the
 15:29:21 25 additions below.

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15:29:23 1 Q. So to the extent that you have a view on
 15:29:27 2 behalf of the firm, you would cite that language in
 15:29:31 3 item 6. Is that fair to say?
 15:29:33 4 A. I would say the language, it is what it is.
 15:29:43 5 Q. In the APA, did Novell intend to have the
 15:29:47 6 right to direct Santa Cruz to waive any of Santa Cruz's
 15:29:52 7 rights under any contract relating to any of the products
 15:29:56 8 listed in item 6 of Schedule 1.1(a)?
 15:30:00 9 A. You know, Ted --
 15:30:02 10 MR. BRAKEBILL: Calls for a legal conclusion.
 15:30:04 11 MR. PARNES: You can answer.
 15:30:05 12 THE WITNESS: Okay. I would refer you, in
 15:30:12 13 answering that question, to Tor's declaration because I
 15:30:17 14 think that question is addressed specifically by Tor.
 15:30:28 15 Q. BY MR. NORMAND: You would direct me to Tor's
 15:30:31 16 declaration because it's something you can't speak to?
 15:30:33 17 A. It's because he was the primary negotiator of
 15:30:38 18 this contract and of -- the primary communicator with our
 15:30:43 19 client, and I have no reason to -- I have no different
 15:30:52 20 view of this besides that which he articulated.
 15:30:55 21 Q. So is it the firm's view that whatever
 15:30:58 22 Mr. Braham has to say about waiver rights reflects the
 15:31:01 23 view of the firm?
 15:31:07 24 MR. PARNES: You can answer. If you know.
 15:31:09 25 THE WITNESS: Could you repeat the question,

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15:31:17 1 please.
 15:31:18 2 Q. BY MR. NORMAND: Is it the firm's view that
 15:31:20 3 whatever Mr. Braham has to say about waiver rights
 15:31:24 4 reflects the view of the firm?
 15:31:26 5 A. Yes.
 15:31:32 6 Q. But apart from what Mr. Braham says in the
 15:31:35 7 declaration that he has signed and that you've read, you
 15:31:38 8 don't know what Mr. Braham's views are; is that fair to
 15:31:42 9 say?
 15:31:42 10 MR. PARNES: On what subject, Counsel?
 15:31:44 11 MR. NORMAND: The issue of waiver.
 15:31:45 12 MR. PARNES: You can answer.
 15:31:46 13 THE WITNESS: I have not spoken, if you're
 15:31:51 14 asking about spoken independently with Tor about this
 15:31:53 15 issue, the answer is no. Did I misconstrue your
 15:32:00 16 question?
 15:32:00 17 MR. NORMAND: Well, what you've said is a
 15:32:02 18 subset of my question.
 15:32:04 19 Q. But what -- your understanding of
 15:32:08 20 Mr. Braham's views are those views set forth in the
 15:32:10 21 declaration that he's signed and that you've reviewed; is
 15:32:14 22 that fair to say --
 15:32:15 23 A. Yes, that's fair.
 15:32:20 24 Q. Do you have any personal recollection of the
 15:32:26 25 issue of what I've called waiver rights from your

15:32:29 1 **experience in the negotiation and drafting of the APA?**

15:32:37 2 **A. No.**

15:32:53 3 **Q. So in order for me to examine the firm's**

15:32:55 4 **views as to the issue of waiver rights, I'd need to be**

15:32:58 5 **able to speak with Mr. Braham; is that fair to say?**

15:33:01 6 MR. BRAKEBILL: Argumentative.

15:33:02 7 MR. PARNES: Join in the objection.

15:33:04 8 MR. NORMAND: How is it argumentative?

15:33:06 9 MR. BRAKEBILL: It's how you present the

15:33:08 10 argument.

15:33:09 11 **Q. BY MR. NORMAND: Isn't it obvious, Mr. Alter?**

15:33:11 12 MR. PARNES: You can answer.

15:33:12 13 MR. NORMAND: I don't understand why you're

15:33:14 14 looking at your counsel repeatedly for these fairly

15:33:18 15 straightforward questions. There's no reason for you not

15:33:20 16 to be able to answer that question. There's no sign or

15:33:23 17 counsel you can get from your attorney that would help

15:33:25 18 you answer that question.

15:33:26 19 If he wants to direct you not to answer it,

15:33:29 20 he's going to say it. You don't need to be looking at

15:33:33 21 him in order to get that instruction.

15:33:34 22 MR. PARNES: Are you finished, Counsel?

23 MR. NORMAND: I am finished.

15:33:36 24 MR. PARNES: Do you want to berate the

15:33:38 25 witness some more? It's Friday afternoon. Do you want

15:33:41 1 to berate him some more?

15:33:42 2 MR. NORMAND: That's hardly berating. I've

15:33:43 3 tolerated it for two hours that he's looking constantly

15:33:46 4 at you, which the camera will reflect, and I don't see

15:33:51 5 how it's appropriate.

15:33:51 6 MR. PARNES: I'm not signaling him, Counsel.

7 MR. NORMAND: I didn't say you're signaling

8 him.

9 MR. PARNES: And I reject the implication

10 that he's looking for some signal.

15:33:54 11 MR. NORMAND: Let the record reflect that

15:33:57 12 you're leaning over at me three feet in my direction,

13 because it's absurd for you to assert that I'm saying

15:34:01 14 you're signaling him. I'm saying there's no reason for

15:34:02 15 him to be looking at you.

15:34:04 16 It's pausing, it's contemplating. Whatever

15:34:06 17 he wants to get out of looking at you, it's

15:34:09 18 inappropriate.

15:34:10 19 MR. PARNES: I disagree, Counsel. He can

15:34:12 20 look anywhere. He can refresh his recollection with

15:34:14 21 anything.

15:34:14 22 MR. NORMAND: There's a difference between

15:34:15 23 looking anywhere and looking at you. Come on.

15:34:18 24 MR. PARNES: Counsel, he can look at anybody.

15:34:20 25 He can look at your associate. He can look over here.

15:34:24 1 MR. NORMAND: There's a difference between

15:34:25 2 looking at anything else in the room and you. There has

15:34:29 3 to be a difference.

15:34:29 4 MR. PARNES: You pointed that out as an

15:34:29 5 implication that he's somehow getting some communication

15:34:30 6 relating to his testimony. I bitterly -- I bitterly --

15:34:34 7 MR. NORMAND: No, what I said on the record,

15:34:35 8 Counsel, was I don't understand why he's doing it. If I

15:34:40 9 want to accuse you of signaling him, I'll flat-out do it.

15:34:42 10 I haven't done it. I said I don't understand why he's

15:34:46 11 doing it. That's what I've said on the record.

15:34:48 12 MR. PARNES: And the clear implication is

15:34:51 13 that because he's looking at me, he's somehow --

15:34:52 14 MR. NORMAND: If I want to imply that or say

15:34:53 15 it, I will say it. I will just flat-out say it.

15:34:54 16 MR. PARNES: All right. Is there a question

15:34:56 17 pending? This is not productive.

15:35:02 18 MR. NORMAND: So we can start over because

19 we're going to go back.

15:35:04 20 **Q. In order for me to cross-examine the firm's**

15:35:08 21 **witness on the issue of waiver rights under the APA, in**

15:35:12 22 **your view, I'd need to be able to speak with Mr. Braham;**

15:35:15 23 **is that fair to say?**

15:35:16 24 MR. BRAKEBILL: Argumentative.

15:35:16 25 MR. PARNES: Counsel, this is the firm's

15:35:18 1 witness. You've had an opportunity to cross-examine him.

15:35:21 2 MR. NORMAND: How can I cross-exam him about

15:35:24 3 waiver rights? He's just punted it to Mr. Braham.

15:35:28 4 MR. PARNES: And you've got Mr. Braham's

15:35:30 5 declaration.

15:35:30 6 MR. NORMAND: I just said in order to

15:35:31 7 cross-examine. How can I cross-examine you about the

15:35:33 8 content of his declaration? You've said you don't know

15:35:34 9 anything about it other than what he's said.

15:35:37 10 This is not the chicanery. I don't

15:35:40 11 understand how I can speak to the firm's representative

15:35:43 12 when we've just had the testimony he's given.

15:35:49 13 MR. PARNES: Can you answer --

15:35:50 14 **Q. BY MR. NORMAND: Is there any utility in me**

15:35:53 15 **going through my series of questions with you on the**

15:35:55 16 **question of waiver rights? I mean --**

15:35:56 17 MR. BRAKEBILL: Why don't you ask the

15:35:58 18 questions.

15:35:58 19 MR. NORMAND: Well, because I'm trying to

15:36:00 20 save the witness on a Friday afternoon half an hour of

15:36:03 21 questions I've drafted up. I don't see the point. Do

15:36:06 22 you want me to start the process and we can try a few

15:36:09 23 questions in?

15:36:09 24 MR. PARNES: I'm not going to tell you what

15:36:11 25 your job is, Ted. You know, Tor was the primary --

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15:36:16 1 MR. NORMAND: I don't need you to tell me
 15:36:19 2 what my job is. I've been very patient on this question
 15:36:22 3 of the extent of your ability to testify on behalf of the
 15:36:25 4 firm. I feel like I'm making a very self-evident point,
 15:36:29 5 which is there is no utility in me asking you questions
 15:36:32 6 about waiver.
 15:36:32 7 Now, if you disagree with me or if there's
 15:36:35 8 any ambiguity in that question, I'll start with the
 15:36:35 9 questions and we can revisit this in ten minutes.
 15:36:38 10 THE WITNESS: Can you tell me more what you
 15:36:39 11 mean by "waiver"?
 15:36:40 12 **Q. BY MR. NORMAND: Let me try a few questions**
 15:36:42 13 **and we'll do it that way.**
 15:36:45 14 **A. Is there a provision of the APA to which you**
 15:36:48 15 **want to --**
 15:36:48 16 **Q. 4.16(b) generally goes to the issue of**
 15:36:51 17 **waiver, what we've called waiver in the case.**
 15:36:54 18 **A. Okay.**
 15:37:02 19 **Q. The first sentence says: "Buyer shall not**
 15:37:06 20 **have the authority to amend, modify, or waive any right**
 15:37:10 21 **under or assign any SVRX license without the prior**
 15:37:15 22 **consent of seller. In addition, at seller's sole**
 15:37:18 23 **discretion and direction, buyer shall amend, supplement,**
 15:37:21 24 **modify, or waive any rights under or shall assign any**
 15:37:24 25 **rights to any SVRX license to the extent so directed in**

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15:37:29 1 **any manner or respect by seller."**
 15:37:31 2 **Do you see that language?**
 15:37:32 3 **A. I do.**
 15:37:33 4 **Q. In the view of the Wilson Sonsini law firm,**
 15:37:36 5 **in the APA, does Novell have the right to direct Santa**
 15:37:40 6 **Cruz to waive any of Santa Cruz's rights under any SVRX**
 15:37:44 7 **license that Novell directed Santa Cruz to waive?**
 15:37:47 8 **A. So I'll pause here and tell you that any**
 15:37:53 9 **position that the firm had at the time respecting waiver**
 15:38:00 10 **was articulated by Tor in his declaration and that I**
 15:38:06 11 **don't have anything additional to add to that because I**
 15:38:12 12 **do not have a personal recollection of involvement in the**
 15:38:16 13 **negotiation of or discussion of this provision.**
 15:38:25 14 **Q. In the view of the Wilson Sonsini law firm,**
 15:38:28 15 **does Novell have to exercise its right under Section**
 15:38:32 16 **4.16(b) in good faith in order to effectuate the purposes**
 15:38:38 17 **of the APA?**
 15:38:38 18 MR. BRAKEBILL: Calls for a legal conclusion.
 15:38:40 19 MR. PARNES: You can answer.
 15:38:46 20 THE WITNESS: You're asking if there's an
 15:38:47 21 obligation of good faith in enforcing rights under this
 15:38:50 22 contract on Novell's part?
 15:38:52 23 **Q. BY MR. NORMAND: I didn't mean to ask the**
 15:38:53 24 **question that generally, just with respect to Section**
 15:38:56 25 **4.16(b). And if you want to read the entirety of that**

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15:39:00 1 **language, that's fine. I meant to focus on the first two**
 15:39:02 2 **sentences.**
 15:39:03 3 **A. Okay. So I would read this language to**
 15:39:20 4 **specifically exclude any limitation, whether it be good**
 15:39:27 5 **faith or otherwise.**
 15:39:28 6 **Q. No limitation on reasonable discretion?**
 15:39:30 7 **A. Sole discretion and direction is what I read.**
 15:39:34 8 **Q. An unfettered right, in your view?**
 15:39:38 9 MR. BRAKEBILL: Mischaracterizes the
 15:39:40 10 testimony.
 15:39:40 11 **Q. BY MR. NORMAND: Are you comfortable using**
 15:39:42 12 **the word "unfettered"?**
 15:39:46 13 **A. With respect to this specific provision of**
 15:39:49 14 **4.16(b), the language looks pretty stark and unfettered.**
 15:39:56 15 **Q. And is it the firm's view that the language**
 15:39:58 16 **is stark and unfettered?**
 15:40:00 17 **A. No, I would -- that's my own characterization**
 15:40:03 18 **of an adjective. So I guess it sort of speaks for**
 15:40:08 19 **itself. It's their sole discretion and direction.**
 15:40:20 20 **Q. In the APA, in the firm's view, does Novell**
 15:40:24 21 **have the right to direct Santa Cruz to modify any SVRX**
 15:40:28 22 **license that Novell directs Santa Cruz to modify to**
 15:40:33 23 **increase an SVRX licensee's rights to use SVRX source**
 15:40:38 24 **code?**
 15:40:38 25 MR. BRAKEBILL: Calls for a legal conclusion.

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15:40:39 1 THE WITNESS: So just reading on in that
 15:40:55 2 second sentence, that -- that seems to be what it says.
 15:40:59 3 At seller's sole direction and discretion, buyer shall
 15:41:03 4 amend, supplement, modify, or waive any rights or shall
 15:41:07 5 assign any rights to any license to the extent so
 15:41:11 6 directed in any manner or respect by seller.
 15:41:13 7 **Q. BY MR. NORMAND: Apart from reading the**
 15:41:15 8 **language of Section 4.16(b), do you have any view as to**
 15:41:19 9 **the question of waiver rights under the APA?**
 15:41:20 10 **A. Again --**
 15:41:21 11 **Q. And apart from deferring to Mr. Braham's**
 15:41:23 12 **declaration?**
 15:41:24 13 **A. No.**
 15:41:33 14 **Q. In order for me to speak with a**
 15:41:34 15 **representative of the firm with some view as to waiver**
 15:41:37 16 **rights independent of the language of the APA, I would**
 15:41:40 17 **need to speak with Mr. Braham; is that right?**
 15:41:42 18 MR. PARNES: I'll object. Mr. Braham's not
 15:41:44 19 an employee of this firm. But he would be a
 15:41:48 20 representative of this firm at this point.
 15:41:51 21 But you can answer the question.
 15:41:53 22 MR. BRAKEBILL: Argumentative.
 15:41:55 23 THE WITNESS: So do you want me to answer,
 15:41:58 24 Mark?
 15:42:01 25 **Q. BY MR. NORMAND: In order to me to speak with**

15:42:03 1 someone who represented Novell in connection with the APA
 15:42:07 2 who has a view of the question of waiver rights apart
 15:42:11 3 from the language of the APA, I would need to speak with
 15:42:14 4 Mr. Braham; is that right?
 15:42:16 5 MR. BRAKEBILL: Foundation, also.
 15:42:17 6 MR. PARNES: You can answer.
 15:42:18 7 THE WITNESS: That's correct.
 15:42:19 8 Q. BY MR. NORMAND: And if you had spoken with
 15:42:21 9 Mr. Braham, apart from reading his declaration, it's
 15:42:26 10 possible that you would have gained a view as to the
 15:42:28 11 question of waiver rights that goes beyond the language
 15:42:31 12 of the APA and goes beyond the language of his
 15:42:36 13 declaration; is that right?
 15:42:37 14 MR. BRAKEBILL: Speculation.
 15:42:37 15 THE WITNESS: If I had spoken to Mr. Braham?
 15:42:40 16 When do you mean?
 15:42:41 17 Q. BY MR. NORMAND: If you had spoken with
 15:42:44 18 Mr. Braham regarding the subject matter of waiver rights
 15:42:46 19 under the APA.
 15:42:47 20 A. You mean in preparation for this deposition?
 15:42:49 21 Q. Correct.
 15:42:50 22 MR. BRAKEBILL: Speculation.
 15:42:51 23 THE WITNESS: Yeah, I don't know what he
 15:42:53 24 would have -- all I have is what he said in his
 15:42:55 25 declaration to go on.

15:42:58 1 Q. BY MR. NORMAND: And what I asked was whether
 15:42:59 2 it was possible that you would have gained some knowledge
 15:43:02 3 about the question of waiver rights beyond the language
 15:43:05 4 of the APA and beyond what he has said in his
 15:43:08 5 declaration.
 15:43:08 6 A. It's possible.
 15:43:25 7 Q. If I were to ask you questions about
 15:43:28 8 Mr. Braham's declaration with respect to the issue of
 15:43:29 9 waiver rights, would you be able to answer those
 15:43:33 10 questions apart from reading the language of Section
 15:43:35 11 4.16(b)?
 15:43:39 12 A. I'm not sure I understand the question.
 15:43:44 13 Q. What is your lack of clarity with respect to
 15:43:49 14 the question?
 15:43:50 15 A. Could you repeat the question for me.
 15:43:55 16 Q. The question is whether there would be any
 15:43:57 17 utility in my taking out Mr. Braham's declaration, and I
 15:44:02 18 understand, you don't have to tell me how to do my job.
 15:44:04 19 My question is: If I took out Mr. Braham's declaration
 15:44:07 20 and started asking you questions about his testimony
 15:44:10 21 regarding waiver rights, would I be merely asking you to
 15:44:15 22 read Section 4.16(b) of the APA?
 15:44:18 23 A. Yes. I don't have an independent
 15:44:20 24 recollection of discussions regarding waiver rights other
 15:44:23 25 than my interpretation of 4.16(b), which I've already

15:44:28 1 shared with you.
 15:44:41 2 Q. In the view of the law firm, does the plain
 15:44:43 3 language of Section 4.16(b) make illusory the notion that
 15:44:49 4 Novell had sold the UNIX and UnixWare business to Santa
 15:44:52 5 Cruz?
 15:44:52 6 MR. BRAKEBILL: Vague and ambiguous.
 15:44:53 7 THE WITNESS: No.
 15:44:55 8 Q. BY MR. NORMAND: And why not?
 15:44:56 9 A. Because what SCO was buying was more than a
 15:45:11 10 set of existing licenses. It was getting -- it was
 15:45:17 11 getting a user base, if you will, to which it could up
 15:45:22 12 sell. It was administering these licenses and seeing
 15:45:32 13 what the terms were, which would enable them to do any of
 15:45:46 14 a number of things, provide amendments to, fix as
 15:45:52 15 maintenance. I mean, I think there was a whole revenue
 15:45:55 16 stream associated with the business outside of the SVRX
 15:45:59 17 licenses. So...
 15:46:03 18 Q. Didn't Novell retain the right to direct
 15:46:06 19 Santa Cruz to terminate all of its SVRX licenses?
 15:46:16 20 MR. BRAKEBILL: Did you say terminate?
 15:46:18 21 MR. NORMAND: (Attorney nods head.)
 15:46:36 22 THE WITNESS: Where are you saying is the
 15:46:38 23 termination right?
 15:46:40 24 MR. NORMAND: I didn't mean to suggest it.
 15:46:41 25 That was I understood you to say that the right of waiver

15:46:45 1 and the right set forth in Section 4.16(b), where -- with
 15:46:51 2 that qualification, I don't know if that's the word that
 15:46:54 3 you used, but that's what I understood you to say.
 15:46:57 4 MR. BRAKEBILL: Mischaracterizes his
 15:46:59 5 testimony.
 15:47:00 6 THE WITNESS: I think given that the revenue
 15:47:02 7 stream flowing from these licenses was a substantial part
 15:47:06 8 of -- retaining the revenue stream was a substantial part
 15:47:10 9 of the consideration for doing this deal with SCO, given
 15:47:14 10 that it was a 95/5 percent split, I -- I can only intuit
 15:47:22 11 that SCO was comfortable with granting these rights under
 15:47:27 12 4.16 because it would be on Novell's best interest, as in
 15:47:34 13 SCO's, to keep the revenue flowing from these licenses.
 15:47:38 14 Q. BY MR. NORMAND: Was it your view that Novell
 15:47:40 15 could have directed Santa Cruz to modify all its SVRX
 15:47:44 16 licenses to permit all SVRX licensees to distribute the
 15:47:48 17 source code to whoever they wanted?
 15:47:56 18 A. The second sentence of 4.16(b) is very broad.
 15:48:00 19 And then, I guess the business exigencies are what the
 15:48:07 20 parties would rely on for governors of what might or
 15:48:12 21 might not occur.
 15:48:18 22 Q. Was it business exigencies that you said?
 15:48:21 23 A. Yes.
 15:48:21 24 Q. What did you mean by that?
 15:48:23 25 A. That their interests were aligned and

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15:48:25 1 maximizing revenues from these licenses.
 15:48:35 2 Q. Apart from business exigencies, however, in
 15:48:39 3 your view, Novell had the right to direct Santa Cruz to
 15:48:41 4 modify its SVRX licenses to permit the SVRX licensees to
 15:48:46 5 do whatever they wanted with the SVRX source code?
 15:48:52 6 MR. BRAKEBILL: Mischaracterizes testimony.
 15:49:03 7 THE WITNESS: I believe 4.16(b) gives Novell
 15:49:06 8 broad rights to direct SCO to modify the licenses.
 15:49:16 9 Q. BY MR. NORMAND: And in your view, Novell had
 15:49:18 10 the right under the APA to do so in bad faith?
 15:49:21 11 MR. BRAKEBILL: Mischaracterizes his
 15:49:24 12 testimony.
 15:49:25 13 THE WITNESS: What would constitute bad
 14 faith?
 15:49:33 15 Q. BY MR. NORMAND: Not good faith.
 15:49:53 16 A. I don't see any modifier on Novell's rights
 15:49:56 17 under 4.16(b) with respect to the SVRX licenses.
 15:50:00 18 Q. So is it your view that Novell was entitled
 15:50:05 19 to exercise its rights under Section 4.16(b) with the
 15:50:10 20 intent to harm Santa Cruz?
 15:50:18 21 MR. BRAKEBILL: Mischaracterizes the
 15:50:19 22 testimony, argumentative to the extent you're saying, "So
 15:50:30 23 it is."
 15:50:30 24 THE WITNESS: I'm uncomfortable
 15:50:45 25 characterizing any action of Novell's that they would

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15:50:49 1 have contemplated here as to be in bad faith. I would
 15:50:52 2 reiterate that there's no good-faith reasonableness. I
 15:50:59 3 mean, they're different variations on this theme and
 15:51:03 4 contract provisions, and there are no modifiers to
 15:51:07 5 Novell's rights here.
 15:51:08 6 Q. BY MR. NORMAND: No. And I don't mean to
 15:51:10 7 suggest in the question that Novell never undertook such
 15:51:15 8 conduct with such a state of mind. It's a hypothetical
 15:51:18 9 question. So in a hypothetical --
 15:51:19 10 A. So hypothetically, I would agree that there's
 15:51:22 11 no -- you could -- you can characterize it with using bad
 15:51:28 12 faith or malice or whatever it is. I don't -- aside from
 15:51:33 13 some general legal prohibition or prescription against
 15:51:44 14 entering into a contract with bad faith of the four
 15:51:47 15 corners of the agreement, this provision, there's no such
 15:51:49 16 limitation on Novell's ability to direct SCO to modify or
 15:51:59 17 supplement or waive any rights under these licenses.
 15:52:37 18 Q. In the APA, in the firm's view, did Novell
 15:52:41 19 have the right to approve new SVRX licenses that Santa
 15:52:47 20 Cruz might sign with new SVRX licensees?
 15:52:52 21 MR. BRAKEBILL: Calls for a legal conclusion.
 15:52:54 22 MR. PARNES: You can answer if you have an
 15:52:56 23 understanding.
 15:52:57 24 Q. BY MR. NORMAND: And just to clarify because
 15:52:59 25 I see you looking at the agreement.

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15:53:01 1 A. Isn't that what that third sentence --
 15:53:04 2 Q. I suppose we could go through the agreement.
 15:53:07 3 Do you have an independent view of the issue apart from
 15:53:08 4 looking at the agreement?
 15:53:09 5 A. No, other than I can interpret it for you.
 15:53:12 6 Q. And is this an issue that you have a view as
 15:53:15 7 to whether Mr. Braham has offered testimony on?
 15:53:17 8 A. When you say offered testimony, do you mean
 15:53:21 9 separate and aside from what's in his declaration?
 15:53:23 10 Q. I just mean in his declaration.
 15:53:26 11 A. I think Tor in his declaration is very clear
 15:53:29 12 that all of this was specifically bargained for, it was
 15:53:33 13 intended to reserve these rights, it was part of the
 15:53:35 14 transaction, and I think he says that in his declaration.
 15:53:38 15 That's my recollection.
 15:53:48 16 Q. Is it the firm's view that whatever
 15:53:51 17 Mr. Braham has to say in his declaration on the question
 15:53:54 18 of new SVRX licenses represents the view of the firm?
 15:54:00 19 A. When you say "the view of the firm," do you
 15:54:02 20 mean now as reviewing this or at the time the deal was
 15:54:07 21 getting negotiated? You mean the latter; correct?
 15:54:09 22 Q. I do because I think that's the spirit in
 15:54:12 23 which Mr. Braham offered his testimony in his
 15:54:15 24 declaration.
 15:54:16 25 A. Right. Right. And I would say what -- at

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15:54:18 1 the time he was the lead partner, he had a very clear
 15:54:22 2 understanding of the direction from the client, and I
 15:54:28 3 think he speaks to this point specifically.
 15:54:36 4 Q. So does that mean that his views constitute
 15:54:39 5 the firm's views?
 15:54:41 6 A. Yes, in my opinion.
 15:54:53 7 Q. Do you know whether he does address the issue
 15:54:55 8 of new SVRX licenses in his declaration? I don't need to
 15:55:06 9 waste your time with the question. Obviously, I can
 15:55:09 10 look, but I don't recall right now.
 15:55:39 11 Did you answer the question verbally? I'm
 15:55:40 12 not sure.
 15:55:41 13 A. So I -- could you repeat the question for me.
 15:55:45 14 Q. Do you know whether Mr. Braham addresses the
 15:55:48 15 issue in his declaration?
 15:55:49 16 A. I don't know. Sorry. So I don't know -- I
 15:55:52 17 don't recall specifically whether in his declaration Tor
 15:56:02 18 speaks specifically to the language of the ultimate
 15:56:04 19 sentence of 4.16(b), which is the prohibition against
 15:56:09 20 entering into future licenses.
 15:56:17 21 MR. NORMAND: Why don't we take a break.
 15:56:20 22 THE VIDEOGRAPHER: We are now going off the
 15:56:22 23 video record. The time is 3:54 p.m.
 15:56:25 24 (Recess.)
 16:07:29 25 THE VIDEOGRAPHER: We are now back on the

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16:07:44 1 video record. The time is 4:06 p.m.

16:07:48 2 **Q. BY MR. NORMAND:** Mr. Alter, in the APA, what

16:07:51 3 payments did Novell intend to require Santa Cruz to remit

16:07:55 4 to Novell?

16:07:56 5 **A.** 95 percent of the SVRX royalties.

16:08:13 6 **Q.** And what were the SVRX royalties?

16:08:16 7 **A.** Just quoting from the agreement for 16 A, all

16:08:34 8 royalties, fees, and other amounts due under all SVRX

16:08:37 9 licenses is the definition of the SVRX royalties.

16:08:40 10 **Q.** And do you have an independent view of the

16:08:43 11 question of the payments that Santa Cruz was obligated to

16:08:49 12 remit to Novell apart from reading the language of the

16:08:53 13 APA?

16:08:54 14 **A.** By an independent view, I'm not sure what you

16:09:03 15 mean.

16:09:03 16 **Q.** Well, is it an issue that you worked on in

16:09:08 17 1995 in connection with your work on the APA?

16:09:11 18 **A.** I'm still not -- I don't understand -- I'm

16:09:19 19 sorry, could you rephrase the question.

16:09:21 20 **Q.** If you were to put the APA to the side and I

16:09:24 21 were to ask you questions about the payments --

16:09:26 22 **A.** Do I have some independent recollection of

16:09:30 23 what -- of the discussion of royalties? No.

16:09:32 24 **Q.** And do you have any independent knowledge,

16:09:34 25 meaning by virtue of having spoken with people or studied

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16:09:38 1 any documents?

16:09:38 2 **A.** No.

16:09:39 3 **Q.** And do you have an understanding of the issue

16:09:43 4 apart from what you regard to be the plain language of

16:09:46 5 the APA?

16:09:47 6 **A.** I do not.

16:09:48 7 **Q.** Do you know if Mr. Braham has a view on the

16:09:54 8 issue of payments that Novell was obligated or that Santa

16:09:58 9 Cruz was obligated to remit to Novell, apart from what

16:10:03 10 you regard as the plain language of the APA?

16:10:06 11 **A.** I don't have any knowledge of what he might

16:10:19 12 know or not know.

16:10:20 13 **Q.** Handing you what's been previously marked as

16:10:23 14 Exhibit 1029, which is Novell's 10-Q for the fiscal

16:10:37 15 quarter ending January 27th, 1996. I think that's

16:10:42 16 reflected at the bottom of the first page and the top of

16:10:50 17 the second page of the document. And there's numbers at

16:10:53 18 the top right of this document. And I wanted to turn

16:10:55 19 your attention to page 9 of 17.

16:11:07 20 **And in the middle of the page, in the**

16:11:10 21 **paragraph beginning in December, 1995 there's language**

16:11:13 22 **that says, "The agreement also calls for Novell to**

16:11:17 23 **receive a revenue stream from SCO based on revenue**

16:11:21 24 **performance of the purchased UnixWare product line. This**

16:11:25 25 **revenue stream is not to exceed 84 million net present**

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16:11:29 1 **value and will end by the year 2002. In addition, Novell**

16:11:33 2 **will continue to receive revenue from existing licenses**

16:11:37 3 **for older versions of UNIX system source code."**

16:11:41 4 **Do you see that language?**

16:11:42 5 **A.** I do.

16:11:44 6 **Q.** In your view, is it accurate to say that

16:11:46 7 **under the APA, Novell will continue to receive revenue**

16:11:50 8 **from existing licenses for older version of UNIX system**

16:11:56 9 **source code?**

16:11:56 10 **A.** I'm not understanding the link between the

16:12:00 11 **disclosure and the 10-Q and the APA. Could you -- could**

16:12:08 12 **you tie that together for me?**

16:12:12 13 **Q.** My question is whether the sentence I just

16:12:16 14 **read into the record from the 10-Q is an accurate**

16:12:19 15 **description of the APA on the issue of the payments that**

16:12:22 16 **Santa Cruz was obligated to remit to Novell.**

16:12:30 17 **A.** I don't know.

16:12:44 18 **Q.** Do you have a view as to whether under the

16:12:46 19 **APA, Novell would receive revenue not just from existing**

16:12:50 20 **SVRX licenses, but from new SVRX licenses as well?**

16:13:06 21 **So the record reflects that you're reviewing**

16:13:08 22 **the APA. I should have been clear. Do you have a view**

16:13:10 23 **apart from reviewing the APA today --**

16:13:12 24 **A.** No.

16:13:12 25 **Q.** -- on the issue that I just asked you about?

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16:13:14 1 **A.** No. I guess other than the plain language of

16:13:29 2 **the first sentence of 4.16(a), which doesn't say all**

16:13:34 3 **current, it doesn't say all prior, it says all SVRX**

16:13:39 4 **licenses.**

16:13:41 5 **Q.** We looked earlier at the definition of SVRX

16:13:52 6 **licenses. That's in item 6 of Schedule 1.1(a). And that**

16:14:05 7 **begins on the page with the Bates number ending 952.**

16:14:22 8 **Item 6 is an item in the schedule of assets transferred;**

16:14:26 9 **correct?**

16:14:26 10 **A.** Correct.

16:14:28 11 **Q.** And Section 4.16(a) cross-references that

16:14:33 12 **item; is that right?**

16:14:35 13 **A.** Yes.

16:14:41 14 **Q.** So wouldn't it be fair to say that by

16:14:44 15 **definition, 4.16(a) cross-references a list of existing**

16:14:50 16 **licenses to be transferred?**

16:14:52 17 **MR. BRAKEBILL:** Foundation, argumentative.

16:15:04 18 **THE WITNESS:** Well, I would read it, Ted, to

16:15:06 19 **say in Roman VI, it's all contracts relating to the**

16:15:12 20 **licenses listed below. So to the extent you had pointed**

16:15:18 21 **out previously that these are actually lists of versions**

16:15:24 22 **of the product. So if there were other contracts, these**

16:15:29 23 **are not the contracts per se, but if there were**

16:15:35 24 **additional contracts with other parties, I would read**

16:15:38 25 **4.16(a) and 1.1(a) Roman VI together to say except this**

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16:15:45 1 is the IP that was being licensed, that the royalties
 16:15:49 2 would -- they would constitute SVRX royalties. To the
 16:15:53 3 extent it was new IP, new merged product, intellectual
 16:15:58 4 property or royalties, that would be a different matter.
 16:16:16 5 **Q. What if Santa Cruz entered into a new SVRX**
 16:16:20 6 **license in the middle of 1996? By definition, that**
 16:16:26 7 **couldn't be among the licenses that had been transferred**
 16:16:28 8 **in September of '95; correct?**
 16:16:31 9 MR. BRAKEBILL: Argumentative.
 16:16:42 10 THE WITNESS: I can answer?
 16:16:43 11 MR. PARNES: You can still answer, yes.
 16:16:51 12 MR. BRAKEBILL: Foundation, too.
 16:16:59 13 THE WITNESS: So I don't read Roman VI to be
 16:17:05 14 a definitive list of licenses, but rather the
 16:17:13 15 intellectual property that will be covered by the SVRX
 16:17:16 16 licenses. And so, therefore, were there to be a
 16:17:20 17 subsequent license of this intellectual property, that
 16:17:24 18 would be a royalty stream that Novell would arguably be
 16:17:31 19 entitled to, less the 5 percent administrative fee.
 16:17:40 20 **Q. BY MR. NORMAND: Doesn't item 6 of Schedule**
 16:17:43 21 **1.1(a) identify the contracts that are among the assets**
 16:17:47 22 **being transferred?**
 16:17:48 23 **A. Yes. Well, I'm sorry, I mean I think you**
 16:17:55 24 **pointed out to me, didn't you, that these aren't -- these**
 16:18:02 25 **aren't contracts. These are lists of -- you said**

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16:18:06 1 **products but, you know, releases, software iterations,**
 16:18:12 2 **different releases of underlying product.**
 16:18:16 3 **Q. Item 6 of Schedule 1.1(a) --**
 16:18:19 4 **A. Right.**
 16:18:21 5 **Q. -- is one of seven Roman numeral items**
 16:18:27 6 **identifying assets that Novell was transferring to Santa**
 16:18:31 7 **Cruz; correct?**
 16:18:31 8 **A. Right.**
 16:18:32 9 **Q. Item 6 specifies that among those assets are**
 16:18:36 10 **all contracts relating to the SVRX licenses listed below;**
 16:18:43 11 **correct?**
 16:18:43 12 **A. Correct.**
 16:18:49 13 **Q. Item 6 is not a reference to future contracts**
 16:18:52 14 **that might relate to the SVRX licenses listed below;**
 16:18:58 15 **correct?**
 16:18:58 16 MR. BRAKEBILL: Argumentative.
 16:18:59 17 THE WITNESS: I don't agree with that. I
 16:19:07 18 don't think you are correct.
 16:19:09 19 **Q. BY MR. NORMAND: So among the assets that**
 16:19:12 20 **Novell was transferring in September of '95 was any SVRX**
 16:19:16 21 **license that Santa Cruz entered into after September of**
 16:19:19 22 **1995?**
 16:19:20 23 **A. Well, when I read Roman VI together with the**
 16:19:38 24 **last sentence of 4.16(b), under what circumstance would**
 16:19:54 25 **there be a license entered into that wasn't one which**

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16:19:59 1 **Novell had an interest in by SCO. Because that last**
 16:20:04 2 **sentence provides that the buyer has no right to enter**
 16:20:08 3 **into any licenses of SVRX except -- sorry.**
 16:20:13 4 **Q. So your view is if Santa Cruz had entered**
 16:20:17 5 **into any new SVRX license, it would constitute a breach**
 16:20:20 6 **of Section 4.16(b)?**
 16:20:42 7 **A. Seems to me what it says, yeah, to me.**
 16:20:47 8 **Q. Now, the issue we started with was 4.16(a)**
 16:20:51 9 **and the meaning of SVRX royalties.**
 16:20:52 10 **A. Right.**
 16:20:54 11 **Q. Is it your view that if Santa Cruz had**
 16:20:57 12 **entered into a new SVRX license, which I think you've**
 16:21:04 13 **said you would regard as a breach, is it your view that**
 16:21:07 14 **any payments under that new SVRX license would be ones**
 16:21:13 15 **that Santa Cruz would have to remit to Novell?**
 16:21:16 16 **A. Less the 5 percent fee.**
 16:21:18 17 MR. BRAKEBILL: Mischaracterizes testimony in
 16:21:20 18 the first part of your question.
 16:21:21 19 **Q. BY MR. NORMAND: And why is that your view?**
 16:21:23 20 **Is there language in the APA that you're relying on in**
 16:21:26 21 **reaching that view?**
 16:21:27 22 **A. The language I'm relying on is the -- is**
 16:21:32 23 **4.16(a), and the first sentence which says following the**
 16:21:38 24 **closing, all licenses -- it's all -- so it's reading**
 16:22:01 25 **4.16(a), first sentence, last sentence of 4.16(b), and**

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16:22:10 1 **the reference to Schedule 1.1(a) Roman VI together.**
 16:22:30 2 **And I guess the only color commentary would**
 16:22:34 3 **be what 4.16 seems to say is, look, SVRX is -- is --**
 16:22:49 4 **Novell in C is saying it's not going to be out promoting**
 16:22:57 5 **the sale of SVRX, but rather it was going to be the**
 16:23:05 6 **purview of SCO to do that, and that I believe that SCO**
 16:23:11 7 **would then be seeking to migrate licensees to its own**
 16:23:16 8 **product, this merged product, using its own IP. So I --**
 16:23:22 9 **I speculate that -- well, I'll stop there.**
 16:23:32 10 **Q. Let me be sure I understand. Section**
 16:23:37 11 **4.16(a), that first sentence that you referred to?**
 16:23:39 12 **A. Yes.**
 16:23:41 13 **Q. In your view, would that sentence encompass a**
 16:23:47 14 **new SVRX license entered into after the closing of the**
 16:23:52 15 **APA?**
 16:23:56 16 MR. BRAKEBILL: Asked and answered.
 16:23:57 17 THE WITNESS: Yes.
 16:23:58 18 **Q. BY MR. NORMAND: You don't view 4.16(a) as**
 16:24:03 19 **referring to solely SVRX licenses that were in existence**
 16:24:07 20 **and being transferred at that time in the APA?**
 16:24:11 21 **A. Right, I do not and -- I do not.**
 16:24:23 22 **Q. So is it fair to say that you read item 6 of**
 16:24:26 23 **Schedule 1.1(a) to refer to future contracts relating to**
 16:24:33 24 **SVRX licenses?**
 16:24:34 25 **A. Yeah, it says all contracts relating to SVRX**

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16:24:38 1 licenses, and then these are the specific release.
 16:24:41 2 **Q. Now, item 6 appears in the context of a list**
 16:24:45 3 **of assets being transferred; correct?**
 16:24:47 4 **A. Yes.**
 16:24:48 5 **Q. But it's not your view that Novell was**
 16:24:56 6 **purporting to transfer contracts that were not yet in**
 16:25:04 7 **existence, was it?**
 16:25:06 8 MR. BRAKEBILL: Misstates the testimony.
 16:25:08 9 THE WITNESS: Am I to answer?
 16:25:09 10 MR. PARNES: I'm sorry. Yes, you can answer.
 16:25:13 11 THE WITNESS: Ted, could I trouble you to
 16:25:15 12 repeat what you said?
 16:25:18 13 **Q. BY MR. NORMAND: It's not your view that**
 16:25:20 14 **Novell was purporting to transfer contracts that were not**
 16:25:23 15 **yet in existence?**
 16:25:25 16 MR. TIBBITTS: Same objection.
 16:25:27 17 THE WITNESS: Right. It was transferring all
 16:25:33 18 contracts that were in existence. It was retaining the
 16:25:40 19 intellectual property underlying the contracts of
 16:25:45 20 evidence in 1.1(b). And to the extent under 4.16 SCO had
 16:25:55 21 gone out and gotten an SVRX license, it would either --
 16:26:01 22 it would have done so -- or gotten another licensee, I'm
 16:26:08 23 not sure how they'd do that without breaching the
 16:26:11 24 provision of 4.16(b), by the way, but had they done so,
 16:26:15 25 it would be my reading of this that that would be covered

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16:26:19 1 under the SVRX royalties.
 16:26:22 2 **Q. So to the extent in Exhibit 1029, which we**
 16:26:26 3 **started with, to the extent that this document says that**
 16:26:30 4 **Novell will continue to receive revenue from existing**
 16:26:33 5 **licenses for older versions of UNIX system source code,**
 16:26:37 6 **is it your view that that statement is not entirely**
 16:26:40 7 **accurate?**
 16:26:41 8 **A. Well, this is a disclosure and a 10-Q that**
 16:26:45 9 **talks about the present value of the revenue stream, and**
 16:26:59 10 **it's based on -- I mean, they -- I guess they ran some --**
 16:27:03 11 **a present value calculation and made some assumptions on**
 16:27:11 12 **revenue performance. So I won't speculate as to how they**
 16:27:19 13 **came up with these numbers and whether that included**
 16:27:22 14 **some -- some assumptions about there being no further**
 16:27:30 15 **licenses being done, just given the language of the**
 16:27:33 16 **contract and...**
 16:27:39 17 **So, yeah. That's all I have.**
 16:27:43 18 **Q. In your view, is the statement that Novell**
 16:27:46 19 **will continue to receive revenue from existing licenses**
 16:27:49 20 **for older versions of UNIX system source code an accurate**
 16:27:54 21 **summary of the revenues that Novell would continue to**
 16:27:58 22 **receive under the APA?**
 16:28:00 23 **A. To the extent that that's intended to**
 16:28:06 24 **juxtapose against the go-forward, I would read that to**
 16:28:10 25 **mean anything that SCO -- that's the way I would read**

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16:28:22 1 that disclosure, Ted, that it's meant to make a
 16:28:30 2 distinction between -- versions as of the date of the
 16:28:34 3 closing and then versions that SCO would develop going
 16:28:39 4 forward.
 16:28:39 5 **Q. Is it your view that under the APA, Novell**
 16:28:42 6 **would receive revenue from new licenses for older**
 16:28:46 7 **versions of UNIX system source code?**
 16:28:48 8 **A. Yes.**
 16:28:49 9 **Q. So to the extent that this document doesn't**
 16:28:52 10 **say that, it's at least incomplete. Is that your view?**
 16:28:55 11 **A. Well, I don't -- I think at the time, you**
 16:28:58 12 **know, when they filed this Q, this was contemporaneous,**
 16:29:02 13 **this contract got entered into the fourth -- so Novell**
 16:29:06 14 **had a funky fiscal year. So that's why there was a Q**
 16:29:10 15 **filed in December. So the re -- I think what they're**
 16:29:14 16 **doing is they entered into a material contract and**
 16:29:16 17 **described it and the financial impact of that, and at**
 16:29:21 18 **that time I think the language of the -- if I was reading**
 16:29:25 19 **4.16 then, this would say there are no future licenses or**
 16:29:33 20 **amendments that are being issued. Buyer shall not --**
 16:29:36 21 **have no right to enter into future licenses or**
 16:29:39 22 **amendments. So that's why it doesn't speak to those.**
 16:29:58 23 **Q. Did Novell intend to have Santa Cruz's rights**
 16:30:00 24 **under the APA change in the event of certain changes of**
 16:30:04 25 **control?**

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16:30:08 1 **A. May I review the agreement?**
 16:30:11 2 **Q. You may. And let me just clarify is that an**
 16:30:14 3 **issue that you have any independent recollection of apart**
 16:30:16 4 **from reviewing the agreement?**
 16:30:18 5 **A. I do not.**
 16:30:20 6 **Q. And I think it is Section 6 where the issue**
 16:30:31 7 **is addressed, and more particularly --**
 16:30:35 8 **A. 6.3.**
 16:30:37 9 **Q. -- 6.3, and I think there's a subsequent**
 16:30:45 10 **section that bears on the issue of 6.6.**
 16:30:55 11 **A. The right of first refusal?**
 16:30:58 12 **Q. Correct.**
 16:30:59 13 **A. Okay. So other than reading these sections**
 16:31:03 14 **now and interpreting them for you, Ted, I have no**
 16:31:06 15 **independent recollection.**
 16:31:11 16 **Q. Okay. If you could look at Section 6.3(c) on**
 16:31:53 17 **page 30 --**
 16:31:53 18 **A. Okay.**
 16:31:55 19 **Q. -- which is titled "Expansion of Seller's**
 16:31:58 20 **Rights Relating to the License Technology Upon a Change**
 16:32:02 21 **of Control." Which says: "Until two years from the**
 16:32:11 22 **closing date in the event buyer has merged with, sold**
 16:32:15 23 **shares representing 50 percent or more of the voting**
 16:32:18 24 **power of buyer 2, sold all or substantially all of**
 16:32:22 25 **buyer's assets to or engaged voluntarily in any other**

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16:32:25 1 change of control, transaction with, any party identified
 16:32:30 2 by seller on Schedule 6.3(a) hereof, or in the event any
 16:32:35 3 party identified by seller on Schedule 6.3(a) hereof
 16:32:39 4 shall acquire shares representing 50 percent or more of
 16:32:43 5 the voting buyer power of buyer, seller have
 16:32:47 6 automatically have unlimited royalty-free perpetual right
 16:32:50 7 for license technology."
 16:32:51 8 Do you see that language?
 16:32:52 9 A. I do.
 16:32:52 10 Q. Does that language refresh your recollection
 16:32:54 11 at all in the issue of changes of control?
 16:32:59 12 A. It does not.
 16:33:15 13 Q. Is it fair to say from the plain language of
 16:33:19 14 Section 6.3(c) that Novell intended to have Santa
 16:33:26 15 Cruz's -- I'm sorry, that Novell intended to have its
 16:33:30 16 rights with respect to the license technology change in
 16:33:32 17 the event of a change of control only if such a change
 16:33:37 18 occurred within two years from the closing date?
 16:33:40 19 MR. BRAKEBILL: Vague and ambiguous, calls
 16:33:45 20 for speculation, foundation.
 16:34:09 21 THE WITNESS: I'm not sure about that. I
 16:34:11 22 read the -- I read the second part of C as disjunctive.
 16:34:16 23 I think the two years modifies the transaction with any
 16:34:26 24 party on Schedule 6(a), 6.3(a). I'm not sure. I think
 16:34:58 25 it can be read two ways. I think the way you're reading

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16:35:01 1 it, the question in my mind is does the two years modify
 16:35:06 2 a merger only or somebody out in the market buying up
 16:35:15 3 50 percent of the shares.
 16:35:16 4 So a volitional transaction as opposed to
 16:35:27 5 a -- a negotiated transaction as opposed to one of the
 16:35:32 6 parties in 6.3(a) acquiring hostilely the majority of
 16:35:38 7 interest in -- of SCO.
 16:35:41 8 Q. You don't have a view one way or the other.
 16:35:44 9 Is that right?
 16:35:44 10 A. My view is that it can be read in the
 16:36:05 11 disjunctive.
 16:36:06 12 Q. Can it be read in the conjunctive as well?
 16:36:10 13 A. Yes, I believe so.
 16:36:15 14 Q. Do you have a view as to whether it's more
 16:36:18 15 reasonable to read it one way or the other?
 16:36:21 16 A. I do not.
 16:36:26 17 Q. In the APA, did Novell intend to acquire the
 16:36:41 18 right to use the quote/unquote licensed technology as
 16:36:45 19 defined in the APA in Novell's products?
 16:36:48 20 A. Can you direct me to the definition of
 16:37:01 21 licensed technology, Ted?
 16:37:04 22 Q. Yes, sir. I think it's Section 1.6.
 16:37:17 23 A. Yep. So this relates to the license back.
 16:37:21 24 Q. Now, I suppose before you go into this, is
 16:37:23 25 this an issue that you have independent recollection of?

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16:37:25 1 A. No, no.
 16:37:26 2 Q. Is it something you know whether Mr. Braham
 16:37:28 3 addresses in his declaration?
 16:37:31 4 A. I don't recall.
 16:37:31 5 Q. Okay. Section 1.6 of the APA titled "License
 16:37:37 6 Back of Assets"?
 16:37:38 7 A. Right.
 16:37:39 8 Q. Is this a section you've read recently and
 16:37:44 9 have an understanding of?
 16:37:46 10 A. I mean, I think -- I've read it today,
 16:37:49 11 earlier, and I recall that there was a -- this would be a
 16:38:01 12 standard provision in an asset transfer so that you don't
 16:38:05 13 create a situation where the seller is immediately then
 16:38:08 14 sued for patent infringement by the buyer. So I'll read
 16:38:12 15 what it says.
 16:38:13 16 Q. Let me read this into the record.
 16:38:16 17 A. Okay. Okay.
 16:38:17 18 Q. First sentence of Section 1.6, I'm sorry,
 16:38:19 19 says: "Concurrent with the Closing, Buyer shall execute
 16:38:22 20 a license agreement under which it shall grant to Seller
 16:38:26 21 a royalty-free, perpetual worldwide license to (i) all of
 16:38:33 22 the technology included in the Assets and (ii) all the
 16:38:39 23 derivatives of the technology included in the Assets,
 16:38:44 24 including the 'Eiger'" -- E-i-g-e-r -- "product release
 16:38:50 25 (such licensed back technology to be referred to

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16:38:54 1 collectively as 'Licensed Technology')." "
 16:38:57 2 Do you see that language?
 16:38:57 3 A. I do.
 16:38:59 4 Q. The reference to all of the technology
 16:39:03 5 included in the assets, what do you understand that to
 16:39:08 6 mean?
 16:39:08 7 A. I understand it to mean what it says, which
 16:39:12 8 is all the technology set out in the list of assets in
 16:39:15 9 Schedule 1.1(a).
 16:39:17 10 Q. And the reference to all derivatives of the
 16:39:20 11 technology included in the assets, what do you understand
 16:39:22 12 that to mean?
 16:39:22 13 A. I understand that to mean what SCO would do
 16:39:25 14 with the technology going forward.
 16:39:28 15 Q. So is it fair to say that Novell was
 16:39:31 16 acquiring a license back to the technology included in
 16:39:35 17 the assets and the -- I think you called them
 16:39:38 18 enhancements --
 16:39:39 19 A. Yes.
 16:39:40 20 Q. -- that Santa Cruz would be making to the
 16:39:43 21 assets?
 16:39:43 22 A. Right.
 16:39:53 23 Q. And Section 1.6 goes on to say: "Seller
 16:39:58 24 agrees that it shall use the Licensed Technology only (i)
 16:40:03 25 for internal purposes without restriction or (ii) for

16:40:07 1 resale in bundled or integrated products sold by Seller
 16:40:12 2 which are not directly competitive with the core products
 16:40:15 3 of Buyer and in which the Licensed Technology does not
 16:40:19 4 constitute a primary portion of the value of the total
 16:40:22 5 bundled or integrated product."
 16:40:25 6 Do you see that language?
 16:40:26 7 A. I do.
 16:40:27 8 Q. And then the language goes on. I don't mean
 16:40:29 9 to suggest that it doesn't.
 16:40:31 10 Do you know whether SCO and Novell
 16:40:33 11 subsequently entered into a license back agreement?
 16:40:38 12 A. I do not.
 16:40:48 13 Q. Do you have a view as to why Novell was
 16:40:50 14 willing to accept certain limitations on how Novell could
 16:40:55 15 use the licensed technology in Novell's products?
 16:41:00 16 A. I think it's consistent with my understanding
 16:41:04 17 of the intention of the transaction, which was to turn
 16:41:06 18 over the business to SCO at the point of the asset
 16:41:11 19 purchase, and that whatever retention of rights was not
 16:41:15 20 to give Novell the right to compete with or go out and
 16:41:21 21 sell the assets, sell licenses to all -- technology to
 16:41:26 22 somebody else, but rather simply to enable Novell's core
 16:41:31 23 business and its other businesses to port to and
 16:41:34 24 integrate interfaces with UNIX, UnixWare operating
 16:41:40 25 systems and computers.

16:41:58 1 Q. I'm handing you, Mr. Alter, what's previously
 16:42:02 2 been marked Exhibit 1008, which is titled "Technology
 16:42:07 3 License Agreement."
 16:42:07 4 A. Uh-huh.
 16:42:08 5 Q. Do you recognize this document?
 16:42:10 6 A. Well, it's clearly the document -- I don't
 16:42:14 7 recognize it, but it looks like it's that. The document
 16:42:17 8 that was contemplated by the -- by Section 1.6.
 16:42:29 9 Q. At the time the APA and technology license
 16:42:40 10 agreement were executed, did Novell regard as
 16:42:45 11 unreasonable limitations set forth on how Novell could
 16:42:49 12 use the licensed technology in Novell's products?
 16:42:53 13 MR. PARNES: Object to the extent it calls
 16:42:55 14 for an attorney-client privileged communication.
 16:42:57 15 If you can answer, go ahead.
 16:42:59 16 THE WITNESS: Could you repeat the question,
 16:43:01 17 please, Ted.
 16:43:02 18 Q. BY MR. NORMAND: At the time the APA and TLA
 16:43:04 19 were executed, did Novell regard as unreasonable the
 16:43:07 20 limitations in those documents on how Novell could use
 16:43:12 21 the licensed technology in Novell's products?
 16:43:15 22 A. I don't have any idea.
 16:43:16 23 Q. At the time the APA and TLA were executed,
 16:43:19 24 did the Wilson Sonsini law firm regard as unreasonable
 16:43:23 25 the limitations in those documents on how Novell could

16:43:26 1 use the licensed technology in Novell's products?
 16:43:29 2 A. So there are two different dates, are there
 16:43:32 3 not? Were these executed contemporaneously?
 16:43:36 4 Q. No. They are different --
 16:43:37 5 A. So three months. So at the time -- I don't
 16:43:41 6 know how -- I don't have an independent recollection. I
 16:43:47 7 don't see how at the time this was negotiated -- by
 16:43:53 8 "limitations," you're referring to the language in 1.6?
 16:43:56 9 Q. With respect to the APA, that's right.
 16:43:58 10 A. Yeah. I don't know -- I would -- I don't
 16:44:03 11 know how it could have been viewed as -- you used the
 16:44:09 12 word "unreasonable"?
 16:44:10 13 Q. I did.
 16:44:11 14 A. Yeah. And I take it that we bargained for
 16:44:15 15 this. This is -- they were satisfied with the language
 16:44:17 16 of 1.16.
 16:44:19 17 THE WITNESS: Mark, I don't know whether we
 16:44:21 18 worked -- I'm not sure from a document standpoint whether
 16:44:25 19 we worked on this, or was it an internal Novell?
 16:44:27 20 MR. PARNES: You should just answer based on
 16:44:31 21 your understanding, if you have knowledge.
 16:44:33 22 THE WITNESS: Okay. I don't have any
 16:44:34 23 recollection or knowledge about the technology license
 16:44:36 24 back agreement.
 16:44:37 25 Q. BY MR. NORMAND: Do you know whether

16:44:38 1 Mr. Braham has any views on the technology license
 16:44:41 2 agreement specifically?
 16:44:41 3 A. I don't have any knowledge of whether he has
 16:44:44 4 any views.
 16:44:45 5 Q. So if I were to ask you any questions about
 16:44:47 6 the technology license agreement, it would be based
 16:44:51 7 solely on your review of the language of the document --
 16:44:54 8 A. Correct.
 16:44:54 9 Q. -- as you sit here today?
 16:44:56 10 A. Correct.
 16:44:56 11 Q. But I think you did say that you regard this
 16:45:00 12 technology license agreement as the prospective agreement
 16:45:05 13 referred to Section 1.6 of the APA?
 16:45:08 14 A. I guess I don't have any basis for saying so
 16:45:12 15 other than you telling me that that's the case and
 16:45:16 16 looking at the -- quickly looking at the recitals that it
 16:45:18 17 says this is -- this looks to be that agreement.
 16:45:37 18 Q. The second paragraph of page 1 of the
 16:45:39 19 technology license agreement says: "Whereas pursuant to
 16:45:43 20 the asset purchase agreement Novell shall be entitled to
 16:45:46 21 retain and exercise after the closing date certain
 16:45:49 22 licenses for licensed technology, including related
 16:45:52 23 documentation and support."
 16:45:53 24 Do you see that language?
 16:45:54 25 A. I do.

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16:45:54 1 **Q. Does that inform your view one way or the**
 16:45:59 2 **other as to whether this is the technology license**
 16:46:02 3 **agreement prospective referenced in Section 1.6 of the**
 16:46:07 4 **APA?**
 16:46:07 5 **A. Yeah, I mean, it would make me more**
 16:46:11 6 **comfortable if I saw it referencing back to Section 1.6**
 16:46:16 7 **of the agreement. But this appears -- I mean, it**
 16:46:19 8 **references the assets purchase agreement, first**
 16:46:29 9 **amendment -- yeah, I don't have anything else to say on**
 16:46:38 10 **that.**
 16:46:38 11 **Q. At the time the APA was executed, if the law**
 16:46:41 12 **firm had regarded as unreasonable the limitations in the**
 16:46:46 13 **APA on how Novell could use the licensed technology in**
 16:46:49 14 **Novell's products, would the firm have permitted Novell**
 16:46:52 15 **to sign the APA?**
 16:46:54 16 MR. BRAKEBILL: Foundation.
 16:46:59 17 THE WITNESS: So I don't have any independent
 16:47:01 18 reason to believe that anyone viewed this as
 16:47:07 19 unreasonable. I think clients will from time to time --
 16:47:16 20 clients will do what they will do after having received
 16:47:20 21 our advice. I think if we had said we thought it was
 16:47:24 22 unreasonable, we might have conveyed that. I suppose
 16:47:27 23 hypothetically it's possible they would have entered into
 16:47:31 24 it nonetheless.
 16:47:33 25 **Q. BY MR. NORMAND: Do you think it's likely?**

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16:47:35 1 **A. No.**
 16:47:37 2 **Q. At the time the APA was executed, did the law**
 16:47:41 3 **firm regard the limitations in the APA on how Novell**
 16:47:45 4 **could use the licensed technology in Novell's products as**
 16:47:49 5 **contrary to California law?**
 16:47:52 6 **A. So I'm about to turn to the governing law**
 16:48:06 7 **provision of this contract.**
 16:48:06 8 **Q. Sure. It's page 47.**
 16:48:20 9 **A. Yeah. So I think if we had believed it was**
 16:48:29 10 **contrary to the law governing the contract, is the**
 16:48:32 11 **question, whether we would have --**
 16:48:34 12 **Q. The question was actually in this instance:**
 16:48:36 13 **Did the law firm regard the language in Section 1.6 of**
 16:48:41 14 **the APA as contrary to California law?**
 16:48:46 15 **A. I don't have any recollection of considering**
 16:48:51 16 **that, but I --**
 16:48:54 17 **Q. And so the same follow-up question: If the**
 16:48:57 18 **firm had regarded the language of Section 1.6 of the APA**
 16:49:01 19 **as contrary to California law, would the firm have**
 16:49:04 20 **permitted Novell to sign the APA?**
 16:49:06 21 **A. Again, I think we would have counseled them**
 16:49:09 22 **and given them our advice, and if there was some**
 16:49:15 23 **assessment that it was a risk that they were prepared to**
 16:49:21 24 **take or -- I think I'm going out on a hypothetical branch**
 16:49:27 25 **here, but I suppose it's conceivable that they would have**

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16:49:30 1 **signed it or agreed to it nonetheless. But I think**
 16:49:33 2 **that's also unlikely.**
 16:49:35 3 **Q. And as you have read today Section 1.6 of the**
 16:49:40 4 **APA, I know this taps into your deep knowledge of the**
 16:49:44 5 **law, but do you regard that language as contrary to any**
 16:49:48 6 **California law that you're aware of?**
 16:49:50 7 MR. BRAKEBILL: Calls for a legal conclusion.
 16:49:52 8 MR. PARNES: Lacks foundation.
 16:49:54 9 You can answer if you have an understanding.
 16:49:56 10 THE WITNESS: I don't.
 16:50:11 11 **Q. BY MR. NORMAND: You have no view one way or**
 16:50:14 12 **the other?**
 16:50:14 13 **A. I don't have any view.**
 16:50:16 14 **Q. With respect to the Technology License**
 16:50:18 15 **Agreement, or TLA, let me ask a couple of foundational**
 16:50:25 16 **questions, although I've understood you to say you may**
 16:50:28 17 **not know the details of it.**
 16:50:30 18 **Did you have any involvement with respect to**
 16:50:32 19 **the TLA?**
 16:50:33 20 **A. Not that I recall.**
 16:50:34 21 **Q. Do you know whether the firm had any**
 16:50:37 22 **involvement with respect to the TLA?**
 16:50:40 23 **A. I do not know whether the firm had**
 16:50:42 24 **involvement in the TLA.**
 16:50:44 25 **Q. Do you know who negotiated the TLA?**

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16:50:47 1 **A. I do not.**
 16:51:01 2 MR. NORMAND: Do you have the Braham
 16:51:03 3 declaration? Is that right, by the way? Is it Braham?
 16:51:22 4 Have I been saying that right?
 16:51:23 5 MR. PARNES: Yeah.
 16:51:52 6 **Q. BY MR. NORMAND: With respect to Section 1.6**
 16:51:55 7 **of the APA --**
 16:51:56 8 **A. Uh-huh.**
 16:52:05 9 **Q. -- and with respect to the license back of**
 16:52:08 10 **all of the technology included in the assets, that's in**
 16:52:13 11 **little sub I?**
 16:52:14 12 **A. Uh-huh.**
 16:52:17 13 **Q. Was it the firm's view in the course of**
 16:52:25 14 **negotiating the APA that Novell needed a license back of**
 16:52:30 15 **the technology included in the assets in order to use**
 16:52:33 16 **that technology in its products?**
 16:52:42 17 **A. No, and nor would I -- or I should say I**
 16:52:44 18 **don't have an independent recollection, but I would tell**
 16:52:47 19 **you that in an asset transfer of this kind, it is typical**
 16:52:59 20 **that there would be a license back, whether you then were**
 16:53:03 21 **using it or not, just to avoid the problem of a claim for**
 16:53:12 22 **patent infringement or copyright violation or -- in other**
 16:53:17 23 **words, to preclude the buyer from coming back to the**
 16:53:22 24 **seller and seeking a license to use the technology that**
 16:53:27 25 **you'd obtain one, you bargain for one, to cut off that**

16:53:35 1 prospect or possibility.

16:53:38 2 **Q.** Why was it your view that Novell did not need

16:53:42 3 a license back of all of the technology included in the

16:53:46 4 assets in order to use that technology in its products?

16:53:51 5 **A.** Well, it was transferring all of the

16:53:57 6 technology included in the assets to SCO, and what I

16:54:04 7 don't know is to what extent it needed any of that

16:54:10 8 technology in its own products and NetWare, what else it

16:54:19 9 was continuing to support and develop. I don't know to

16:54:25 10 what extent it used any of that technology then or in the

16:54:29 11 future, but this was meant to give Novell the rights to

16:54:33 12 that technology going forward. So I don't have a view on

16:54:37 13 whether it needed it at the time or not or was just being

16:54:42 14 careful on a prospective basis.

16:54:45 15 **Q.** Do you have a view as to whether at the time

16:54:49 16 of the execution of the APA, Novell would have had the

16:54:53 17 legal right to use the UNIX and UnixWare source code in

16:54:58 18 its products but for the license back?

16:55:02 19 **A.** Well, it retained all of the patents and

16:55:12 20 copyrights related to those products, and therefore, I

16:55:17 21 would imagine it did already have the right and that this

16:55:20 22 related to it was more a prospective provision than an

16:55:27 23 at-the-time concern.

16:55:28 24 **Q.** Was do you mean it was more of a prospective?

16:55:32 25 **A.** In other words, so the technology that was

16:55:35 1 going to be developed from that point forward, the

16:55:38 2 go-forward merge product, any new developments or

16:55:40 3 enhancements or new revisions would -- Novell could avail

16:55:46 4 itself of without having to seek a further license.

16:55:49 5 **Q.** So is it your view that to the extent this

16:55:52 6 license back says that Novell shall have the license to

16:56:00 7 use UNIX and UnixWare source code in Novell's products,

16:56:04 8 that to the extent this provision says that, it's

16:56:12 9 superfluous?

16:56:14 10 **A.** I wouldn't say superfluous. I guess I would

16:56:36 11 say, to answer that question, that it made sure that to

16:56:40 12 the extent the assets transferred in the agreement

16:56:47 13 included intellectual property that was either then being

16:56:54 14 used by Novell or could be used in the future, it wanted

16:57:00 15 to make sure that it had a license, and therefore, it was

16:57:08 16 prudent and covering all bases to have language in

16:57:14 17 Section 1.6 read as it does.

16:57:18 18 **Q.** But it's your view that even if the language

16:57:20 19 of 1.6 had not been included in the APA, Novell clearly

16:57:26 20 had the right to use the UNIX and UnixWare source code in

16:57:29 21 its products; is that right?

16:57:32 22 **MR. BRAKEBILL:** Asked and answered.

16:57:33 23 **THE WITNESS:** I'm sorry, Ted, could I burden

16:57:45 24 you the repeat the question.

16:57:46 25 **Q. BY MR. NORMAND:** The question is whether it's

16:57:49 1 your view that even if the language of Section 1.6 had

16:57:53 2 not been included in the APA, Novell clearly had the

16:57:56 3 right to use the UNIX and UnixWare source code in its

16:58:00 4 products?

16:58:07 5 **MR. BRAKEBILL:** Same objection.

16:58:25 6 **THE WITNESS:** I'm not sure I would say that.

16:58:27 7 I -- I don't know technically whether or not the

16:58:34 8 retention of rights by Novell would give it all it needed

16:58:40 9 to use the source code, and therefore, it may well have

16:58:47 10 needed this license back, but I don't -- I'm not an

16:58:56 11 expert in parsing whether that -- I mean, you read

16:58:59 12 Roman I. That subsumes the code for UnixWare and UNIX,

16:59:04 13 and unless Novell could claim our retention of patents

16:59:09 14 and other IP gave us those rights, you would want and

16:59:14 15 need a license back to foreclose a claim that they didn't

16:59:17 16 have a right to use it. So I would not say it's

16:59:20 17 superfluous.

16:59:21 18 **Q. BY MR. NORMAND:** In your view, the retention

16:59:23 19 of the copyrights by Novell did not in itself clearly

16:59:27 20 give Novell the right to use the UNIX and UnixWare source

16:59:31 21 code in its products?

16:59:31 22 **A.** I'm out of my depth in terms of intellectual

16:59:34 23 property scope and coverage. So I don't know.

16:59:40 24 **Q.** You don't have a view as to that question one

16:59:44 25 way or the other?

16:59:45 1 **A.** I don't have a view one way or the other.

17:00:02 2 **Q.** To the extent, as a legal matter, Novell's

17:00:05 3 retention of the UNIX and UnixWare copyrights did give it

17:00:10 4 a right to use the UNIX and UnixWare source code in

17:00:15 5 Novell's products, then this first part of Section 6.1 of

17:00:18 6 the APA would be redundant; is that right?

17:00:21 7 **A.** No, because I -- I'm sorry, could I burden

17:00:27 8 you to repeat your question one more time before I

17:00:31 9 dissent?

17:00:35 10 **Q.** Sure. To the extent that as a legal matter

17:00:38 11 Novell's retention of the UNIX and UnixWare copyrights

17:00:42 12 did give it the right to use the UNIX and UnixWare source

17:00:45 13 code in its products, then the first part of Section 1.6

17:00:53 14 would be redundant; is that right?

17:00:54 15 **A.** Well, no, because it's all the technology

17:00:56 16 included in the assets. So it could extend -- to the

17:01:01 17 extent that there was technology outside those two

17:01:06 18 operating systems that was transferred and that Novell

17:01:11 19 might need to retain in its rights, I would not say it's

17:01:14 20 redundant.

17:01:15 21 **Q.** Do you have a view as to whether there was

17:01:17 22 technology --

17:01:18 23 **A.** I don't.

17:01:19 24 **Q.** -- outside of those two?

17:01:20 25 **A.** I don't. I don't believe -- I don't know one

17:01:24 1 way or another.

17:01:45 2 **Q. Do you have a view as to whether the license**

17:01:47 3 **technology in the APA includes trade secrets in the UNIX**

17:01:52 4 **and UnixWare source code?**

17:01:57 5 MR. PARNES: Objection. Vague.

17:02:02 6 You can answer if you know.

17:02:03 7 THE WITNESS: Okay. Thank you.

17:02:18 8 Well, trade secrets meaning proprietary

17:02:27 9 know-how, nothing that's federally registered, not

17:02:33 10 trademark, not patent, not copyrights, you're talking

17:02:37 11 about -- I don't -- I don't see that in the list of

17:02:40 12 excluded assets, Ted. So I would say that would fall

17:02:49 13 under the description of the intellectual property in --

17:03:17 14 I'm looking for a reference to trade secrets per se,

17:03:21 15 either in one or the other list, in 1.1(a) or 1.1(b).

17:03:26 16 I'm not seeing it in 1.1(b).

17:03:29 17 **Q. BY MR. NORMAND: I don't think there is.**

17:03:33 18 **A. Okay.**

17:03:33 19 **Q. I could be wrong.**

17:03:34 20 **A. So that would be another reason why you'd**

17:03:39 21 **want -- you'd want a license back so that to the extent a**

17:03:43 22 **claim was made, you're continuing to use IP. It might**

17:03:47 23 **not be trademark or copyright, but subject to the**

17:03:51 24 **limitations in 1.1 -- 1.6, you'd want a -- Novell would**

17:03:56 25 **have wanted to keep the right to use that to the extent**

17:03:59 1 **it needed it for its products.**

17:04:02 2 **Q. How about I think you mentioned know-how.**

17:04:06 3 **Would the same be true of know-how, in your view?**

17:04:08 4 **A. I guess.**

17:04:09 5 **Q. How about methods or concepts?**

17:04:10 6 **A. So those are --**

17:04:13 7 **Q. Also not mentioned?**

17:04:14 8 **A. Okay.**

17:04:14 9 **Q. Another form of --**

17:04:16 10 **A. Yeah, I'm struggling to understand the**

17:04:18 11 **distinction between these descriptions.**

17:04:25 12 **Q. The licensed technology as defined in the APA**

17:04:27 13 **and as set forth in Section 1.6 includes more than just**

17:04:33 14 **trade secrets and know-how; right?**

17:04:35 15 **A. Right.**

17:04:43 16 **Q. If Novell wanted a license back of technology**

17:04:47 17 **that it didn't have rights to use in its products by**

17:04:51 18 **virtue of the retention of certain intellectual**

17:04:54 19 **property --**

17:04:54 20 **A. Correct.**

17:04:55 21 **Q. -- why didn't Novell specify in Section 1.6**

17:04:59 22 **that intellectual property that it didn't already have**

17:05:02 23 **the right to copy?**

17:05:04 24 **A. I don't know. I mean, I think it -- it**

17:05:08 25 **serves the purpose of the provision well to say it's**

17:05:13 1 **everything. It says we're going to get a license back of**

17:05:16 2 **everything we got transferred to you and we'll only use**

17:05:19 3 **it in these -- the following limited respects. And as**

17:05:23 4 **a -- sorry.**

17:05:24 5 **Q. But to some extent, the license back is**

17:05:28 6 **redundant, isn't it?**

17:05:30 7 **A. I don't see that.**

17:05:32 8 MR. BRAKEBILL: Asked and answered.

17:05:33 9 MR. PARNES: Yeah, misstates prior testimony.

17:05:35 10 **Q. BY MR. NORMAND: I guess I didn't hear your**

17:05:37 11 **answer.**

17:05:37 12 **A. I said I don't see it as redundant. I**

17:05:42 13 **thought we had gone over this already.**

17:05:49 14 MR. PARNES: Counsel, let me ask you a

17:05:50 15 question. We've been going over this technology license

17:05:53 16 agreement. If the end game here is you want to come back

17:05:56 17 and talk to Mr. Alter again, you know, I'm disappointed

17:06:01 18 because I thought we were going to finish this today, and

17:06:04 19 that was the commitment of your office to do that.

17:06:06 20 We're willing to stay here, but, you know,

17:06:09 21 I'd like to know if we're going to complete this before

17:06:14 22 we go into the night.

17:06:16 23 MR. NORMAND: Well, I'm done with the TLA.

17:06:19 24 There's other topics to go over with the witness.

17:06:23 25 MR. PARNES: Do you have any estimate of

17:06:24 1 time? And again, I'm very disappointed because your

17:06:30 2 office committed that we'd get this done today.

17:06:32 3 MR. NORMAND: Well, I'm disappointed in the

17:06:34 4 preparation of the two witnesses today.

17:06:36 5 MR. PARNES: Okay. So we're both

17:06:38 6 disappointed. So how are we going to solve this?

17:06:48 7 MR. NORMAND: Let me take a moment and look

17:06:49 8 at my notes. Well, the time estimate, of course, is a

17:07:07 9 function of his independent knowledge. So it's hard to

17:07:10 10 give an estimate. But I think --

17:07:12 11 MR. PARNES: Ted, what do you want to do? Do

17:07:14 12 you want to adjourn and come back next week, two weeks,

17:07:17 13 three weeks?

17:07:17 14 MR. NORMAND: No, I think we should keep

17:07:20 15 going. I don't think it's be any more than an hour. I

17:07:25 16 don't know how long you're going.

17:07:29 17 MR. PARNES: Can you do that?

17:07:29 18 THE WITNESS: Absolutely.

17:07:29 19 THE VIDEOGRAPHER: This is the end of

17:07:55 20 Videotape Number 2. We are now going off the video

17:07:57 21 record. The time is 5:06 p.m.

17:15:55 22 (Recess.)

17:16:00 23 THE VIDEOGRAPHER: This is the beginning of

17:16:04 24 Videotape Number 3. We are now back on the video record.

17:16:07 25 The time is 5:14 p.m.

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17:16:10 1 Q. BY MR. NORMAND: Mr. Alter, did you have any
 17:16:13 2 involvement with respect to Amendment Number 1 to the
 17:16:16 3 APA?
 17:16:19 4 A. I don't recall much personal involvement,
 17:16:24 5 Ted. My understanding is that it was negotiated
 17:16:29 6 internally at Novell, but that the drafts were reviewed
 17:16:34 7 by the firm as the negotiations were ongoing.
 17:16:39 8 Q. I've handed you a copy of Amendment Number 1,
 17:16:44 9 Exhibit 1026.
 17:16:44 10 A. Yeah.
 17:16:44 11 Q. Who from the firm was involved in reviewing
 17:16:47 12 drafts?
 17:16:54 13 A. I believe it was the same team that was
 17:16:56 14 involved in the APA, with Tor taking the lead and me and
 17:17:02 15 Shannon Whisenant.
 17:17:06 16 Q. You said you don't recall much personal
 17:17:08 17 involvement. Do you recall any involvement?
 17:17:11 18 A. I don't.
 17:17:12 19 Q. Were there any particular events that gave
 17:17:16 20 rise to Amendment Number 1?
 17:17:18 21 A. I don't recall.
 17:17:27 22 Q. Do you know who negotiated Amendment Number 1
 17:17:31 23 from the Santa Cruz side?
 17:17:33 24 A. I do not.
 17:17:45 25 Q. If you look at page 6 of Amendment Number 1,

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17:17:50 1 paragraph J starts out by saying that in Section 4.16,
 17:17:57 2 paragraph B, the last sentence is amended to read as
 17:18:00 3 follows, and the language here in Amendment Number 1
 17:18:06 4 says: "Notwithstanding the foregoing, Buyer shall have
 17:18:10 5 the right to enter into amendments of the SVRX licenses
 17:18:16 6 (i) as may be incidentally involved through its rights to
 17:18:20 7 sell and license UnixWare software or the Merger
 17:18:23 8 Product." And the language goes on.
 17:18:25 9 Do you see that language?
 17:18:26 10 A. I do.
 17:18:27 11 Q. Do you have any understanding of what that
 17:18:28 12 language means?
 17:18:30 13 A. Other than in reading it with you right now?
 17:18:33 14 Q. Yes, sir.
 17:18:33 15 A. So, no, other than reading it with you right
 17:18:37 16 now.
 17:18:37 17 Q. And as you read it right now, do you have an
 17:18:40 18 understanding of what it meant to say that Santa Cruz
 17:18:46 19 would have the right to enter into amendments of the SVRX
 17:18:49 20 licenses as may be incidentally involved through Santa
 17:18:53 21 Cruz's rights to sell and license UNIX software?
 17:19:06 22 A. It looks to remove any ambiguity about the
 17:19:14 23 ability of subsequent -- any licensees who were licensing
 17:19:28 24 a merged product being required to take a separate
 17:19:36 25 license from -- to SVRX and then generate additional

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17:19:42 1 royalty. So I would guess -- that would be my
 17:19:44 2 supposition. It's meant to enable -- it was meant to
 17:19:49 3 enable SCO to upgrade, if you will, or have its -- have
 17:19:56 4 people take licenses in the merged product without also
 17:20:00 5 having to negotiate a separate SVRX license, if you will.
 17:20:13 6 Q. Is it fair to say that that's the
 17:20:14 7 understanding you divine from the language of this
 17:20:18 8 Section J of the -- of Amendment Number 1, as you read it
 17:20:23 9 today?
 17:20:26 10 A. Yeah, although -- amendments of the licenses
 17:20:32 11 (reading). Yeah, because it says it's incidental to
 17:20:38 12 selling UnixWare software or the merged product by SCO.
 17:20:45 13 There wouldn't be -- yes, that's -- that's my reading of
 17:20:50 14 this.
 17:20:52 15 Q. The last sentence of this paragraph J on
 17:20:55 16 page 7 says: "In addition, Buyer shall not and shall
 17:21:00 17 have no right to enter into new SVRX licenses except in
 17:21:05 18 the situations specified in (i) of the preceding sentence
 17:21:09 19 or as otherwise approved in writing in advance by Seller
 17:21:12 20 on a case-by-case basis."
 17:21:14 21 Do you see that language?
 17:21:15 22 A. I do.
 17:21:16 23 Q. Do you have an understanding of what that
 17:21:18 24 means as you sit here today?
 17:21:20 25 A. I -- I don't know what you're asking me to

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17:21:23 1 say other than to paraphrase this, Ted. I mean, it seems
 17:21:27 2 clear.
 17:21:27 3 Q. And what do you understand it to mean? Do
 17:21:30 4 you have any understanding apart from --
 17:21:31 5 A. No.
 17:21:32 6 Q. -- the language used here?
 17:21:33 7 A. No.
 17:21:34 8 Q. Do you know whether Mr. Braham has any
 17:21:39 9 independent understanding as to Amendment Number 1?
 17:21:41 10 A. I do not.
 17:21:42 11 Q. Amendment Number 2, Mr. Alter, handing you a
 17:21:54 12 copy of previously marked as Exhibit 1009. Do you
 17:22:00 13 recognize this document?
 17:22:02 14 A. I do not.
 17:22:08 15 Q. Is the question of the negotiation and
 17:22:16 16 drafting of Amendment Number 2 a topic you're prepared to
 17:22:20 17 address today?
 17:22:21 18 MR. PARNES: Well, lacks foundation, Counsel.
 17:22:23 19 Why don't you ask him what role our firm had, if any, in
 17:22:27 20 this.
 17:22:28 21 THE WITNESS: Okay. So, Mark, I don't -- I
 17:22:35 22 don't recall. I don't recall -- I'm reading the trailer
 17:22:40 23 and trying to see if it was even a Wilson document or
 17:22:50 24 whether Novell did it.
 17:22:51 25 Q. BY MR. NORMAND: I take it you didn't have

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17:22:52 1 any involvement with respect to Amendment --

17:22:55 2 A. If I did, I don't recall.

17:22:56 3 Q. And do you know whether the firm had any

17:22:59 4 involvement with respect to Amendment Number 2?

17:23:01 5 A. I also do not know that off the top of my

17:23:04 6 head.

17:23:04 7 Q. And I take it you don't know whether

17:23:07 8 Mr. Braham did?

17:23:07 9 A. I do not.

17:23:08 10 MR. NORMAND: And Mr. Parnes, can I ask you

17:23:11 11 if you know?

17:23:11 12 MR. PARNES: Yeah. I don't think we were

17:23:13 13 involved with this one or really with amendment X,

17:23:16 14 either, except very minorly. So...

17:23:27 15 Q. BY MR. NORMAND: Apart from the drafting and

17:23:30 16 negotiation of Amendment Number 2, do you know whether

17:23:33 17 the firm ever had occasion in 1996 to review Amendment

17:23:36 18 Number 2 and reach any conclusions as to what it means?

17:23:39 19 A. I don't have any recollection of that.

17:23:56 20 Q. And just to close the loop on something that

17:24:00 21 was discussed earlier today, I take it that you were not

17:24:04 22 involved in the 2000, 2001 SCO Caldera transaction; is

17:24:10 23 that fair to say?

17:24:10 24 A. That's correct.

17:24:11 25 Q. And is it your understanding that no one from

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17:24:13 1 the firm who was involved in the 1995 transaction was

17:24:17 2 involved in the 2000, 2001 SCO Caldera transaction?

17:24:21 3 A. That's correct.

17:24:33 4 Q. Do you know whether the firm was involved at

17:24:39 5 all with respect to Amendment Number X?

17:24:43 6 A. The only way I do know is in conferring with

17:24:49 7 Mark in terms of our document, just pulling the

17:24:56 8 documents, the historical record, it was prepared by

17:25:00 9 Novell in-house, and there was -- there was a limited

17:25:06 10 communication with Tor by an in-house counsel at Novell

17:25:10 11 on Amendment X as to which I believe there's a privilege

17:25:15 12 issue.

17:25:15 13 MR. PARNES: Yeah, you can't discuss the

17:25:18 14 content. That would be privileged. But I think the

17:25:21 15 point was we had a very limited role there.

17:25:24 16 Q. BY MR. NORMAND: And do you know who

17:25:25 17 Mr. Braham had his discussion with from in-house attorney

17:25:29 18 at Novell?

17:25:31 19 A. I do not.

17:25:36 20 Q. BY MR. NORMAND: And apart from that, was

17:25:39 21 there any particular provision of Amendment Number X that

17:25:42 22 the discussion related to?

17:25:44 23 A. I don't -- I have no information on that.

17:26:14 24 Q. Do you know anything about the negotiation or

17:26:17 25 drafting of Amendment Number X other than what we've just

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17:26:20 1 discussed?

17:26:21 2 A. I do not.

17:26:22 3 Q. Have you had occasion to review Amendment

17:26:34 4 Number 2 other than my having presented it to you today?

17:26:43 5 A. No.

17:26:43 6 Q. Let me direct your attention to paragraph A

17:27:17 7 of Amendment Number 2. Paragraph A says: "With respect

17:27:27 8 to Section 1.1(b) of the Agreement entitled 'Excluded

17:27:31 9 Assets,' Section V, Subsection A shall be revised to

17:27:34 10 read: All copyrights and trademarks, except for the

17:27:36 11 copyrights and trademarks owned by Novell as of the date

17:27:40 12 of the agreement required for SCO to exercise its rights

17:27:43 13 with respect to the acquisition of UNIX and UnixWare

17:27:46 14 technologies. However, in no event shall Novell be

17:27:50 15 liable to SCO for any claim brought by any third party

17:27:53 16 pertaining to said copyrights and trademarks."

17:27:55 17 Do you see that language?

17:27:56 18 A. I do.

17:27:57 19 Q. Do you have a view as to whether ownership of

17:28:11 20 any of the copyrights in UNIX and UnixWare was necessary

17:28:15 21 for SCO to exercise its rights under the asset purchase

17:28:20 22 agreement?

17:28:20 23 A. I don't have any.

17:28:22 24 Q. Do you have a view as to whether ownership of

17:28:25 25 any of the copyrights in UNIX and UnixWare was necessary

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17:28:28 1 for SCO to exercise its rights with respect to the

17:28:32 2 acquisition of the UNIX and UnixWare technologies?

17:28:41 3 MR. BRAKEBILL: Foundation.

17:28:42 4 THE WITNESS: Other than it was the subject

17:28:44 5 of an amendment that the parties agreed to, no.

17:28:47 6 Q. BY MR. NORMAND: We spoke earlier about the

17:29:04 7 APA. We spoke about Section 4.16, 4.16(b) in particular.

17:29:11 8 Is it the firm's view that under the APA, Novell had the

17:29:15 9 right to increase a SVRX licensee's rights to use SVRX

17:29:23 10 source code?

17:29:26 11 A. Yes.

17:29:35 12 Q. Is it your view that under the APA, Novell

17:29:39 13 had the right to grant new SVRX licenses?

17:29:55 14 A. They're not precluded from doing so,

17:30:34 15 certainly, by this agreement. So I guess my answer would

17:30:37 16 be yes.

17:30:40 17 Q. With respect to Amendment Number 2, that

17:30:43 18 language in paragraph A, do you have any understanding of

17:30:47 19 what paragraph A means other than the language of the

17:30:52 20 paragraph itself?

17:30:53 21 A. I do not.

17:31:00 22 Q. And do you know whether Mr. Braham has a view

17:31:02 23 as to what --

17:31:04 24 A. I do not.

17:31:05 25 Q. -- Amendment Number 2 means other than the

17:31:07 1 language of the amendment?
 17:31:08 2 A. I do not.
 17:31:23 3 Q. In connection with the APA, there was a bill
 17:31:26 4 of sale. Did you have any personal involvement with the
 17:31:29 5 bill of sale?
 17:31:29 6 A. I don't have any recollection of having any
 17:31:35 7 involvement in that.
 17:31:37 8 Q. Do you know who the principal negotiators
 17:31:39 9 were from both sides as to the bill of sale?
 17:31:42 10 A. I don't. But I --
 17:31:48 11 THE WITNESS: Mark, is it appropriate to ask
 17:31:50 12 you about what our records showed in the documentation we
 17:31:57 13 pulled? I mean, I guess -- was it executed
 17:32:00 14 contemporaneously? I imagine it was, with the asset
 17:32:06 15 purchase agreement and therefore --
 17:32:09 16 MR. NORMAND: Let's take a look at it.
 17:32:13 17 Q. I'm handing you, Mr. Alter, what's previously
 17:32:16 18 been marked as Exhibit 10, maybe. It's hard to read
 17:32:20 19 (indicating), which is the bill of sale.
 17:32:23 20 MR. PARNES: Thank you. It's dated
 17:32:28 21 December 6, 1995.
 17:32:30 22 THE WITNESS: So contemporaneous with the
 17:32:32 23 closing, right? Because it's signed --
 17:32:34 24 Q. BY MR. NORMAND: Yes, sir.
 17:32:34 25 A. I mean, in looking at it, it's Shannon's

17:34:05 1 Q. Does that refresh your recollection as to
 17:34:08 2 whether he might have been involved with the bill of
 17:34:10 3 sale?
 17:34:10 4 A. No, it doesn't.
 17:34:18 5 Q. I wanted to ask the same questions about the
 17:34:22 6 operating agreement.
 17:34:23 7 A. Okay.
 17:34:23 8 Q. Is that a document that you recall?
 17:34:25 9 A. Somewhat, having had my recollection
 17:34:29 10 refreshed recently.
 17:34:40 11 Q. We previously marked as Exhibit 26, I believe
 17:34:44 12 (indicating).
 17:34:47 13 A. Thank you.
 17:34:48 14 MR. NORMAND: Do you want this, Ken?
 17:34:50 15 MR. BRAKEBILL: Sure. Thank you.
 17:34:52 16 Q. BY MR. NORMAND: Do you recognize this
 17:34:53 17 document, Mr. Alter?
 17:34:55 18 A. I do.
 17:34:56 19 Q. Do you recall whether you were personally
 17:34:58 20 involved in the negotiation or drafting of this document?
 17:35:01 21 A. I -- my recollection was refreshed recently.
 17:35:04 22 This is one of the documents I was shown, and as you can
 17:35:09 23 see, it's my -- it is my trailer, I believe.
 17:35:16 24 Q. Do you recall what the purpose of this
 17:35:18 25 document was?

17:32:38 1 trailer. I would expect that she and I may well have
 17:32:41 2 been in -- I mean would have been involved in helping
 17:32:44 3 prepare it.
 17:32:47 4 Q. Shannon is Shannon Whisenaut?
 17:32:50 5 A. Whisenaut.
 17:32:51 6 Q. And that's the trailer on the bottom left?
 17:32:54 7 A. Exactly. It's her initials, S.T.W.
 17:32:57 8 Q. Do you have any independent recollection of
 17:32:59 9 working on the bill of sale?
 17:33:00 10 A. I don't.
 17:33:00 11 Q. Do you have a view as to the purpose of the
 17:33:02 12 bill of sale?
 17:33:05 13 A. Yeah, I mean, an asset transfer is almost
 17:33:13 14 always a document that's delivered so that if there's a
 17:33:20 15 question of title with a third party, it can be produced
 17:33:22 16 and you don't have to serve up an agreement like this
 17:33:25 17 (indicating). And it would typically have a listing of
 17:33:38 18 the -- of the -- it would simply recite that the assets
 17:33:43 19 set forth on an exhibit are that which was transferred.
 17:33:49 20 Q. Do you know who negotiated the bill of sale
 17:33:52 21 from the Santa Cruz site?
 17:33:53 22 A. I do not.
 17:33:59 23 Q. The signature for the Santa Cruz side, Alok
 17:34:04 24 Mohan?
 17:34:04 25 A. Right.

17:35:18 1 A. I think it was to be something of a catchall
 17:35:32 2 to help the transition of the UnixWare -- of the business
 17:35:38 3 of the assets that were transferred. I recall that there
 17:35:46 4 were obligations to do training, and it was one -- it was
 17:35:49 5 sort of -- again, a go-forward, if you will, high-level
 17:35:55 6 recitation about joint marketing and that sort of -- the
 17:36:07 7 operational aspects of the relationship going forward as
 17:36:11 8 it related to the business that wouldn't have been
 17:36:18 9 covered in the asset purchase agreement.
 17:36:23 10 Q. Can you recall who negotiated this operating
 17:36:26 11 agreement from both sides?
 17:36:27 12 A. I don't recall.
 17:36:28 13 Q. The document says in Section 7 at page 8, the
 17:36:36 14 quote is: "The intent of the parties to transfer the
 17:36:38 15 agreements and associated rights and obligations which
 17:36:41 16 relate to Novell's UNIX system business to SCO."
 17:36:49 17 Do you see that language?
 17:36:50 18 A. I do.
 17:36:51 19 Q. In your view, is that an accurate statement
 17:36:54 20 of the parties' intent?
 17:36:55 21 A. It is, but I would guess I would say this
 17:37:05 22 would need to be read in conjunction with the asset
 17:37:15 23 purchase agreement. I'm looking at the -- there is an
 17:37:26 24 integration clause in this document, too, saying this is
 17:37:28 25 the sole agreement covering its subject matter. So...

17:37:31 1 Q. You said there is not --

17:37:34 2 A. There is. There's a -- so there's -- I think

17:37:38 3 if you -- just looking at 8E. So I'm digressing. I

17:37:56 4 guess I would just revert to my statement that that would

17:38:00 5 be an accurate --

17:38:03 6 Q. The document in paragraph 8 on page 1 does

17:38:09 7 cross-reference the asset purchase agreement?

17:38:10 8 A. Right.

17:38:11 9 Q. To that extent, it's your view that it should

17:38:14 10 be read in conjunction with the asset purchase agreement?

17:38:16 11 A. Yes, precisely.

17:38:29 12 Q. Is it your view that the technology license

17:38:32 13 agreement should be read in conjunction with the asset

17:38:35 14 purchase agreement?

17:38:36 15 A. Yes. That's referenced specifically by the

17:38:41 16 asset purchase agreement.

17:38:45 17 Q. Is it your view that the bill of sale should

17:38:48 18 be read in conjunction with the asset purchase agreement?

17:38:50 19 A. Yes.

17:38:51 20 Q. Do you know whether there are any particular

17:39:06 21 events that gave rise to Amendment Number X?

17:39:17 22 A. I do not.

17:39:18 23 Q. Handing you, Mr. Alter, what's been

17:39:21 24 previously marked is as Exhibit 1002, which is entitled

17:39:27 25 "Amendment No. X to Software Agreement SOFT-00015 As

17:39:33 1 Amended," do you recognize the document?

17:39:36 2 A. I mean, I don't recall -- not before -- I

17:39:46 3 know it's been referenced -- I've heard of it. I haven't

17:39:48 4 reviewed it previously.

17:39:53 5 Q. Apart from the issue we discussed earlier

17:39:58 6 regarding, I think, the firm's review -- I don't want to

17:40:02 7 put words in your mouth.

17:40:03 8 Apart from the issue we discussed earlier

17:40:05 9 regarding Mr. Braham's role, is there anything that you

17:40:09 10 can tell me about Amendment Number X, apart from the

17:40:13 11 language of this agreement?

17:40:13 12 A. Nothing.

17:40:33 13 Q. We've discussed Mr. Braham's declaration a

17:40:36 14 few times. I think you said you have had occasion to

17:40:39 15 read that declaration. Does Mr. Braham's testimony in

17:40:41 16 his declaration reflect the views of the Wilson Sonsini

17:40:46 17 law firm?

17:40:47 18 A. Yes.

17:40:47 19 Q. And I think you've said you've had occasion

17:40:54 20 to read David Bradford's declaration as well; is that

17:40:58 21 right?

17:40:58 22 A. Yes.

17:40:59 23 Q. Does Mr. Bradford's testimony in his

17:41:02 24 declaration reflect the Wilson Sonsini firm's views as to

17:41:06 25 Novell's intent under the APA?

17:41:08 1 A. Yes.

17:41:12 2 Q. Have you had occasion to read the declaration

17:41:14 3 of James Tolonen?

17:41:16 4 A. No.

17:41:16 5 Q. And have you had the occasion to read the

17:41:20 6 declaration of Alison Media (phonetic)?

17:41:22 7 A. No.

17:41:27 8 Q. Mr. Alter, how much time did you take to

17:41:32 9 prepare for today's deposition?

17:41:34 10 A. Just in hours how much time?

17:41:41 11 Q. I don't think you can tell me other than the

17:41:44 12 total amount of time. I think you can tell me that, if

17:41:46 13 you recall.

17:41:47 14 A. Okay. So four to seven hours, I would say.

17:41:57 15 Maybe five to eight.

17:42:02 16 Q. So four to eight, maybe. Okay.

17:42:14 17 MR. NORMAND: Let's take just three minutes

17:42:16 18 and I can figure out if I have anything else to ask.

17:42:20 19 THE WITNESS: Okay.

17:42:21 20 THE VIDEOGRAPHER: We are now going off the

17:42:23 21 video record. The time is 5:40 p.m.

17:42:27 22 (Recess.)

17:48:07 23 THE VIDEOGRAPHER: We are now back on the

17:48:28 24 video record. The time is 5:47 p.m.

17:48:37 25 MR. NORMAND: I'm going to hand you,

17:48:39 1 Mr. Alter, what's being marked as an exhibit, which is a

17:48:42 2 letter dated May 1st, 1996.

17:48:59 3 (Exhibit 1072 marked.)

17:49:03 4 MR. NORMAND: It's a letter from Scott Lester

17:49:06 5 to Novell under the letterhead of Brobeck Phleger &

17:49:11 6 Harrison, and the letter copies Larry W. Sonsini of

17:49:16 7 Wilson Sonsini on the second page.

17:49:20 8 Q. Are you familiar with this document?

17:49:21 9 A. I am not.

17:49:23 10 Q. I'm going to represent to you that the

17:49:28 11 document concerns issues that had arisen between Novell

17:49:34 12 and Santa Cruz as of this date, of course, in 1996. You

17:49:41 13 can take some time to review the letter, if you'd like,

17:49:45 14 but my question is whether you're familiar with any of

17:49:47 15 the subject matter of this letter.

17:49:48 16 A. I am not.

17:49:49 17 Q. And do you know whether anyone at the firm is

17:49:52 18 familiar with the subject matter of this letter?

17:49:54 19 A. I am not.

17:49:57 20 Q. I take it, then, you don't know if

17:50:01 21 Mr. Sonsini had occasion to review this letter?

17:50:04 22 A. Right, I do not.

17:50:21 23 (Exhibit 1073 marked.)

17:50:24 24 Q. BY MR. NORMAND: Exhibit 1073, Mr. Alter, is

17:50:28 25 titled "Strategic Development Agreement Between Novell,

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17:50:30 1 Inc., and the Santa Cruz Operation, Inc."
 17:50:45 2 Do you recognize this document?
 17:50:46 3 A. I do not.
 17:50:48 4 Q. Do you know whether the firm played any role
 17:50:50 5 in the negotiation or drafting of this document?
 17:50:53 6 A. I do not.
 17:51:00 7 MR. NORMAND: That's all I have. As I did
 17:51:02 8 with the deposition earlier this morning, I'd like to
 17:51:04 9 reserve the right to speak with -- in all likelihood,
 17:51:09 10 Mr. Parnes regarding the nature of the deposition today.
 17:51:12 11 So to that extent, I'd like to hold the deposition open.
 17:51:15 12 But I have no further questions at this time.
 17:51:18 13 MR. BRAKEBILL: Just a few questions that I
 17:51:19 14 can handle from here.
 15 EXAMINATION BY MR. BRAKEBILL
 17:51:21 16 Q. Mr. Alter, I'm going to hand you a document
 17:51:23 17 that we'll mark as Exhibit 305.
 17:51:33 18 (Exhibit 305 marked.)
 17:51:36 19 Q. BY MR. BRAKEBILL: And ask if you could
 17:51:38 20 please take a quick look at that.
 17:51:49 21 Do you recognize this document as a draft of
 17:51:51 22 Schedules 1.1(a) and 1.1(b) to the asset purchase
 17:51:56 23 agreement dated on or around September 16, 1995?
 17:51:57 24 MR. NORMAND: Objection to form.
 17:51:58 25 MR. PARNES: You can answer the question.

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17:51:59 1 THE WITNESS: I do.
 17:52:01 2 Q. BY MR. BRAKEBILL: And do you see that
 17:52:03 3 there's various handwriting throughout this draft of
 17:52:07 4 Schedule 1.1(a) and 1.1(b)?
 17:52:10 5 A. Yes.
 17:52:11 6 MR. NORMAND: Same objection.
 17:52:12 7 Q. BY MR. BRAKEBILL: Do you know whose
 17:52:13 8 handwriting this is?
 17:52:14 9 A. It's mine.
 17:52:17 10 Q. Does this refresh your memory that prior to
 17:52:20 11 the execution of the asset purchase agreement, that you
 17:52:24 12 were involved in reviewing and commenting and editing
 17:52:30 13 Schedule 1.1(a) and 1.1(b)?
 17:52:34 14 MR. NORMAND: Objection to form.
 17:52:35 15 THE WITNESS: Yes.
 17:52:38 16 Q. BY MR. BRAKEBILL: And in this particular
 17:52:40 17 draft of Schedule 1.1(a) and 1.1(b), do you see that
 17:52:50 18 there is a list of excluded intellectual property on
 17:52:55 19 page 2 of Schedule 1.1(b)?
 17:52:58 20 MR. NORMAND: Objection to form.
 17:52:59 21 THE WITNESS: Yes.
 17:53:00 22 Q. BY MR. BRAKEBILL: And do you see an
 17:53:03 23 exclusion relating to copyrights?
 17:53:05 24 MR. NORMAND: Same objection.
 17:53:06 25 THE WITNESS: I do.

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17:53:08 1 Q. BY MR. BRAKEBILL: Did you strike the
 17:53:12 2 exclusion of copyrights when you reviewed this draft?
 17:53:16 3 MR. NORMAND: Objection to form.
 17:53:17 4 THE WITNESS: I did not.
 17:53:25 5 Q. BY MR. BRAKEBILL: Is it a fair statement
 17:53:26 6 that you left the copyright exclusion intact when you
 17:53:29 7 reviewed this draft?
 17:53:32 8 A. Yes.
 17:53:35 9 Q. And if you could turn to Roman V of Schedule
 17:53:41 10 1.1(a). Do you see that you made any edits to the
 17:53:48 11 included intellectual property section of the asset
 17:53:52 12 schedule?
 17:53:52 13 MR. NORMAND: Objection to form.
 17:53:53 14 THE WITNESS: I do.
 17:53:55 15 Q. BY MR. BRAKEBILL: Did you add copyrights as
 17:53:59 16 an included asset?
 17:54:00 17 A. I did not.
 17:54:05 18 MR. BRAKEBILL: I'd like to hand you what
 17:54:08 19 we'll mark as Exhibit 306.
 17:54:19 20 (Exhibit 306 marked.)
 17:54:22 21 Q. BY MR. BRAKEBILL: If you take a quick look
 17:54:24 22 at that, Mr. Alter, I'd appreciate it.
 17:54:39 23 For the record, this is a fax from the Wilson
 17:54:44 24 Sonsini firm to Jeffrey Higgins at Brobeck Phleger &
 17:54:49 25 Harrison, dated September 18, 1995, copied to Burt

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17:54:54 1 Levine, Tor Braham, and Aaron Alter.
 17:54:57 2 Do you see that?
 17:54:57 3 A. I do.
 17:55:03 4 Q. Do you see that your name is check marked on
 17:55:05 5 the copyee list on the first page?
 17:55:08 6 A. Yes.
 17:55:08 7 Q. Does that indicate that this was a copy that
 17:55:12 8 was sent to you in the ordinary course of business?
 17:55:15 9 MR. NORMAND: Objection to form.
 17:55:15 10 THE WITNESS: Yes.
 17:55:16 11 Q. BY MR. BRAKEBILL: And the message on the
 17:55:18 12 front page of Exhibit 306 says: "Attached please find
 17:55:23 13 Schedule 1.1(a) and 1.1(b) marked to show changes
 17:55:27 14 requested by Burt Levine at Novell. Please feel free to
 17:55:31 15 call me at (415) 493-9300 if these changes generate
 17:55:33 16 questions."
 17:55:33 17 Do you see that?
 17:55:34 18 A. I do.
 17:55:35 19 Q. And then do you see attached to this fax
 17:55:41 20 cover page a draft Schedule 1.1(a) and 1.1(b)?
 17:55:45 21 A. Yes.
 17:55:46 22 Q. And do you see that in Schedule 1.1(b),
 17:55:55 23 there's a section dealing with intellectual property as
 17:56:00 24 excluded assets?
 17:56:02 25 MR. NORMAND: Objection to form.

17:56:03 1 THE WITNESS: Yes.

17:56:08 2 **Q. BY MR. BRAKEBILL: Do you see whether or not**

17:56:10 3 **there's a copyright exclusion in the excluded assets**

17:56:14 4 **draft attached to this Exhibit 306?**

17:56:20 5 **A. The copyrights are listed in the excluded**

17:56:23 6 **assets.**

17:56:26 7 **Q. Does viewing this fax dated September 18,**

17:56:31 8 **1995 to Jeffrey Higgins refresh your recollection that**

17:56:34 9 **prior to the execution of the asset purchase agreement**

17:56:39 10 **between Novell and Santa Cruz, that Wilson Sonsini sent a**

17:56:48 11 **draft of Schedule 1.1(b) containing a copyright exclusion**

17:56:52 12 **to Santa Cruz representatives?**

17:56:55 13 MR. NORMAND: Objection to form.

17:56:56 14 THE WITNESS: It does.

17:56:59 15 MR. BRAKEBILL: No more questions.

17:57:13 16 FURTHER EXAMINATION BY MR. NORMAND

17:57:28 17 **Q. I apologize for the delay.**

17:57:31 18 **A. I thought you were done.**

17:57:33 19 **Q. Well, what happens is he asks questions, and**

17:57:35 20 **if he raises an issue, then I at least arguably can ask**

17:57:43 21 **you more questions.**

17:57:44 22 **A. I didn't sign up for that, Marco.**

17:58:32 23 **Q. Let me just state my concern, or I'm**

17:58:35 24 **delaying. Towards of end of our discussion, you said you**

17:58:38 25 **regard Mr. Bradford's, and more importantly, Mr. Braham's**

17:58:43 1 **declaration as representative of the firm's views, at**

17:58:47 2 **least as I understood it. Some of what Mr. Braham has**

17:58:51 3 **testified to, I take it you have some knowledge about,**

17:58:53 4 **some of what he's testified to in your declaration you**

17:58:55 5 **don't have knowledge about.**

17:58:56 6 **I don't want to sit here and ask you and**

17:58:58 7 **cross-examine you about his declaration because although**

17:59:02 8 **some of that might be fruitful, I think a good part of it**

17:59:05 9 **you don't know anything about, other than what Mr. Braham**

17:59:08 10 **has said.**

17:59:09 11 **Is that a fair statement on my part, that you**

17:59:11 12 **might not know a fair amount of what he's testified to in**

17:59:15 13 **his declaration?**

17:59:17 14 MR. BRAKEBILL: Object as outside the scope

17:59:19 15 of my examination.

17:59:20 16 MR. PARNES: You can answer the question.

17:59:21 17 THE WITNESS: Okay.

17:59:22 18 I think it would be fair to say that prior to

17:59:25 19 the time I spent, to the best of my recollection in

17:59:31 20 prepping for this, given the passage of time, since the

17:59:34 21 time when this was negotiated, very little of this was

17:59:37 22 anything that I recalled. So when I reviewed the

17:59:41 23 documents and reviewed Tor's declaration, there was

17:59:47 24 nothing inconsistent with my recollection there, and it

17:59:54 25 helped refresh my recollection as to some of what

17:59:57 1 transpired. I've tried to be fully forthcoming about

18:00:00 2 what I personally remembered and my role vis-a-vis Tor's.

18:00:06 3 So his -- so I guess I'll leave it at that.

18:00:12 4 MR. NORMAND: All right. Let me just say,

18:00:13 5 then -- and I understand counsel is not representing that

18:00:17 6 he will bring you back, but let me add that among the

18:00:20 7 reasons I want to hold the deposition open is the

18:00:25 8 opportunity to speak with a witness on behalf of the law

18:00:30 9 firm with respect to Mr. Braham's declaration. And given

18:00:34 10 the late hour, it's not something I want to try to do

18:00:38 11 with you today.

18:00:39 12 And with that caveat, I have no further

18:00:41 13 questions.

18:00:41 14 MR. PARNES: Yeah. I mean, I will just state

18:00:43 15 for the record that I don't think there is any obligation

18:00:46 16 on this firm to produce any person who's no longer an

18:00:50 17 employee at the firm. But I'm certainly happy to discuss

18:00:54 18 with counsel whatever you'd like, and we'll see if we'll

18:00:59 19 come back or not.

18:00:59 20 Thank you, gentlemen. I appreciate your

18:01:02 21 time.

18:01:02 22 THE VIDEOGRAPHER: This concludes today's

18:01:04 23 proceedings. The number of videotapes used was three.

18:01:07 24 We are now going off the video record. The time is

18:01:12 25 5:59 p.m.

18:01:16 1 (The deposition was adjourned at 5:59 p.m.)

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1 CASE TITLE: SCO vs. Novell
 2 DATE OF DEPOSITION: April 27, 2007
 3 REFERENCE NO.: 74351B
 4
 5
 6 Please be advised I have read the foregoing deposition,
 7 and I hereby state there are:
 8 (Check one)
 9 _____ NO CORRECTIONS
 10 _____ CORRECTIONS ATTACHED
 11
 12
 13
 14 _____
 15 Aaron J. Alter
 16
 17 _____
 18 Date Signed
 19
 20 --oOo--
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1 REPORTER'S CERTIFICATE
 2 I certify that the witness in the forgoing
 3 deposition,
 4 AARON J. ALTER
 5 was by me duly sworn to tell the truth, the whole truth
 6 and nothing but the truth in the within-entitled cause;
 7 that said deposition was taken at the time and place
 8 herein named; that the testimony of said witness was
 9 reported by me, a duly certified shorthand reporter and
 10 a disinterested person, and was thereafter transcribed
 11 under my direction into typewriting.
 12 I further certify that I am not of counsel or
 13 attorney for either or any of the parties to said
 14 deposition, nor in any way interested in the outcome of
 15 the cause named in said caption.
 16 Dated May 3, 2007.
 17
 18
 19 _____
 20 Leslie Rockwood
 21 Certified Shorthand Reporter
 22 State of California
 23 Certificate No. 3462
 24
 25

1 DEPONENT'S CHANGES OR CORRECTIONS
 2
 3 Note: If you are adding to your testimony, print the
 4 exact words you want to add. If you are deleting from
 5 your testimony, print the exact words you want to
 6 delete. Specify with "add" or "delete" and sign this
 7 form.
 8 DEPOSITION OF: Aaron J. Alter (Ref# 74351B)
 9 CASE: SCO vs. Novell
 10 DATE OF DEPO: April 27, 2007
 11 Page Line CHANGE/ADD/DELETE
 12 _____
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 25 Deponent's Signature _____ Date _____