

1 THE COURT: Do you have anything, counsel, before  
2 we bring the jury in?

3 MR. SINGER: Would it be possible to hear the last  
4 question read back before the jury comes in? Is that go to  
5 be --

6 THE COURT: I think we have a new court reporter.  
7 That may not be appropriate.

8 MR. SINGER: Okay.

9 THE COURT: Mr. Brennan, you may have to ask the  
10 question again. And if you think you need to renew your  
11 objection, you can do so, Mr. Singer.

12 MR. SINGER: All right.

13 MR. BRENNAN: Thank you.

14 MR. SINGER: It may be the wording on the question  
15 rather than -- that's why I wanted to hear it exactly.

16 THE COURT: All right. Mr. Frankenberg, I think  
17 you can sense this, but if at any time a question is asked of  
18 you and you see Mr. Singer stand up, if you would not answer  
19 until I've had a chance to hear from Mr. Singer.

20 THE WITNESS: Yes, Judge.

21 MR. SINGER: Thank you, Your Honor.

22 (Whereupon, the jury returned to the court  
23 proceedings.)

24 THE COURT: Go ahead, Mr. Brennan.

25 MR. BRENNAN: Thank you, Your Honor.

1           Q.   BY MR. BRENNAN: Mr. Frankenberg, you may recall  
2           that before we took our break we were talking about the  
3           minutes of the board of directors of Novell held on  
4           September 18, 1995, as well as provisions of the asset  
5           purchase agreement.

6                         We were looking in particular at Schedule 1.1(b),  
7           the excluded assets provision of the asset purchase agreement.  
8           The language that you now see before you in Section -- excuse  
9           me -- in Schedule 1.1(b), that same language was presented to  
10          the board of directors of Novell on September 18, 1995;  
11          correct?

12          A.   Correct.

13          Q.   In fact, what you have before you as the asset  
14          purchase agreement which you signed is in the same form that  
15          was presented to the board of directors the day before you  
16          signed the agreement; correct?

17          A.   Correct.

18          Q.   So let's go, then -- with that in mind, let's go  
19          back to admitted Exhibit Z3, the minutes of the meetings. And  
20          I'd like to continue with the account reported in the minutes,  
21          and the bottom last full paragraph on Page 1, which begins,  
22          various questions. Do you see that?

23          A.   Yes.

24          Q.   So that portion reads:

25                         Various questions were then posed by the

1 directors concerning: Possible analyst reactions;  
2 impact on employees; impact on Novell's  
3 relationship with Microsoft; the ongoing viability  
4 of SCO.

5 And then it continues with other items that were  
6 posed in terms of questions by the directors; correct?

7 A. Correct.

8 Q. I'd like to have you focus for a minute on the  
9 reference of the ongoing viability of SCO. What was it that  
10 was discussed at the board of directors meeting before this  
11 asset purchase agreement was approved regarding SCO's  
12 viability?

13 A. As I recall, the concern was the amount of cash  
14 that SCO had and the size of the company relative to the size  
15 of the task.

16 Q. In fact, SCO didn't have cash that it was even  
17 paying to Novell under the proposed asset agreement; correct?

18 A. Correct.

19 Q. And then it continues. It says:

20 Mr. Frankenberg, Mr. Mattingly and  
21 Mr. Bradford responded to the questions and a  
22 discussion ensued.

23 Do you recall responding to board of director  
24 questions at that meeting?

25 A. I do, yes.

1 Q. Now, before we move on, to make sure we know who  
2 the players were, as it were, the attendees at the meeting,  
3 you mentioned earlier in response to a question by Mr. Singer  
4 that there was a Novell executive at the time by the name of  
5 Duff Thompson; correct?

6 A. Correct.

7 Q. Mr. Thompson was not a member of the board of  
8 directors, was he?

9 A. No, he wasn't.

10 Q. In fact, he was not even present at the  
11 September 18th meeting, was he?

12 A. Correct.

13 Q. But there were other people at Novell who also were  
14 not directors who were present; correct?

15 A. Correct.

16 Q. David Bradford is an example of that; correct?

17 A. Correct.

18 Q. Let's go to the top of the second page of  
19 Exhibit Z3, the minutes, and we'll focus on the first full  
20 paragraph that begins with, the directors. It continues,  
21 quote:

22 The directors next discussed various  
23 competitive alternatives and concluded that the  
24 transaction as structured was justifiable both from a  
25 strategic perspective as well as from a financial one.

1                    Now, in terms of the structured asset purchase  
2 agreement, you understood at the meeting of the board of  
3 directors that what SCO would be actually transferring to  
4 Novell was shares of SCO's stock; correct?

5                    A.    Correct.

6                    Q.    There was no money, actual currency or cash that  
7 would be transferred; right?

8                    A.    Correct.

9                    Q.    Now, you were not with Novell when it acquired the  
10 UNIX business in its entirety from AT&T, were you?

11                   A.    I was not.

12                   Q.    You were not involved in that transaction at all,  
13 were you?

14                   A.    No, I was not.

15                   Q.    Do you know how much Novell paid for the UNIX  
16 assets when it acquired the entire business from AT&T?

17                   A.    Over 300 million. I don't remember precisely how  
18 much, but it was over \$300 million.

19                   Q.    And the transaction that you were considering at  
20 the board of directors meeting on September 18th, 1995, was  
21 not a transaction whereby Santa Cruz Operations would be  
22 paying Novell \$330 million, was it?

23                   A.    No, it was not.

24                   Q.    As we've discussed, there was no cash that was  
25 going to come to Novell; right?

1           A.    In the initial payment, that's correct.

2           Q.    And all that was going to come was the SCO's stock  
3 shares; right?

4           A.    No.  The SCO stock shares plus the royalties and  
5 buyouts of the SVRX.

6           Q.    We'll cover that in a minute.  But in terms of the  
7 actual compensation that would be paid to Novell, all that  
8 would come initially was the SCO shares; right?

9           A.    Initially, yes.  But the other compensation was  
10 part of the deal.

11          Q.    I'll catch up with that in just a minute.

12          A.    Okay.

13          Q.    Now, the SCO shares themselves at the time this  
14 agreement was being discussed were worth how much?

15          A.    In the range of 5 or \$6 a share, I believe.

16          Q.    So in your mind multiplying that out times the  
17 number of shares that would be transferred, what was your  
18 understanding of the value of the shares that Novell would  
19 receive from SCO?

20          A.    In the neighborhood of 25- to \$30 million.

21          Q.    Far less than \$330 million; fair?

22          A.    Yes.  Correct.

23          Q.    So continuing now with the minutes of the board of  
24 directors meetings, it says:

25                Mr. Bradford and Mr. Sonsini then reviewed the

1 terms of the asset purchase agreement between SCO  
2 and Novell.

3 Now, was it the case that Mr. Bradford and  
4 Mr. Sonsini were asked to review the terms because they were  
5 both attorneys?

6 A. Yes.

7 Q. They were both familiar with the language of the  
8 asset purchase agreement?

9 A. Yes.

10 Q. Mr. Bradford had been the one who was given legal  
11 responsibility for the terms and conditions; right?

12 A. He was given oversight responsibility of the legal  
13 aspects of the transaction, yes.

14 Q. And as you told us earlier, Mr. Sonsini was not  
15 only a member of the board, but was a legal advisor that  
16 Novell looked to regularly for advice; right?

17 A. That's correct.

18 Q. And is that why you asked Mr. Bradford and  
19 Mr. Sonsini, the two members that were present, one a board  
20 member, Mr. Sonsini, and Mr. Bradford, the general counsel, to  
21 review what the actual asset purchase agreement said?

22 A. Yes.

23 Q. So, did, in fact, Mr. Bradford and Mr. Sonsini  
24 review the asset purchase agreement with the board at that  
25 time?

1           A.    Yes, they did.

2           Q.    And you had a chance to follow that discussion;  
3 correct?

4           A.    Yes.

5           Q.    You had a chance to look at what the terms and  
6 conditions of the asset purchase agreement were; right?

7           A.    Yes.

8           Q.    The notes -- excuse me -- the minutes then,  
9 continue:

10                    Both the financial terms of the transaction  
11 were reviewed as well as the non-financial terms  
12 including issues of Standstill, Registration  
13 rights, Board seats, Rights of first refusal,  
14 employee severance and what happens in the event  
15 of a change of the SCO -- of either SCO or Novell.

16                    Do you recall those items being discussed at the  
17 meeting?

18           A.    Yes.

19           Q.    And then it continues:

20                    The directors asked a variety of questions  
21 concerning the contract terms, and suggestions  
22 were made to improve the terms of royalty  
23 collection from SCO.

24                    Do you see that?

25           A.    I do, yes.



1           Q.   Now, you understood under the asset purchase  
2 agreement what would happen is that Novell's rights to  
3 royalties from SVRX licenses would continue to be 100-percent  
4 Novell's payment stream; right?

5           A.   Less the 95 percent collection fee.

6           Q.   Less the 5 percent --

7           A.   I'm sorry. Less the 5 percent. So 95 percent of  
8 the royalties would remain Novell's, not 100 percent.

9           Q.   Just so we're all clear here. You understood that  
10 under the structure of the asset purchase agreement, Novell  
11 would retain the right to receive royalties from SVRX  
12 licenses; right?

13          A.   Yes.

14          Q.   And you understood that those SVRX licenses were  
15 part of the UNIX transaction that Novell had had with AT&T  
16 earlier; right?

17          A.   As well as any sales that may have been made  
18 between those two events, yes.

19          Q.   And that what SCO would do under the proposed asset  
20 purchase agreement is it would go out and collect those  
21 royalties for Novell, and all of them would be transferred to  
22 Novell except for 5 percent; correct?

23          A.   Correct.

24          Q.   And that 5 percent would be an administrative fee  
25 that SCO would be paid for administering and collecting the

1 royalties; right?

2 A. Correct.

3 Q. Okay. Now let's go to the next section of the  
4 minutes. It says in the next session, it says, then upon  
5 motion. Let's focus on that. Quote:

6 Then upon motion duly made, seconded and  
7 unanimously carried, the following recitations and  
8 resolutions were adopted.

9 Do you see that?

10 A. Yes, I do.

11 Q. So following orderly corporate governance after the  
12 discussion of the asset purchase agreement, a member of the  
13 board of directors made a motion for resolutions and approval.  
14 That motion was seconded, and then there was a vote taken;  
15 right?

16 A. Correct.

17 Q. And the vote was unanimous in favor of the  
18 resolutions reached at the meeting; right?

19 A. Correct.

20 Q. And you were one who would have voted unanimously  
21 in favor of the resolutions; right?

22 A. Yes.

23 Q. Let's then look at the resolution. Next session,  
24 first paragraph.

25 Resolved. That the board of directors of this

1 corporation, Novell, hereby determines that it is  
2 in the best interests of this corporation and its  
3 shareholders to enter into an asset purchase  
4 agreement with the Santa Cruz Operation, Inc.,  
5 SCO.

6 Right?

7 A. Yes.

8 Q. And again, that asset purchase agreement was the  
9 one we were looking at that's Exhibit 1; correct?

10 A. Correct.

11 Q. With the terms that we looked at; correct?

12 A. Correct.

13 Q. Okay. Let's continue with the next paragraph in  
14 the resolution.

15 Pursuant to the asset purchase agreement,  
16 Novell will transfer to SCO its UNIX and UnixWare  
17 technology assets, a portion of the employee base  
18 in New Jersey, approximately 100 to 400 employees,  
19 equipment used in UnixWare business and certain  
20 assumed liability thereto.

21 Do you see that?

22 A. Yes.

23 Q. You understood that's what was going to happen  
24 under the transaction; right?

25 A. Yes.

1 Q. And then the resolution continues:  
2 Pursuant to the asset purchase agreement, SCO  
3 issued 6.1 million new shares of common stock to  
4 Novell.  
5 Right?  
6 A. Correct.  
7 Q. So you understood that the structured agreement  
8 again is that Novell would get 6.1 million shares; right?  
9 A. Correct.  
10 Q. And then it continues:  
11 SCO will also collect and pass through to  
12 Novell 95 percent of the SVRX royalties.  
13 Right?  
14 A. Yes.  
15 Q. So those SVRX royalties were the property of Novell  
16 before the transaction; right?  
17 A. Yes.  
18 Q. Novell will continue to receive 100 percent less  
19 5 percent of those royalties; right?  
20 A. Yes.  
21 Q. Then it says:  
22 Further, SCO will pay to Novell ongoing  
23 royalties associated with their future sale of the  
24 UnixWare technology as more fully set forth in the  
25 asset purchase agreement.

1                   Do you see that?

2           A.    I do.

3           Q.    And did you understand under the asset purchase  
4 agreement if SCO which was granted the right to develop  
5 UnixWare were then selling new licenses to UnixWare, we're not  
6 talking about UNIX, we're talking about UnixWare. Are you  
7 with me?

8           A.    I'm with you.

9           Q.    Okay. So with the UnixWare new licenses that  
10 Novell would be entitled to a portion of those royalties, but  
11 only if SCO hit a certain threshold of sales; did you  
12 understand that?

13          A.    Yes.

14          Q.    And what did you understand that threshold to be?

15          A.    As I recall, it was \$84 million.

16          Q.    Do you know whether SCO ever sold \$84 million worth  
17 of the UnixWare royalties?

18          A.    Well, that would have been after I left. So  
19 perhaps the same ruling earlier applies.

20          Q.    And you don't know because you left the company;  
21 right?

22          A.    I don't know.

23          Q.    Fair enough.

24                   Then let's go with the next portion of the  
25 resolution. And it bears particular attention:

1                   Novell will retain all of its patents,  
2                   copyrights and trademarks, except for the  
3                   trademarks UNIX and UnixWare, a royalty-free  
4                   perpetual worldwide license back to UNIX and  
5                   UnixWare for internal use and resale of bundled  
6                   products exceeded with other miscellaneous  
7                   unrelated technology.

8                   Do you see that?

9                   A.    I do, yes.

10                  Q.    So at the meeting of the board of directors, it was  
11                  specifically presented to the board that under the asset  
12                  purchase agreement Novell would retain all of its patents,  
13                  copyrights and trademarks with the sole exception of the UNIX  
14                  and UnixWare trademarks; correct?

15                  A.    That's what it says, yes.

16                  Q.    And these are accurate board minutes; right?

17                  A.    Yes.

18                  Q.    And these were prepared by Mr. Bradford, the  
19                  secretary of the corporation; right?

20                  A.    Yes.

21                  Q.    And you had a chance to review them and approve  
22                  them; correct?

23                  A.    Yes.

24                  Q.    And you did; right?

25                  A.    Yes.

1 Q. If we could look to the last page of the board  
2 meetings. Under the section, adjournment, there's language  
3 and a signature. Let's take a quick look at that. It says:

4 There being no further business to come before  
5 the board, the meeting was declared adjourned by  
6 Mr. Frankenberg at 1:30 p.m. Mountain Time.

7 And then there's a signature above the printed  
8 words, David R. Bradford, secretary; correct?

9 A. Correct.

10 Q. Now, after that board of directors meeting, did you  
11 then sign the asset purchase agreement?

12 A. Yes.

13 Q. Did you read every word of it before you signed it?

14 A. No, I did not.

15 Q. You were relying upon the advice of Mr. Bradford  
16 and Mr. Sonsini among others; right?

17 A. Also Duff Thompson, also Ed Chatlos, the other  
18 people on the team that were -- including the general manager  
19 of the UnixWare business, I relied on all of those people,  
20 yes.

21 Q. So thank you. Among others, Mr. Thompson,  
22 Mr. Chatlos all recommended that you sign the asset purchase  
23 agreement; correct?

24 A. Yes, they did.

25 Q. And as we look, the asset purchase agreement that

1       you signed and it was approved by the board of directors is in  
2       the same form as Exhibit 1; right?

3             A.    Correct.

4             Q.    And it's that document that includes the schedule  
5       of excluded assets; right?

6             A.    Yes.

7             Q.    And that schedule of excluded assets is essentially  
8       the same as the resolution reached by the board of directors  
9       where the board of directors unanimously approved a resolution  
10       stating that there would be no Novell patents, no Novell  
11       copyrights and no Novell trademarks except for UNIX and  
12       UnixWare that would be transferred under the agreement;  
13       correct?

14            A.    That's what it says, yes.

15            Q.    Thank you.

16                    Now, after the asset purchase agreement was entered  
17       into, the deal did not close for several months; correct?

18            A.    Correct.

19            Q.    And to your understanding, what was the reason for  
20       the deal not closing immediately upon signing the asset  
21       purchase agreement?

22            A.    Well, I believe that there were quite a number of  
23       things that had to be accomplished including figuring out who  
24       would move from Novell to SCO, how that integration might take  
25       place so the disposition of employees that weren't going to



1 move, reexamination of the documents, to make sure that they  
2 were correct, all the things that are required to properly  
3 complete a complex transaction such as this.

4 Q. And you understood it to be a complex transaction;  
5 correct?

6 A. Yes.

7 Q. This was more complex than a simple sale of the  
8 entire business. There were other moving parts; right?

9 A. Yes.

10 Q. You mentioned that one of the reasons that the  
11 transaction did not close immediately upon the signing was  
12 because there was to be a reexamination of the documents;  
13 right?

14 A. Yes. There always is under those circumstances.

15 Q. And so what Novell wanted to do is have a chance to  
16 go back and carefully read the language of the asset purchase  
17 agreement that you had signed in its behalf on September 19th,  
18 1995; correct?

19 A. Correct.

20 Q. And you understood that Santa Cruz Operation would  
21 have the same right and opportunity; correct?

22 A. Correct.

23 Q. So for the almost three-month period between  
24 September 19th, 1995, and December 6th, 1995, both Novell and  
25 Santa Cruz Operation had a full opportunity to review the

1 asset purchase agreement; correct?

2 A. Correct.

3 Q. And upon the closing of the asset purchase  
4 agreement that did occur on or about December 6, 1995, both  
5 Novell and Santa Cruz Operation reached an agreement that  
6 there were certain provisions in the asset purchase agreement  
7 that should be amended or modified; correct?

8 A. Correct.

9 Q. And those changes or modifications were set forth  
10 in what's known as Amendment 1 to the asset purchase  
11 agreement; that is correct?

12 A. Correct.

13 Q. And you were still the chairman of the board and  
14 chief executive officer as of December 6, 1995; right?

15 A. I was, yes.

16 Q. Mr. Frankenberg, I hand you what has been marked as  
17 Exhibit T5.

18 And as I understand it, Your Honor, there's a  
19 stipulation for admissibility of this exhibit?

20 THE COURT: Any objection to T5 being admitted?

21 MR. SINGER: Your Honor, it is already part of SCO  
22 Exhibit 1, so it's in evidence already as part of that  
23 exhibit.

24 THE COURT: All right.

25 MR. SINGER: I don't.

1                   MR. BRENNAN: This is a standalone version, Your  
2 Honor, just so we're clear.

3                   THE COURT: Okay. All right. You couldn't operate  
4 from that portion of SCO's Exhibit 1?

5                   MR. BRENNAN: You know, Your Honor, I'm sure I  
6 could. And if Your Honor would prefer me to do that, I would  
7 be willing to, but I think it might be easier than flipping  
8 back and forth to see it alone.

9                   THE COURT: All right. Go ahead. The Court  
10 will admit Exhibit T5.

11                   MR. BRENNAN: Thank you, Your Honor.

12                   (Whereupon, Defendant's Exhibit T5 was received.)

13                   Q. BY MR. BRENNAN: So looking at Exhibit T5, do you  
14 recognize this as the Amendment Number 1 to the asset purchase  
15 agreement?

16                   A. Yes.

17                   Q. So let's look at the first page and the first  
18 quarter of the page. And let's go down to just the first  
19 heading of Amendment Number 1.

20                   So we've looked at this. This is the heading of  
21 Amendment Number 1 to asset purchase agreement. And then  
22 we'll look at the first paragraph. It states, quote:

23                   As of the effective date indicated below, the  
24 September 19, 1995, asset purchase agreement, the  
25 agreement, between Novell and the Santa Cruz

1           Operation, is amended in the following respects.

2                   Do you see that?

3           A.    I do, yes.

4           Q.    And what follows are certain changes or  
5    modifications to the asset purchase agreement executed on  
6    September 19, 1995; correct?

7           A.    Correct.

8           Q.    Now, we talked earlier about Schedule 1.1(a) in the  
9    asset purchase agreement that listed the assets that Novell  
10   was to transfer to Santa Cruz. Do you recall that?

11          A.    I do, yes.

12          Q.    And Amendment Number 1 does not modify the language  
13   used in Schedule 1.1(a) to include copyrights, does it?

14          A.    Not that I see here, no.

15          Q.    There was no attempt made, to your understanding,  
16   either by Novell or by Santa Cruz Operation given the nearly  
17   three-month period to examine documents to then in Amendment  
18   Number 1 come back and say words to the effect, oops, we made  
19   some mistake. We intended to include Novell's copyrights to  
20   UNIX, and we now should go back and include those. That was  
21   never reflected in Amendment Number 1, was it?

22          A.    It's not in there, no.

23          Q.    Now let's consider on the other side of that coin,  
24   if you will, that's the excluded assets. We looked earlier at  
25   Schedule 1.1(b), which was the list of assets that were

1 excluded. Do you recall that?

2 A. Yes.

3 Q. And in the September 1995 asset purchase agreement  
4 that you signed that we looked at and is consistent with the  
5 board meeting, Novell excluded and Santa Cruz agreed to  
6 exclude all copyrights and trademarks except for UNIX and  
7 UnixWare; right?

8 A. Right.

9 Q. So then looking at the amendment, there was no  
10 change in those exclusions, was there?

11 A. No, there was not.

12 Q. So is it correct, then, Mr. Frankenberg, that even  
13 after the board meeting that was held at which the asset  
14 purchase agreement was approved, after you and other members  
15 of the board had a chance to thoroughly review the asset  
16 purchase agreement and even after Mr. Sonsini and  
17 Mr. Bradford, the legal advisors, apprised the board about  
18 what was contained in the agreement and even after a nearly  
19 three-month period to review it, neither Novell nor Santa Cruz  
20 Operation chose to include UNIX copyrights in the asset  
21 purchase agreement when Amendment Number 1 was executed;  
22 correct?

23 A. Correct.

24 Q. Now, still if we could focus on Amendment Number 1,  
25 I'd like us to look to, it's numbered Page 11, which is the

1 signature page.

2 Now, to your observation, was Amendment Number 1

3 signed in Novell's behalf?

4 A. Yes.

5 Q. And that was by Duff Thompson; right?

6 A. Yes.

7 Q. And based upon your review of the executed Exhibit

8 Number 1, did you have reason to believe that Mr. Thompson

9 would have reviewed Exhibit 1 before he signed it?

10 A. Exhibit 1? Do you mean Amendment 1?

11 Q. Yes. Thank you. My mistake.

12 A. Yes. I believe he would have.

13 Q. And then on the left-hand side of the signature

14 page there appears to be a signatures for Santa Cruz

15 Operation. Do you see that?

16 A. Yes.

17 Q. And you were asked by Mr. Singer about an

18 Alok Mohan, and I believe you indicated you believed he was

19 the chief executive officer of Santa Cruz; right?

20 A. Yes.

21 Q. And in reviewing Amendment Number 1, did you

22 believe that Mr. Mohan had signed it in behalf of Santa Cruz

23 Operation?

24 A. I did, yes.

25 Q. Now, Mr. Singer asked you whether you'd had

1 discussions with SCO executives suggesting that copyrights  
2 were not to be included in the asset purchase agreement. Do  
3 you recall those questions and your answers?

4 A. Yes, I do.

5 Q. Now, after the asset purchase agreement was signed  
6 by you on September 19th, 1995, did you have any discussions  
7 with Alex Mohan of Santa Cruz between the date you signed it  
8 and December 6, 1995, when Amendment Number 1 was signed?

9 A. His name is Alok.

10 Q. I apologize.

11 A. Alok Mohan. Yes. I'm sure I did.

12 Q. And during that time period, did Mr. Mohan suggest  
13 to you that he believed that copyrights had been transferred  
14 under the asset purchase agreement?

15 A. I don't recall.

16 Q. He never brought that up, did he?

17 A. I don't recall him bringing it up, no.

18 Q. Also there was a question asked about a Mr. Doug  
19 Michels or Michels. I want to make sure I get my  
20 pronunciation. You probably can help me.

21 A. Doug Michels.

22 Q. Thank you, Mr. Frankenberg.

23 Between the time you signed the asset purchase  
24 agreement on September 19th, 1995, and December 6, 1995, when  
25 Novell and Santa Cruz signed the first amendment, did you have

1 any discussions with Mr. Michael?

2 A. Yes, I did.

3 Q. And during any of those discussion, did Mr. Michels  
4 suggest to you that he thought that UNIX copyrights had been  
5 transferred under the asset purchase agreement?

6 A. I don't recall him saying that. I also don't  
7 recall him saying that they weren't, so....

8 Q. And let me see if I understand this. You were an  
9 executive at Hewlett-Packard for roughly 24 years. Do I have  
10 that right?

11 A. I was an executive for perhaps the last 10 years.  
12 I was at HP for almost 25 years.

13 Q. Thank you. And during the time that you were an  
14 executive at Hewlett-Packard, you were involved in business  
15 transactions; correct?

16 A. Correct.

17 Q. And was Hewlett-Packard represented by legal  
18 counsel in those transactions?

19 A. Yes, we were.

20 Q. And during the time that you were a Hewlett-Packard  
21 executive, did you allow legal counsel to represent the  
22 interest of Hewlett-Packard in reaching those agreements?

23 A. Not without discussions with me as the responsible  
24 executive or perhaps people responsible for the business. You  
25 don't let lawyers loose and say, go negotiate a deal.



1 Q. You would have provided direction --

2 A. Sorry.

3 Q. I'm sorry?

4 A. No offense.

5 Q. None taken. Thank you.

6 You would have provided directions to legal counsel

7 and expected legal counsel to carry out your instructions to

8 obtain the best result consistent with what you asked them;

9 right?

10 A. Generally the way I've worked is to come to a

11 business agreement with the other party and ask legal counsel

12 to memorialize that and be true to the deal that was made.

13 Q. And in connection with the asset purchase

14 agreement, you had David Bradford and outside counsel

15 Wilson Sonsini who were charged with making sure that Novell's

16 legal interests were protected in connection with the asset

17 purchase agreement; right?

18 A. Correct. As well as the -- as well as the business

19 interest by the other members of the team.

20 Q. And you believe that Mr. Bradford and Mr. Braham

21 accomplished their mission; correct?

22 A. Mr. Braham was a lawyer for Wilson -- working for

23 Wilson Sonsini and working on this, yes.

24 Q. I'd like to have you turn back, if we might, to

25 Exhibit 1, which is the asset purchase agreement signed on

1       September 19th, 1995, where I hope to avoid being tedious.  
2       I'll do this as quickly as I can, but I do want to focus on a  
3       couple provisions in the asset purchase agreement itself. So  
4       we'll turn to the first page of -- and you were asked a bit  
5       about this by Mr. Singer representing SCO, and we're going to  
6       look at Recitals A and B, if we might.

7                     Now, did you have an understanding that recitals  
8       essentially set forth the basic premises for the transaction?

9             A.    Yes.

10            Q.    So the so-called business that's the subject of the  
11       recitals is described in Recital A; right?

12            A.    Yes.

13            Q.    Okay. Then looking in B, is this language that we  
14       looked at before that references the board of directors of  
15       each of the buyer and the seller believing that it was, quote:

16                     In the best interests of the each company and  
17                     their respective stockholders that buyer acquire  
18                     certain of the assets of and assume certain of the  
19                     liabilities of seller compromising the business.

20                     Correct?

21            A.    Correct.

22            Q.    So you understood what was going to happen in this  
23       agreement is that certain of the assets of the business were  
24       the subject of the asset purchase agreement; right?

25            A.    Correct. Certain other, such as Tuxedo, were not

1 part of the transaction.

2 Q. They were excluded; correct?

3 So then let's turn to the language regarding what  
4 was actually to be purchased. This is Section 1.1 on the  
5 bottom of the first page under, acquisition. So Section 1.1,  
6 purchase of assets subpart (a) begins this way, quote:

7 Purchase and sale of assets. On the terms and  
8 subject to the conditions set forth in this  
9 agreement.

10 Let me pause there. Did you understand that  
11 whatever was going to be done in terms of the business  
12 transaction that it was to be done on the terms and conditions  
13 that were described and set forth and stated in the actual  
14 asset purchase agreement?

15 A. Yes. To the extent that it reflected the intent,  
16 yes.

17 Q. And we'll look at this in a minute. But you  
18 also understood that there was a specific clause in the asset  
19 purchase agreement that said, that if there were any  
20 understandings or prior agreements or private thoughts, as it  
21 were, that were not reflected in the actual words of the  
22 agreement, that none of those mattered; right?

23 A. They say somewhere else, yes.

24 Q. We'll show that in a minute.

25 A. Okay.

1 Q. Let's continue with the description of the assets.

2 It says:

3 Seller will sell, convey, transfer, assign and  
4 deliver to buyer, and buyer will purchase and  
5 acquire from seller on the closing date all of  
6 seller's right, title and interest in and to the  
7 assets of properties of seller relating to the  
8 business.

9 But then it doesn't stop there, does it? It  
10 continues; right?

11 A. Yes.

12 Q. It continues as follows:

13 Identified on -- and we'll flip the page --  
14 Schedule 1.1(a) hereto.

15 Do you see that?

16 A. I do, yes.

17 Q. So you understood as you signed the asset purchase  
18 agreement that to find out what assets were actually being  
19 transferred, conveyed or sold by Novell to Santa Cruz  
20 Operation would be those assets described in Schedule 1.1(a);  
21 right?

22 A. Yes.

23 Q. And then it continues:

24 Notwithstanding the foregoing, the assets to  
25 be so purchased shall not include those assets set

1           forth in Schedule 1.1(b).

2                       You see that; right?

3           A.    I do, yes.

4           Q.    So you understood to find out what was not included  
5 in the transaction you could look to Schedule 1.1(b); right?

6           A.    Correct.

7           Q.    Let's have a look at what the payments or payment  
8 was to be made.  And let's go to Section 1.2 subpart (a).  
9 Mr. Singer asked you about this.  It says:

10                       On the terms and subject to the conditions set  
11 forth in this agreement -- and then these words --  
12 as full payment for the transfer of the assets by  
13 seller to buyer, at the closing buyer shall assume  
14 the assumed liabilities and issue to seller  
15 6,127,500 shares of fully paid and nonassessable  
16 shares of common stock of the buyer.

17                       Do you see that?

18           A.    Yes.

19           Q.    And then that payment is described as the shares or  
20 purchase price; right?

21           A.    Yes.

22           Q.    So Section 1.2(a) tells us, correct, that the  
23 shares were the full payment for the assets; right?

24           A.    Payments, it says, is the title for 1.2, I believe.  
25 And my view of the transaction was that the shares as well as

1 the royalties were the payment for the UNIX and UnixWare  
2 business.

3 Q. Let's look at the language of the agreement to see  
4 again what the language of the agreement states.

5 A. Okay.

6 Q. Back to 1.2 subpart (a):

7 On the terms and subject to the conditions set  
8 forth in this agreement as full payment for the  
9 transfer of the assets.

10 Do you see that?

11 A. I do.

12 Q. And then it identifies two things that will  
13 constitute full payment, the shares and SCO's assumption of  
14 certain liabilities; right?

15 A. Yes.

16 Q. And those are the two items that are described as  
17 full payment of the assets; right?

18 A. Yes.

19 Q. Okay. Now let's go to Section 3. You were asked  
20 about this by Mr. Singer, as well. We'll focus on the first  
21 portion of this, maybe through the first full sentence, if we  
22 might. So looking at royalties, it says:

23 Buyer agrees to collect and pass through to  
24 seller 100 percent of the SVRX royalties as  
25 defined and described in Section 4.16 hereof.

1 Right?

2 A. Yes.

3 Q. So there's no statement that what Santa Cruz  
4 Operation was going to do was pay to Novell these royalties in  
5 exchange for the assets, instead according to the language of  
6 the agreement what Santa Cruz agreed to do was to go out and  
7 collect and pass back to Novell those royalties; right?

8 A. Correct.

9 Q. In fact, the role of Santa Cruz in connection with  
10 this agreement was to go out and essentially act as an  
11 administrator and collector for Novell; right?

12 A. I think that understates the role.

13 Q. That's what the words say essentially; right?

14 A. That's what the words say, but I think it  
15 understates the role.

16 Q. Let's see what else the role is, because it  
17 continues:

18 Seller agrees to pay buyer an administrative  
19 fee of 5 percent of the SVRX royalties.

20 So you understood from the language of the asset  
21 purchase agreement itself that in exchange for Santa Cruz  
22 going out and serving the administrative function of  
23 collecting and turning over to Novell the SVRX royalties that  
24 an administrative fee of 5 percent of those royalties would be  
25 paid back to Santa Cruz; right?

1 A. That's correct.

2 Q. Okay. Then it continues:

3 Seller and buyer further acknowledge and agree

4 that seller --

5 That's Novell; right?

6 A. Yes.

7 Q. -- is retaining all rights to the SVRX

8 royalties, notwithstanding the transfer of the

9 SVRX licenses to buyer pursuant hereto.

10 Do you see that?

11 A. Yes.

12 Q. So you understood when you signed the agreement

13 that Novell was retaining all of the rights to the royalties;

14 correct?

15 A. To the royalties, yes.

16 Q. And then it says:

17 And that buyer --

18 That's Santa Cruz; correct?

19 A. (Witness indicates by nodding head up and down.)

20 Q. -- only has legal title and not an

21 equitable interest in such royalties within

22 the meaning of Section 541(D) of the Bankruptcy Code.

23 Do you see that?

24 A. Correct.

25 Q. Now, you understood that the reason that that



1 language was included in the agreement is that Novell wanted  
2 to protect itself in the event that Santa Cruz Operation were  
3 to somehow have financial difficulty and file bankruptcy and  
4 that Novell then wanted to make sure that it had retained the  
5 full rights to the royalties; right?

6 A. That, as well as being assured that we would be  
7 able to negotiate buyouts of those royalties with existing  
8 customers.

9 Q. Yes. Thank you. And, in fact, that was an added  
10 reason why Novell retained control over the royalties; right?

11 A. Yeah. The major concern was making sure that we  
12 received the royalties, because, as I said, we viewed it as  
13 part of the payment.

14 Q. Now, I want to ask you a few questions about other  
15 provisions of the agreement. We're going to skip forward all  
16 the way to Section 9.3 of the agreement, if we might. It's on  
17 Page Number 47. I'm sorry. I misspoke. 9.5. My apologies.

18 Now, I asked you earlier if you thought that there  
19 was a clause in the agreement that essentially had the effect  
20 to make clear between the parties that what mattered and  
21 really the only thing that mattered was what was in the  
22 agreement. Do you remember me asking about that?

23 A. Yes.

24 Q. So let's look at Section 9.5. It states, quote:

25 Entire agreement. This agreement and the

1 schedules and exhibits hereto.

2 I'll pause there. You understood that the  
3 reference to this agreement was the asset purchase agreement  
4 signed on September 19th, 1995; correct?

5 A. Yes.

6 Q. And then the reference to schedules were the  
7 schedules that were set forth in the agreement including the  
8 schedules of included assets and excluded assets; right?

9 A. Yes.

10 Q. And exhibits thereto. There were various exhibits  
11 to the agreement; right?

12 A. Yes.

13 Q. Okay. Then it continues:

14 (A). Constitute the entire agreement among  
15 the parties with respect to the subject matter  
16 hereof and supercede all prior agreements and  
17 understandings, both written and oral, among the  
18 parties with respect to the subject matter hereof.

19 Do you see that?

20 A. Yes.

21 Q. Now, did you understand that the reason for that  
22 provision was so that in the event that either Novell or  
23 Santa Cruz Operation, it had previous discussions, previous  
24 understandings, even previous expectations or hopes or dreams  
25 or desires, that all of those would be eliminated and what the

1 parties would agree to would be what was set forth in the  
2 written agreement?

3 MR. SINGER: Your Honor, I object on the basis of  
4 the prior rulings. If I could --

5 THE COURT: Can you refer me to the one you have in  
6 mind?

7 MR. SINGER: Well, it involves the issue of whether  
8 or not the intent of the parties is to be considered in  
9 interpreting the agreement.

10 MR. BRENNAN: That's not impacted by this  
11 provision, Your Honor.

12 THE COURT: I will overrule the objection and allow  
13 the answer.

14 Q. BY MR. BRENNAN: Mr. Frankenberg, do you have the  
15 question in mind?

16 A. Pardon?

17 Q. Do you have the question in mind? Do you remember  
18 the question I asked you?

19 A. Could you repeat it, please?

20 Q. I'll do my best. That was a long one. Maybe I'll  
21 shorten it this time.

22 A. Okay.

23 Q. Did you have the understanding when you signed the  
24 asset purchase agreement that the reason for Section 9.5 was  
25 to make sure that if either Novell or Santa Cruz Operation had

1 had either prior understandings or expectations or thoughts  
2 that none of those would really matter or be binding, instead  
3 what would matter is what was set forth in the written  
4 agreement?

5 A. Well, clearly subsequently there was an amendment  
6 to this, so the entire agreement got modified to be something  
7 else.

8 Q. And that's because we looked at Amendment Number 1.  
9 Both parties in writing agreed to that amendment; correct?

10 A. Yes.

11 Q. And, in fact, there is a provision in the agreement  
12 that we can look at that says if both parties reach a  
13 modification in writing that that counts; right?

14 A. I assume so, yes.

15 Q. Okay. The section we're looking at says that if  
16 before signing this agreement someone had a hope or  
17 expectation or thought they had agreement, rather than worry  
18 about that, we're going to focus on what the words of this  
19 agreement says; right?

20 A. That's what this says, yes.

21 Q. And it says:

22 Supercedes all prior agreements and  
23 understandings.

24 Correct?

25 A. Yes.

1                   MR. SINGER: Your Honor, I'm going to object again  
2 and move to strike. This is ineffective as a matter of law  
3 under the law of this case, this provision.

4                   MR. BRENNAN: Would you like me to respond or not?

5                   THE COURT: Yes, if you may.

6                   MR. BRENNAN: Your Honor, this is a written  
7 provision that's never been amended, and it's a standard  
8 integration clause. And I'm simply asking the witness and  
9 he's answered questions in terms of what his understanding was  
10 with respect to the meaning and effect of that provision.

11                   THE COURT: The dilemma that I have is in light of  
12 Mr. Singer's question that was asked that you objected to that  
13 the Court sustained earlier that if you continue to pursue  
14 this I have no choice but to allow Mr. Singer on redirect to  
15 get into an area that you perhaps don't want him to.

16                   MR. BRENNAN: I understand that, Your Honor.

17                   THE COURT: If you want him to answer this  
18 question, I will then have to allow Mr. Singer to revisit that  
19 issue.

20                   MR. BRENNAN: Well, I don't want the answer that  
21 badly, Your Honor.

22                   THE COURT: All right.

23                   Q. BY MR. BRENNAN: Now, you also understood that  
24 lawyers would be involved; right?

25                   A. Lawyers would be involved in what?

1 Q. In drafting and negotiating the agreement; correct?

2 A. Yes.

3 Q. So let's look at the next provision in the document  
4 that addresses the role of attorneys in both the preparation  
5 and drafting of the agreement. So if we could look at  
6 Section 9. -- give me one moment and I'll direct you to it --  
7 Section 9.9. It says:

8 The parties hereto agree that they have been  
9 represented by counsel during the negotiation and  
10 execution of this agreement.

11 Do you see that?

12 A. I do, yes.

13 Q. And you understood that Novell purposely wanted to  
14 be represented by counsel in the agreement; right?

15 A. Yes.

16 Q. And you understood that so did Santa Cruz  
17 Operation. They wanted lawyers to be involved; right?

18 A. Yes.

19 Q. Now, speaking of lawyers, after you left Novell,  
20 you had your deposition taken in this case; right?

21 A. Yes, I did.

22 Q. And that deposition was taken by Mr. Singer;  
23 correct?

24 A. Correct.

25 THE COURT: Ladies and gentlemen, let me explain to

1       you. You heard reference earlier during opening by Mr. Singer  
2       about depositions, and let me for your information explain to  
3       you that prior to trial the attorneys in this case had the  
4       opportunity to question the witnesses that were going to  
5       appear here. And that would be a very formal questioning.  
6       The witnesses would be put under oath. They would be  
7       represented by counsel, and their counsel could make legal  
8       objections to questions that were asked. A transcript of that  
9       question and answer would then be prepared, and the witness  
10      would be given an opportunity to review it and to make any  
11      changes in it. And then the document would be signed, and it  
12      can be used in trial for certain purposes.

13                So you will hear references to depositions both  
14      written and video during the course of this trial, and keep in  
15      mind what I just explained to you what it is.

16                MR. BRENNAN: Thank you, Your Honor.

17                Q. BY MR. BRENNAN: Now, before your deposition was  
18      taken, and by the way, do you recall that your deposition was  
19      taken by Mr. Singer in February of 2007?

20                A. That's correct, yes.

21                Q. And before your deposition was taken, you had  
22      occasion to meet with two attorneys that represent Novell;  
23      correct?

24                A. Correct.

25                Q. One was Mr. Ken Brakebill of the law firm of

1 Morrison & Foerster; correct?

2 A. Right.

3 Q. And the other was Mr. Jim Lundberg, who was inhouse  
4 counsel for Novell; correct?

5 A. Correct.

6 Q. Do you recall where you met for that meeting?

7 A. I believe it was in my lawyer's office.

8 Q. And at that meeting did you, in fact, confirm both  
9 to Mr. Brakebill and to Mr. Lundberg your belief that under  
10 the asset purchase agreement you've looked at today that,  
11 indeed, Novell wanted to retain the UNIX copyrights in order  
12 to facilitate both buyout negotiations of SVRX licenses and to  
13 protect the revenue stream under those licenses?

14 A. I did not say that. What I said was, I believe  
15 that there might have been some conversations about that, and  
16 I asked them if they could refresh my memory on it. They were  
17 unable to do that, nor was anyone else.

18 Q. In fact, do you recall when you were asked about  
19 this that you said that you had a vestigial memory of that  
20 topic being discussed?

21 A. Of the topic of intellectual property and  
22 copyrights, yes.

23 Q. And then after you met with Mr. Lundberg and  
24 Mr. Brakebill you then met with Mr. Duff Thompson; right?

25 A. I did, yes.



1 Q. And Duff Thompson was the Novell executive who in  
2 1995 you were working with in connection with the asset  
3 purchase agreement; right?

4 A. One of the executives, yes.

5 Q. And when you were working with him among others at  
6 that time he was a Novell employee; right?

7 A. Right.

8 Q. But when the asset purchase agreement went through,  
9 Mr. Thompson left Novell's employ; right?

10 A. No.

11 Q. Well, he became a SCO -- member of the SCO board of  
12 directors, didn't he?

13 A. He became a member of the SCO board of directors as  
14 part of the purchase of -- well, as part of the agreement  
15 between SCO and Novell. He was still a Novell employee.

16 Q. And how long --

17 A. And later on he did leave Novell's employ, and I  
18 believe he remained a member of the board, yes.

19 Q. So when you met, then, with Duff Thompson before  
20 your deposition in 2007, after you met with Mr. Lundberg and  
21 Mr. Brakebill, you then went and met with Mr. Thompson; right?

22 A. That's correct.

23 Q. And then you had your deposition taken; right?

24 A. Correct. Before I met with Mr. Thompson I asked,  
25 we asked Mr. Lundberg if that -- if he would object to that,

1 and he said he would not object to it.

2 Q. He wasn't opposed to that, was he?

3 A. He said to my lawyer that he wasn't opposed to  
4 that.

5 Q. So you then met with Mr. Thompson; right?

6 A. I did, yes.

7 Q. And you understood at the time that Mr. Thompson  
8 was on the SCO board of directors; right?

9 A. Yes.

10 Q. Did you understand at that time that Mr. Thompson  
11 was the chairman of SCO's litigation committee?

12 A. I did not know that. I knew he was on the board.  
13 I didn't know, in fact, I learned in the deposition that he  
14 was the chair of the litigation committee.

15 Q. So at least what you learned after your deposition  
16 was taken that when you met with Mr. Thompson before your  
17 deposition was taken that Mr. Thompson not only was a SCO  
18 director but the chairman of this litigation committee; right?

19 A. That's correct. That's what I learned, yes.

20 Q. And do you understand that Mr. Thompson was one who  
21 authorized the filing of this lawsuit against Novell?

22 A. I don't know that to be a fact. It may well be.

23 Q. Do you know what Mr. Thompson's financial interest  
24 is in the outcome of this litigation?

25 A. I believe his partnership owns a significant number

1 of SCO shares. I don't know how much.

2 Q. Mr. Frankenberg, thank you for your time.

3 I have no further questions at this juncture, Your  
4 Honor.

5 THE COURT: Thank you, Mr. Brennan.  
6 Mr. Singer?

7 REDIRECT EXAMINATION

8 BY MR. SINGER:

9 Q. Mr. Frankenberg, you've heard a lot of questions  
10 and you've seen some documents. Let me start with, was the  
11 deal as you understood it with Santa Cruz to sell the  
12 copyrights in UNIX and UnixWare or to retain copyrights?

13 A. To sell the copyrights in UNIX and UnixWare  
14 excluding the NetWare copyrights.

15 Q. Excluding the NetWare copyrights?

16 A. Right.

17 Q. And was that your intent at the beginning of the  
18 transaction?

19 A. Yes.

20 Q. Was that your intent throughout the transaction?

21 A. Yes.

22 Q. Was that your intent when the transaction closed?

23 A. Yes.

24 Q. If any lawyers put in language into an agreement  
25 that differed from that, would they be acting within or

1 outside your authority as chief executive officer of the  
2 company?

3 A. Outside.

4 Q. Now, there were some questions about you trust your  
5 lawyers. Do you trust your lawyers to document a deal  
6 consistent with what the business people negotiated?

7 A. I trusted that they would do that, yes. Apparently  
8 that didn't happen.

9 Q. So to the extent there is language in there which  
10 excluded copyrights, would that have been consistent or  
11 inconsistent with what the lawyers were supposed to do in  
12 negotiating -- in documenting this deal?

13 A. They were supposed to be especially careful to make  
14 sure that none of the NetWare copyrights or other Novell  
15 product copyrights transferred as part of the deal. They were  
16 not instructed to withhold copyrights of UNIX or UnixWare.

17 Q. And when you looked at the APA and you saw  
18 reference to excluding copyrights, did you interpret that as  
19 being the NetWare copyrights, or did you interpret that as  
20 being the UNIX, the UnixWare copyrights?

21 A. When I saw that, I'm sure -- well, I shouldn't say  
22 that. When I saw that, what likely registered in my mind was  
23 that was NetWare copyrights. So they were doing their job.  
24 They were excluding the copyrights that were very important to  
25 us.

1 Q. Now --

2 A. I should have read more carefully or clearly or we  
3 might not have been here.

4 Q. Now, there were some questions about the board of  
5 directors. Does any other board of directors member in this  
6 case have the authority to negotiate the deal separate from  
7 what you and the team of executives at Novell was doing?

8 A. No.

9 Q. Were any of the board of directors other than  
10 yourself negotiating the deal with Santa Cruz?

11 A. No.

12 Q. So the only way that the board of directors could  
13 have agreed to sell the copyrights would have been with your  
14 knowledge and action; is that fair?

15 MR. BRENNAN: Objection, Your Honor. That's  
16 leading the witness.

17 THE COURT: Sustained.

18 Q. BY MR. SINGER: Let me rephrase the question,  
19 Mr. Frankenberg. Is there any way the board of directors  
20 could sell the copyrights without you being aware of it as  
21 being part of the deal?

22 A. No.

23 Q. Now, I'd like to take a look with you at the  
24 minutes that you were asked to look at. And if you look at  
25 the first page, do you see any discussion in terms of what was

1 discussed with the board about copyrights?

2 A. I'm sorry. I'm having trouble reading it. Maybe  
3 when I was younger I could have. But --

4 Q. I'm having trouble reading it, too. This might be  
5 easier.

6 A. Thank you.

7 Q. Take a moment and look at the summary of the  
8 discussion.

9 THE COURT: Can you read that all right,  
10 Mr. Frankenberg?

11 THE WITNESS: I can, yes. It's much better. Thank  
12 you, Your Honor.

13 THE COURT: All right.

14 (Time lapse.)

15 THE WITNESS: Nothing on the first page about  
16 copyrights.

17 Q. BY MR. SINGER: Okay. On the top of the second  
18 page where it discusses that, the directors next discussed  
19 various alternatives, that paragraph, anything there that you  
20 see about copyrights? And perhaps Mr. Calvin can blow up that  
21 top paragraph and make it easier to read.

22 (Time lapse.)

23 THE WITNESS: No. There's nothing about copyrights  
24 in there.

25 Q. BY MR. SINGER: From your own personal

1 recollection, was there any discussion at the board meeting  
2 about the copyrights going or staying?

3 A. I don't recall any discussion about that, no.

4 Q. So then you get to the resolutions. Are the  
5 resolutions pretty much a formality after the discussion at  
6 the board meeting to vote to get the formal authority to take  
7 steps?

8 MR. BRENNAN: Objection, Your Honor. That's  
9 leading the witness again.

10 THE COURT: Overruled.

11 THE WITNESS: Generally resolutions are drafted  
12 ahead of the meeting. And unless there are things that  
13 change, a resolution is a result of the discussion or actions  
14 of the board. Those are generally what is put into the  
15 record.

16 Q. BY MR. SINGER: Do you recall any special attention  
17 paid at the meeting back in 1995 of the language of the  
18 particular resolution that had been drafted to approve the  
19 transaction?

20 A. I don't recall that, and the minutes don't say  
21 there's any discussion about the resolution. They refer to  
22 the discussion that we just talked about.

23 Q. If you had looked at the resolution and you saw,  
24 pursuant to the asset purchase agreement Novell will transfer  
25 to SCO its UNIX and UnixWare technology assets, would you have

1 understood that to include the copyrights?

2 A. Yes, I would have.

3 Q. Now, when you do get down to the second paragraph  
4 that refers to Novell retaining all of its patents, copyrights  
5 and trademarks, you see that it's followed by a statement that  
6 says:

7 Worldwide license back to UNIX and UnixWare  
8 for internal use and resale in bundled products.

9 Do you see that?

10 A. Yes, I do.

11 Q. Does that refer to the license back agreement that  
12 we talked about earlier this morning?

13 A. Yes, it does.

14 Q. And would there be any reason for Novell to have to  
15 license back from SCO copyrighted technology if it, in fact,  
16 never sold it to SCO in the first place?

17 A. I can't think of a reason, no.

18 Q. Now, to the extent someone were to read these  
19 minutes as excluding the UNIX and UnixWare copyrights from the  
20 sale, was that consistent or inconsistent with the deal that  
21 you and your executives negotiated with Santa Cruz?

22 A. It was inconsistent or would have been  
23 inconsistent.

24 Q. And if the attorneys had negotiated language and  
25 put language into the agreement that excluded the UNIX and



1 UnixWare copyrights, was that consistent or inconsistent with  
2 what they were supposed to be doing?

3 A. It was inconsistent.

4 Q. Now, you've been asked about Amendment 1 which  
5 occurred over the 90 days that followed. Was there any reason  
6 that you're aware of why Santa Cruz would have thought that  
7 there was some problem with the language in the agreement in  
8 terms of getting the entire UNIX and UnixWare business  
9 including the copyrights?

10 A. I can't think of any, other than if they had read  
11 it more carefully than I did, they would have seen the  
12 reference to copyrights.

13 Q. But did any issue come up over those 90 days?

14 A. Not that I remember, no.

15 Q. Do you know whether or not during that period plans  
16 were made to transition the copyrights on the actual software?

17 A. I don't recall, no.

18 Q. But you're not aware of any issues that would have  
19 come up that would have led at that time before Amendment  
20 Number 1 to having to make some changes to the agreement?

21 MR. BRENNAN: Objection; leading question, Your  
22 Honor.

23 THE COURT: Sustained.

24 Q. BY MR. SINGER: Are you aware of any issues that  
25 came up between September and December of 1995 that would have

1 drawn attention to this language regarding copyrights?

2 A. I'm not aware of any, no.

3 Q. You were asked about the fact, and this is in -- on  
4 the first page of the minutes, Exhibit Z3, that there was also  
5 consideration of an HP license, a license at Hewlett-Packard  
6 at the same board meeting; is that correct?

7 A. Yes.

8 Q. Was there anything inconsistent with Novell  
9 engaging in that license with its sale of the UNIX and  
10 UnixWare assets to Santa Cruz?

11 A. No; because Hewlett-Packard already had a license  
12 to UNIX. So they were one of the companies that already owned  
13 a license and already had UNIX-based systems in the market,  
14 and they were one of the companies paying royalties under the  
15 SVRX agreements. So as far as UNIX was concerned, they didn't  
16 need a license.

17 Q. With respect to the payment terms, was it your  
18 understanding that the payment was just the stock, or was it  
19 also the royalty stream?

20 A. It was the stock and the two royalty streams, the  
21 SVRX royalties and the UNIX royalties, less the 5-percent  
22 administrative fee on the SVRX royalties.

23 Q. Now because the royalties streams would go in the  
24 future, did you know how much money Novell would get over a  
25 period of years in return for the sale of the business?

1           A.   Not exactly.  But we had pretty good estimates of  
2 what that might amount to.

3           Q.   What was the estimated range of what Novell would  
4 realize for the sale of the business through those three  
5 components, the stock and the two royalty streams?

6           A.   I don't recall the exact estimate, but it was in  
7 the order of \$100 million.

8           Q.   Did you recognize when you were pursuing the deal  
9 with Santa Cruz that Novell may be receiving less for the UNIX  
10 and UnixWare business than it had paid AT&T several years  
11 earlier?

12          A.   Yes.

13          Q.   And did you have a view as to whether that was  
14 still in the best interest of the company in terms of its  
15 overall business activities?

16          A.   It was in the best interest of the company.  Just  
17 looking at the estimates of what would come from SCO did not  
18 include payments that would come from buyouts of the SVRX  
19 royalties by existing customers.  But monetary considerations  
20 aside, the major consideration was to get Novell out of the  
21 operating system business and focused on networking businesses  
22 where it had an opportunity to compete with Microsoft as  
23 opposed to -- compete successfully with Microsoft as opposed  
24 to trying to assault a fortified (inaudible).

25                   THE COURT REPORTER:  Fortified what?

1                   THE WITNESS: Fortified (inaudible). I'm sorry.  
2 Assault somebody who has a virtually assured position in the  
3 marketplace that you have no possible way of winning, is a  
4 better way of saying it. Sorry.

5                   Q. BY MR. SINGER: There was some questioning about  
6 whether there was any discussion with Mr. Michels or Mr. Mohan  
7 about the transfer of the copyrights. Do you have any reason  
8 to believe that Mr. Mohan or Mr. Michels needed to raise an  
9 issue of the copyrights transferring during the time that you  
10 were chairman of the company?

11                  A. No.

12                  Q. And had anyone to your knowledge ever gone to the  
13 buyer and said, we want to change the language of the deal,  
14 or, we want to put in language in the agreement to keep the  
15 copyrights back? To your knowledge did that ever occur?

16                  A. I have no knowledge of that occurring. It may  
17 have, but I have no knowledge of it.

18                  Q. Your knowledge as chief executive officer was that  
19 the lawyers would document a deal consistent with what you and  
20 your executives had negotiated?

21                  A. Yes.

22                  Q. Thank you very much.

23                  THE COURT: Mr. Brennan?

24                  MR. BRENNAN: Yes, Your Honor. Just a few.

25                  THE COURT: Go ahead.

1 RE-CROSS-EXAMINATION

2 BY MR. BRENNAN:

3 Q. Mr. Frankenberg, you were just asked by Mr. Singer  
4 about what would be in the best interest of the corporation.  
5 I'd like to look back to what's been introduced into evidence  
6 Exhibit Z3, the minutes of the board of directors. I'd like  
7 to turn to Page 2 and look at the resolution.

8 Now, first of all, you understand that the purpose  
9 for minutes being prepared for the board of directors was so  
10 that there would be a clear record of what occurred so people  
11 could look back in time to see what really happened; right?

12 A. Yes.

13 Q. It's to create an official record of the  
14 corporation; correct?

15 A. Correct.

16 Q. And these board minutes were prepared for that same  
17 purpose; right?

18 A. Yes.

19 Q. So that, for example, those of us today in March of  
20 2010 looking back to something that happened in September of  
21 1995 could have a clear understanding of what was discussed  
22 and importantly what decisions were made by the board of  
23 directors by virtue of a record being prepared; correct?

24 A. Yes. That's the intent of minutes; right.

25 Q. And you told us that you had a chance to review and

1 approve these minutes; right?

2 A. I did.

3 Q. So let's, then, look at the resolution. I believe  
4 you suggested that the resolution that was --

5 A. I'm quite sure if you look at a subsequent set of  
6 minutes you'll see that the minutes were approved.

7 Q. Yes. In fact, that's what happened; isn't it?

8 A. I believe so. Yes.

9 Q. Thank you. I have had that benefit. I appreciate  
10 you pointing that out.

11 A. Okay.

12 Q. Now, the resolution itself, are you suggesting that  
13 the resolution was prepared in advance of the meeting of the  
14 board of directors?

15 A. That's generally what is done.

16 Q. So even before you went to the board of directors  
17 meeting, you knew that this was the resolution that was going  
18 to be considered; right?

19 A. I would say that the resolution would have been  
20 drafted ahead of the meeting. I don't know whether I looked  
21 at it ahead of the meeting or not.

22 Q. But I think you told us earlier that there was a  
23 package of materials prepared even before you went to the  
24 meeting; right?

25 A. Yeah. And generally that would have been

1 included -- any proposed resolutions would have been included  
2 in the package. I don't know for sure that they were.

3 Q. So you expect, then, that you and other members of  
4 the board of directors even before they arrived for the  
5 meeting on September 19th would have seen a resolution that  
6 would describe what was going to be considered and the  
7 business that would be before the board that day; right?

8 A. That would have been the normal procedure, yes.

9 Q. So there wouldn't have been any surprise even at  
10 the board of directors meeting as to what the board was being  
11 asked to approve, the members would have had a chance to think  
12 about even before they get there; right?

13 A. Generally the case, yes.

14 Q. So looking, then, back at the resolution, and this  
15 is the official action taken by the board of directors of  
16 Novell; correct?

17 A. Correct.

18 Q. The governing body of the corporation; right?

19 A. Correct.

20 Q. So again, in the first paragraph let's find out  
21 what, in fact, was in the best interest of the corporation.

22 It says, quote:

23 That the board of directors of this  
24 corporation hereby determines that it is in the  
25 best interest of the corporation and its

1           shareholders to enter into an asset purchase  
2           agreement with Santa Cruz Operation.

3                         Right?

4           A.    Yes.

5           Q.    So you and the other boards members felt that what  
6           was in the best interest of the corporation was to enter into  
7           the asset purchase agreement; correct?

8           A.    Yes.

9           Q.    And the version of which you signed; right?

10          A.    Yes.

11          Q.    The version of which you had a chance to review  
12          before you signed it; right?

13          A.    Yes.

14          Q.    The version of which was discussed with you and the  
15          other board members at the board meeting; right?

16          A.    Yes.

17          Q.    The version of which two senior Novell either  
18          executives or board members, Mr. Bradford and Mr. Sonsini,  
19          walked through with the board at the meeting; right?

20          A.    Yes.

21          Q.    It was that version of the asset purchase agreement  
22          that you and the other board members thought was in the best  
23          interest of Novell to enter into; right?

24          A.    Yes.

25          Q.    And that's the one you signed; right?



1           A.    Yes.

2           Q.    Now, Mr. Singer came back to you again and asked  
3 whether or not it was the intent to withhold copyrights from  
4 Santa Cruz under the asset purchase agreement.  Let's look at  
5 the last sentence in the resolution where it says, Novell  
6 will retain.

7                        So you're at the board meeting.  We've talked about  
8 what was presented.  We talked about what you had a chance to  
9 look at before.  We talked about the legal advice that was  
10 given.  And we talked about how the terms are reviewed.  We  
11 talked about how you had a chance to review and this language,  
12 quote:

13                                Novell will retain all of its patents,  
14 copyrights, and trademarks except for the  
15 trademarks UNIX and UnixWare.

16                                You see that; right?

17           A.    Yes, I do.

18           Q.    And that language is consistent with the language  
19 in the asset purchase agreement; right?

20                        MR. SINGER:  Your Honor, I object to this.

21           Q.    BY MR. BRENNAN:  As signed on September 18th, 1995.

22                        MR. SINGER:  Objection; seeks the scope of recross,  
23 simply repeats recross.

24                        THE COURT:  Overruled.

25                        MR. BRENNAN:  I'll re-ask the question because I

1 got muddled there. I'll try again.

2 THE COURT: Go ahead.

3 Q. BY MR. BRENNAN: The language that we just read in  
4 the resolution is consistent with the language that's employed  
5 in the September 19, 1995, asset purchase agreement regarding  
6 exclusion of copyrights; correct?

7 A. Yes.

8 Q. So what the board reviewed and approved is  
9 consistent with what you signed and what SCO signed; right?

10 A. Yes.

11 Q. Thank you. I appreciate your time.

12 THE COURT: Okay. Counsel, may this witness be  
13 excused? By that I mean, he doesn't need to be worried about  
14 being recalled?

15 MR. SINGER: I believe that's correct, Your Honor.

16 MR. BRENNAN: Yes, Your Honor. Thank you.

17 THE COURT: All right.

18 Mr. Frankenberg, you may go about your business.  
19 You do not have to worry about being recalled as a witness in  
20 this case. But I would ask you to, please, not discuss your  
21 testimony with any other witness or in the presence of any  
22 other witness or allow in any way your testimony as presented  
23 here today to become part of another witness' understanding of  
24 what has taken place in this trial.

25 THE WITNESS: I'll do that, Your Honor.

1 THE COURT: Thank you, Mr. Frankenberg. You may  
2 step down and be excused. Thank you.

3 THE WITNESS: Thank you.

4 THE COURT: We'll go ahead and recess, ladies and  
5 gentlemen, for the afternoon. But I do want to emphasize by  
6 reading to you again the instruction that I gave you yesterday  
7 about your conduct. And the reason I do this is because it is  
8 so important.

9 First, I instruct you that during the trial you are  
10 not to discuss the case with anyone including fellow jurors or  
11 permit anyone to discuss it with you. Until you retire to the  
12 juryroom at the end of the case to deliberate on your verdict,  
13 you simply are not to talk about this case. Not talking about  
14 this case means not talking about it in any way including by  
15 Internet, e-mail, text message and instant communication  
16 devices or services, such as cell phones, Blackberries,  
17 iPhones, or social networking including Facebook, Twitter, My  
18 Space, LinkedIn, YouTube and so on.

19 Second, do not read or listen to anything touching  
20 on this case in any way. Do not watch or listen to any news  
21 reports concerning this trial on television or on the radio,  
22 and do not read any news accounts of this trial in a  
23 newspaper, on the Internet, on instant communication device,  
24 again, including Facebook, Twitter and so on. Importantly, if  
25 anyone should try to discuss this case with you, bring it to

1 my attention immediately.

2 Third, do not do any research or make any  
3 investigation about the case on your own.

4 And finally, ladies and gentlemen, you have now  
5 heard one day of testimony. You may be inclined to think,  
6 well, I can figure out this case already. That would be a  
7 very, very serious mistake. Until you have heard all of the  
8 evidence, until you have been instructed on the law that you  
9 are to apply and until you've heard closing arguments, it  
10 would be inappropriate for you to be making up your mind. At  
11 that point in time, you will begin your deliberations, and  
12 then and only then should you make up your mind about this  
13 case.

14 We will try to start promptly at 8:30 in the  
15 morning, and we would request that all of you be here. And as  
16 soon as you come into the building, please make your way to  
17 the juryroom and stay there until Ms. Malley comes to get you.

18 Ms. Malley, if you would, please.

19 (Whereupon, the jury left the court proceedings.)

20 THE COURT: Mr. Singer, I need to explain to you  
21 why I did not sustain your objection about Mr. Brennan's  
22 question, because in effect both of you did the same thing.  
23 Both of you just simply took the opportunity on redirect and  
24 recross to cover what had already been covered. I will not  
25 preclude you from doing so, but if we start reaching a concern

1 about finishing this within the three weeks, I may perhaps  
2 start admonishing you to be more careful with the use of the  
3 time, okay?

4 One other thing, counsel, that has occurred to me,  
5 because there are very important issues that the Court will  
6 have to decide on its own I may end up having to ask more  
7 questions of witnesses than I normally would. As a general  
8 rule I do not like doing that, even though I will give the  
9 jury instruction that, I may have asked questions, and do not  
10 presume that I have any position on this case. But I am  
11 concerned that I will have to do that, and I hope that you  
12 will understand the reason why I may do so, because there are  
13 some things that I have to understand that the jury does not.  
14 So if you think that the nature of my questions at any point  
15 is inappropriate I want you to let me know. But if I do,  
16 understand why I will.

17 Do you have anything else, Mr. Singer, before we  
18 recess?

19 MR. SINGER: Yes, Your Honor. I have a couple  
20 items.

21 One, Your Honor, we would request for the purpose  
22 of avoiding confusion of the jury that both sides, myself and  
23 other witnesses, as well as Novell 's -- other lawyers, as  
24 well as Novell's counsel, in referring to just 1.1(b) language  
25 which is taken out, either use the term, the original

1 language, or, the prior language, because I think that it  
2 is -- this language no longer exist in the agreement, and it's  
3 being referred to as the agreement, as though that currently  
4 exists. The Court knows and we know and Novell knows it's not  
5 there any longer. And I think in respect for the jury, it  
6 should be using terms such as, the prior language, or, the  
7 original language, so it doesn't suggest it's still there.

8 THE COURT: Mr. Brennan, do you wish to respond?

9 MR. BRENNAN: Your Honor, I think the problem with  
10 that proposition is illustrated by the witness we had today.  
11 Mr. Frankenberg was not even with the company when  
12 Amendment Number 2 was entered into. By its very nature we  
13 can only ask him about the agreements that existed at the time  
14 that he was with the company. And as I understand it, the  
15 entire line of inquiry that has been invited by Amendment  
16 Number 2 was, what was the intent of the parties at the time,  
17 I'm certainly not or my colleagues in a position to ask him  
18 about forward-looking documents that he had no role in, never  
19 commented on, didn't form an intent on. So the questions  
20 today were focused temporally on documents that he did have  
21 involvement on.

22 THE COURT: I understand that, Mr. Brennan. And  
23 there was nothing inappropriate about your question because I  
24 refused to sustain objections. But I do think that  
25 Mr. Singer's point is a good one. And to the extent that we

1 have witnesses, if there were any additional witnesses who  
2 will not be permitted to talk about the agreement to include  
3 the subsequent amendment in 1996, I think it would be  
4 worthwhile if you would always ask your questions in the  
5 context of the original agreement or the September 1995  
6 agreement or something akin to that. It may be that that is  
7 not an issue in the future, but if there is, again, a witness  
8 that cannot talk about the amendment that you do confine your  
9 questions to that.

10 MR. BRENNAN: Thank you, Your Honor. We'll  
11 endeavor to do so.

12 THE COURT: Thank you.

13 MR. SINGER: Your Honor, we have a second related  
14 concern. And I didn't want to mention it in these terms in  
15 front of the jury. But the concern with raising Section 9.5,  
16 the integration clause of the contract, saying that one should  
17 not pay attention to prior discussions and negotiations,  
18 essentially, that's flatly against what the 10th Circuit has  
19 ruled in this case. Those are relevant. That's why the jury  
20 is going to be hearing a lot of testimony about this situation  
21 because there is ambiguous documents. And I'm concerned that  
22 that is essentially telling the jury don't pay attention to  
23 our evidence about the intent. And that isn't what the law is  
24 in this case.

25 MR. BRENNAN: Well, Your Honor, I think we're

1 mixing apples and oranges. What the 10th Circuit, as I  
2 understand its ruling, suggested is that by virtue of the  
3 second amendment that there was an ambiguity presented in that  
4 document that opened up the question of parole evidence as to  
5 what the intent of the parties is.

6 THE COURT: But the bottom line is they opened the  
7 introduction of parole evidence.

8 MR. BRENNAN: That's right.

9 THE COURT: And they said parole evidence is  
10 important. And I would agree with Mr. Singer, and I would  
11 request that you, again, that you -- I will not prohibit you  
12 from asking questions about it. But if you stress it unduly,  
13 I'm going to have to allow either an instruction to the  
14 Court -- or by the Court to the jury on this or an objection  
15 with Mr. Singer explaining it in more detail, which then  
16 will require me to say something to the jury, because I do  
17 agree. I think it does undermine what the 10th Circuit has  
18 told me as a trial court judge have to allow the jury to  
19 consider.

20 MR. BRENNAN: I have a proposal in response, Your  
21 Honor.

22 THE COURT: Go ahead.

23 MR. BRENNAN: In light of the suggestion that the  
24 Court made to me that if we pursue that it would open up, I  
25 think we probably prefer not to go down that road.



1 THE COURT: I think that would be safest. I do.

2 MR. SINGER: Your Honor, what I would request is at  
3 the beginning of tomorrow perhaps an instruction that deals  
4 with what had occurred by simply saying, if the jury in this  
5 case should pay attention to all of the evidence including  
6 evidence of the intent of the transaction. They will hear  
7 that at the end, but now they've been told now because of  
8 Section 9.5 that somehow that doesn't matter, that only what  
9 matters is the plain language of the agreement.

10 THE COURT: If you can work out an instruction to  
11 the jury with Mr. Brennan, I will consider it tomorrow. I  
12 don't know that so much damage has been done with this one  
13 witness that it would be worthwhile to bring any attention to  
14 it. Again, as you just indicated, the jury will be instructed  
15 at the end of the trial.

16 So see if you can work something out. If not, then  
17 we'll take another look at it tomorrow. All right,  
18 Mr. Singer?

19 MR. SINGER: Thank you. Your Honor, the last point  
20 I wanted to make is we have been working cooperatively with  
21 Novell's counsel on the deposition designations. I believe  
22 there's a set of them which are either ready right now or will  
23 be ready momentarily where all but a handful of objections  
24 have been resolved for a series of I believe four deposition  
25 transcripts that will be played possibly as early as late

1 tomorrow, but more likely on the day after depending on how  
2 long the cross and direct examinations go.

3 THE COURT: If you do not have all of them worked  
4 out, then I will need from you and opposing counsel the  
5 written objections and response to them so that I can deal  
6 with them during the course of the day tomorrow.

7 MR. NORMAN: Your Honor, we'll get those to you  
8 this afternoon. I'm not sure it constitutes a handful at this  
9 point. It may be two or three.

10 THE COURT: It would be very helpful, Mr. Norman,  
11 if you would get those to me today. Thank you.

12 Anything else, Mr. Singer?

13 MR. SINGER: Not from us, Your Honor.

14 THE COURT: Mr. Brennan, do you have anything?

15 MR. BRENNAN: No. Thank you, Your Honor.

16 THE COURT: Thank you. Counsel, we do have a  
17 hearing this afternoon.

18 No? Never mind. I was just told that my afternoon  
19 hearing is gone, so that means if you want to leave your  
20 materials on the desk, you may do so. All right.

21 (Whereupon, the court proceedings were concluded.)

22 \* \* \* \* \*

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

4 I, KELLY BROWN HICKEN, do hereby certify that I am  
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of  
7 the foregoing matter on March 9, 2010, and thereat reported in  
8 Stenotype all of the testimony and proceedings had, and caused  
9 said notes to be transcribed into typewriting; and the  
10 foregoing pages number from 134 through 199 constitute a full,  
11 true and correct report of the same.

12 That I am not of kin to any of the parties and have  
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this \_\_\_\_ day of  
15 \_\_\_\_\_ 2010.

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KELLY BROWN HICKEN, CSR, RPR, RMR