

1

(10:30 a.m.)

2

The COURT: Anything, counsel, before we bring the
jury in?

3

4

MR. ACKER: Not on behalf of Novell, Your Honor.

5

MR. SINGER: Not on behalf of SCO, Your Honor.

6

THE COURT: Thank you.

7

(jury present)

8

THE COURT: Go ahead, Mr. Acker.

9

MR. ACKER: Thank you, Your Honor.

10

CROSS-EXAMINATION

11

BY MR. ACKER:

12

Q Good morning, Mr. Thompson. We haven't had a chance to
meet. I'm Eric Acker and I represent Novell. I want to take
a step back so the jury truly understands your position in
this litigation. When you testified about being at Novell,
the time that you were at Novell was just in 1994 to 1996. Do
I have that right?

13

A That's correct.

14

Q And you were an employee at Novell during that period of
time; correct?

15

A Yes.

16

Q And you had come to Novell as a result of Novell
acquiring the company that you used to work for, WordPerfect;
right?

17

A That's correct.

1 Q And when Novell decided in late 2000 -- or 1995 to sell
2 that division, you decided to leave Novell; correct? When
3 they decided to sell WordPerfect, you decided to leave Novell?

4 A Yeah. You said late '95. Actually I think the decision
5 was reached fairly early in the year.

6 Q And You made your decision to leave early in the year in
7 '95?

8 A That's when I announced to Bob or had a discussion with
9 Bob that it would probably be best for me to leave the
10 company.

11 Q Because you didn't want to be at Novell any longer; is
12 that right?

13 A Yeah, I really didn't.

14 Q And what time -- what time frame was that that you told
15 Mr. Frankenberg that you no longer wanted to work for his
16 company?

17 A To the best of my recollection it would have been the
18 April, May time frame.

19 Q Okay. So before the negotiation and actual signing of
20 the APA, you had already decided you were going to leave
21 Novell?

22 A I had discussed with Bob that I would leave Novell.

23 Q And that's what you ultimately did; correct?

24 A Bob asked me to stay to conduct this transaction and a
25 couple of others, and I did.

1 Q Would It be fair to say that at the time of the APA, the
2 negotiations leading up to it, and the time after the signing
3 of the APA in September of 1995 until the end of the year, you
4 were pretty much checked out from Novell? Isn't that
5 accurate?

6 A I don't know what you refer to by checked out.

7 Q Well, mentally you'd already made the decision to leave;
8 right?

9 A If that's what you're referring to is that I had made a
10 decision that I would be leaving the company, then that is
11 correct.

12 Q Now, after you left Novell as an employee, and after the
13 APA transaction, you joined the board of Santa Cruz, the other
14 side of -- the company on the other side of the APA;
15 correct?

16 A I think I actually was made a member of the board of
17 Santa Cruz while I was still an employee of Novell.

18 Q And then subsequently after Santa Cruz, or Tarantella at
19 that point, transferred the assets that it acquired in the APA
20 to Caldera, you became a board member of Caldera in 2001;
21 right?

22 A Correct.

23 Q And since May of 2001, you have been a board member until
24 just recently of Caldera and subsequently the new SCO;
25 correct?

1 A That is correct.

2 Q And it's the new SCO that is the plaintiff in this case
3 that's suing Novell; correct?

4 A That is correct.

5 Q So fair to say for the last nine years you have been a
6 board member for the company that is accusing Novell of
7 slander of title; right?

8 A I was a member of SCO -- SCO's board, that's right.

9 Q And it's that board, SCO's board, that made the decision
10 to sue Novell and accuse it of slander of title; correct?

11 A Yes.

12 Q And so in 2004 you were actually head of the litigation
13 committee that made the decision to sue the company you used
14 to work for; right?

15 A Well, could you repeat that question? I was a member of
16 the board in 2004? Yes, I was a member of the board in 2004.
17 Is that your question?

18 Q My question was were you the member of the board that
19 decided to sue your old company in 2004?

20 A Was I the member of the board that made the decision?

21 Q Were you on the board that made the decision?

22 A I was on the board that made the decision.

23 Q Did you vote in favor of it?

24 A Yes.

25 Q And as a board member of SCO, you have an allegiance to

1 SCO; correct?

2 A Sure. I have obligations and duties that relate to being
3 a board member.

4 Q In fact you have a fiduciary obligation that requires you
5 to act in the best interests of SCO at all times; correct?

6 A That is correct.

7 Q As a board member of that company; correct?

8 A For the period up -- for the total duration of the time
9 that I was a board member of SCO, that's right.

10 Q Including the time the decision was made to sue your old
11 company Novell; right?

12 A Yes.

13 Q And in addition to having a fiduciary obligation to
14 protect SCO, you also have a financial interest in SCO;
15 correct?

16 A Well, I didn't at that time, but I do now.

17 Q And I think you told Mr. Singer you have 100,000 shares
18 of stock?

19 A I think the actual number is 110,000 shares.

20 Q And you also have additional stock options on top of
21 that; correct?

22 A I may have. I may not. The problem with that question
23 is whether or not those other options have expired.

24 Q Well, let me ask you about the stock. Now, you told
25 Mr. Singer that that 110,000 shares of stock was only worth

1 about 80 or \$90,000; correct?

2 A I was informed today that the stock price is 70 something
3 cents, and so I guess that's the amount.

4 Q But if SCO succeeds in this litigation and its stock
5 price goes up, you stand to gain financially; correct?

6 A Sure.

7 Q So you have a financial interest in this case?

8 A Okay, fair to say.

9 Q Is that true?

10 A It is fair to say that I have stock in SCO.

11 Q And you have a financial interest in the outcome of this
12 case; correct?

13 A Yes.

14 Q And you want SCO to win, don't you?

15 A Repeat your name again.

16 Q Eric Acker.

17 A Mr. Acker, I want the truth to be told.

18 Q You want SCO to win, don't you?

19 A I want the truth to be told. The transaction that I
20 conducted in 1995 with my team, I want that transaction to be
21 understood.

22 Q All right. And we'll go through that.

23 A That's what I want.

24 Q We'll go through that. But in addition to your hundred
25 thousand shares of stock that gives you a financial obligation

1 in this case, you're part of a partnership, aren't you?

2 E-S Net? ES-Net?

3 A ES-Net, Yes.

4 Q And isn't it true that your partner is a man by the name

5 of Dan Campbell?

6 A Yes.

7 Q And hasn't Dan Campbell recently invested \$100,000 in

8 order to fund this litigation for SCO?

9 A Well, I'm aware that he has done that, yes. But that's

10 Dan Campbell. That's not my partnership.

11 Q But Dan Campbell, your partner in your venture group;

12 right?

13 A Dan Campbell, a former director of SCO, like me, already

14 has shares in SCO. He exercised his options the same way I

15 exercised my options. As an individual I do not control his

16 investments. I do not benefit from his investments. His

17 investments are his alone.

18 Q And he put \$100,000 in in order to fund this case;

19 right?

20 A I actually don't know how much money he put in. He

21 didn't consult with me when he made the investment, and I

22 don't know what the number is.

23 Q In addition to having a fiduciary obligation to protect

24 SCO in order to have a -- in addition to having a financial

25 interest in the outcome of this case, in order -- in addition

1 to being on the board that voted to bring this case, you also
2 were on the litigation committee at SCO for a number of years
3 and actually oversaw the running of this case; correct?

4 A Well, I didn't oversee the running of the case. The
5 general counsel of the company oversaw the running of the
6 Case. I interfaced between the lawyers and the rest of the
7 board. That was my assignment.

8 Q And when you say the lawyers, you're talking about the
9 lawyers that are running the SCO litigation on behalf of SCO
10 and the board of directors of SCO?

11 A And the general counsel of SCO, and the board of
12 directors.

13 Q That was also your role. Fair to say that of the board
14 members of SCO, since you were on the litigation committee,
15 that you were the person on the board that was most
16 knowledgeable about this litigation over the last four or five
17 years on the SCO board?

18 A No, I don't think that's fair. I think there are a
19 couple of other members of the litigation committee that were
20 just as knowledgeable.

21 Q Let's go back to 1995. I'm going to give you another
22 exhibit, Exhibit A1. Now, Mr. Singer asked you some
23 questions -- and I want this to be clear. And he used the
24 document that was marked the SCO exhibit 1 in your binder
25 there. And that's the APA that included both Amendment 1 and

1 Amendment 2. Do you remember that series of questions from

2 Mr. Singer this morning?

3 A Yes.

4 Q Now, what I've handed you, Novell Exhibit A1, is an APA
5 that does not include either Amendment 1 or Amendment 2;
6 correct?

7 A I'm thumbing through it right now.

8 Q Take your time.

9 A It appears to be just the APA agreement. Is that right?

10 Q I'm going to represent that to you, but if you don't
11 trust me, please take a look.

12 A I think that's what it is. I think it's just the APA
13 agreement.

14 Q Okay. So we get the chronology straight, the APA itself
15 was signed and approved by the board of directors of Novell in
16 September of 1995; got that right?

17 A That's correct, Mr. Acker.

18 Q And you weren't on the board; correct?

19 A I was not.

20 Q And it was the board of Novell that had to approve that
21 deal; right?

22 A That is correct.

23 Q And the transaction, although it was approved in
24 September of 1995, actually didn't get closed, and the bill of
25 sale was not actually signed until December of 1995; is that

1 right?

2 A That's correct.

3 Q And at the signing in December of 1995 there was an
4 Amendment 1 that was prepared during the several months
5 between September of '95 and December of '95; right?

6 A Yes. We had the technology licensing agreement, the bill
7 of sale and the Amendment 1 that were all signed in December
8 of 1995.

9 Q And you signed the Amendment No. 1; right?

10 A Yes.

11 Q And you signed the bill of sale?

12 A Yes.

13 Q And you signed the technology licensing agreement;
14 correct?

15 A That's correct.

16 Q And just so the chronology is set, September of '95 APA
17 is signed and approved by the board; December of 1995
18 Amendment No. 1 is done; correct?

19 A Yes.

20 Q And then you -- you're out of the process. You leave the
21 company; right?

22 A Well, not right then, but within a couple of months I was
23 gone.

24 Q But in terms of dealing with the APA, your last dealing
25 with the APA until you were at Santa Cruz and seeing issues

1 arise was in December of '95; fair?

2 A I think that's a fair statement, yes.

3 Q And fair to say that actually after the deal was signed
4 in September of '95, you sort of became much less involved in
5 the process because you began working on the sale of
6 WordPerfect by Novell; correct?

7 A That's correct.

8 Q So really your real involvement in the negotiations
9 leading up to the APA occurred sometime before September of
10 '95. Is that fair?

11 A Well, by the real involvement, do you mean the majority
12 of the time that I spent on this was prior to the signing of
13 the APA, I would agree with that. I spent some time after the
14 signing of the APA in continuing discussions with the team, Ed
15 Chatlos and others, who were continuing to work on this matter
16 to get it closed. But my time, the time in California, the
17 time meeting with AP -- with SCO and with Alok Mohan and the
18 others, was primarily prior to this time.

19 Q And can you place a time around when it was or how far in
20 advance of September of 1995 this meeting in Palo Alto you
21 referred to was?

22 A Well, there were a number of meetings. I don't mean to
23 suggest there was a single meeting in Palo Alto. The
24 reference I had before was to a particular meeting on the
25 terrace of the law firm of Brobeck in which I was talking to

1 Alok Mohan and Jim Wilt and Jeff Seabrook from their company,
2 and I was there with Ty Mattingly and Ed Chatlos.

3 Q Can you put a date on it?

4 A I don't have a date. It was sometime in the Summer or
5 late Summer, either July or August of 1995.

6 Q So it was --

7 A Could have been early September even.

8 Q So it was at least several weeks before the APA was
9 completed?

10 A Best of my recollection, it was prior -- it was sometime
11 in the Summer of 1995.

12 Q And you weren't involved in the day to day face-to-face
13 negotiations in the APA; correct?

14 A Well, yeah. Occasionally I was there on a day to day
15 basis. I'd be there for two or three days, and then I would
16 go on to other things.

17 Q But Ed Chatlos --

18 A Ed Chatlos was there every day as far as I knew. If
19 there was a negotiation session going on with the team, Ed
20 Chatlos was there.

21 Q And you hired lawyers to assist you in this process;
22 correct?

23 A Yes. We had outside counsel and inside counsel working
24 on this project.

25 Q And inside counsel was Mr. Bradford; correct?

1 A No. No. Actually it wasn't Dave. It was someone on his
2 staff and someone from New Jersey, whose name I can't
3 remember. But there was a gentleman from New Jersey that came
4 out with Mike DeFazio, who was the executive vice-president
5 over the Unix Group within Novell, and then there were other
6 lawyers of the team with Novell. Dave Bradford really wasn't
7 there very much.

8 Q And when you were -- when the detailed negotiations were
9 taking place, you hired Wilson Sonsini to act as your outside
10 counsel; correct?

11 A Dave Bradford -- Dave Bradford hired Wilson Sonsini.
12 That wasn't my role. That was David's --

13 Q That's who represented Novell in the transaction was the
14 outside counsel?

15 A Yes.

16 Q And Tor Braham was the lead lawyer for that team;
17 correct?

18 A Tor Braham was a participant. There were a number of
19 other parties that were draftsmen in that process.

20 Q And because you were not acting as a lawyer at Novell in
21 this period of time, you relied on Novell's outside counsel at
22 Wilson Sonsini to do the detailed drafting of the APA
23 agreement; correct?

24 A Wilson Sonsini was the principal outside firm, yes.

25 Q And you had confidence in the Wilson lawyers, including

1 Mr. Braham; correct?

2 A They were our lawyers.

3 Q And you had confidence in them; correct?

4 A They were our lawyers. I mean were they perfect? No.
5 And it was -- listen. Are you asking me were they absolutely
6 dead-on on everything they ever did? I would say they were
7 better than average.

8 Q So you had confidence in them; correct?

9 A I had confidence in them.

10 Q Now, let's take a look at the APA. And let's back up.
11 You testified --

12 THE COURT: Going to offer it as an amendment --
13 excuse me -- as an exhibit, your A1?

14 MR. ACKER: Yeah. I would move to have A1 admitted,
15 Your Honor. It is A1, yes.

16 THE COURT: Mr. Singer?

17 MR. SINGER: Our only objection is that it's already
18 in evidence as part of SCO Exhibit 1.

19 THE COURT: The Court will admit Exhibit A1.

20 (Defendant's Exhibit A1 received in evidence)

21 Q (BY MR. ACKER) Now, when you were describing the strategy
22 leading up to the decision to select Santa Cruz, not SCO
23 that's the Plaintiff in this case, but Santa Cruz to be the
24 entity to buy portions of the Unix business, you said that you
25 were concerned because they didn't have enough cash at some

1 point. Is that right? That became a concern?

2 A Yeah. The Novell team, Bob, the rest of us, Jim Tolonen,
3 understood that SCO did not have enough cash to just simply
4 buy this outright.

5 Q But the initial plan was to sell the entire business
6 outright for cash; correct?

7 A Well, the plan was to sell the whole business period. It
8 wasn't a question of -- maybe that's the issue that I'm trying
9 to suggest. There was never a provision in the instructions
10 that I received go sell this for cash. The instruction was go
11 sell this lock, stock and barrel. Sell the business. It was
12 not go get cash for this business. It was go sell this.

13 Q And at a point during the negotiations it became clear
14 that Santa Cruz didn't have enough cash, didn't have close to
15 \$300,000,000 in order to buy the business; right?

16 A That's right. They did not have \$300,000,000 cash.

17 Q And because of that, the deal was restructured into the
18 structure that you've described for us, where one portion of
19 it was the payment of \$6,000,000 of stock; right?

20 A The deal was not restructured, Mr. Acker.

21 Q Well, the deal became the giving of \$6,000,000 -- or
22 6,000,000 shares of stock; correct?

23 A The way to pay for this was part stock, which was
24 limited -- our original estimate was that they'd be able to
25 pay for more of it with stock. But it was Novell's issue that

1 it not be a larger amount of stock. SCO was fine giving more
2 stock. I'm not sure that anybody is aware of that, but SCO
3 was fine giving much more stock than they ended up giving.
4 But it was Novell's issue that they did not want more than 19
5 percent of the stock because Novell did not want to have a
6 consolidated financial reporting issue.

7 Q And so what Novell got was a little over 6,000,000 shares
8 of Santa Cruz stock; correct?

9 A Right.

10 Q And then another portion of this deal was this SVRX
11 license, which we're talking about 4.16(a) of the APA;
12 correct?

13 A Yes, the royalties.

14 Q Now, those were royalties that before the deal, AP --
15 that Novell was collecting; correct?

16 A Yes.

17 Q And you said it was about 47 -- or 47 to \$50,000,000 a
18 year that Novell was collecting?

19 A I didn't say 47, but my recollection was that at or
20 around the time that we were making the deal, our estimates in
21 our mind it was around \$50,000,000 a year.

22 Q And then after the transaction, the way it was
23 structured, is instead of Novell collecting that money
24 directly from licensees, Santa Cruz would collect the money
25 and remit 95 percent of it to Novell; correct?

1 A Well, that's exactly what happened, is that when
2 Novell -- when we did the transaction, Novell, which had been
3 the licensor under those licenses, transferred those licenses
4 to SCO, SCO became the licensor and now began to collect those
5 royalties.

6 Q And so what happened between -- before the APA and after
7 the APA is the amount of money that Novell was collecting from
8 those licenses decreased by five percent; correct?

9 A Correct.

10 Q And so to take a round number, for instance, if Novell
11 had been collecting \$100 for the APA for those licenses, then
12 after the APA it would -- it would get a hundred dollars for
13 the APA, but it had to give five bucks back to Santa Cruz?

14 A That's correct.

15 Q That was the second part. We had stock, and then we had
16 this 4.16 SVRX license component to the deal?

17 A Actually, just to be precise, SCO would receive that
18 money. SCO would collect it, all of the royalties. SCO was
19 the party that was in touch with the clients. And SCO on a
20 periodic basis, and it seems to me that there were a
21 particular number of days after the collection of some of the
22 royalties that they were to remit those royalties back to
23 Novell.

24 Q But regardless of how the mechanics worked, the hundred
25 bucks came to Santa Cruz and 95 bucks went to Novell;

1 correct?

2 A Yes.

3 Q So the day before the APA, Novell was getting a hundred
4 bucks; the day after the APA they're getting 95; right?

5 A That's right. Well, not after the APA, but after we
6 closed in December, yeah.

7 Q And then the third part of the deal was the development
8 of a combined product; correct?

9 A That's right.

10 Q And the combined product was Santa Cruz was supposed to
11 go out and continue to develop UnixWare; correct?

12 A Well, the combined product was to combine the Unix
13 components with the SCO OpenServer and Open Desktop
14 components. That was the combined product.

15 Q And those monies, what Novell was able to get for the new
16 network -- NetWare combined product, that -- Novell -- or
17 Santa Cruz was entitled to those monies until they reached a
18 certain amount of revenue, and then Novell was entitled to its
19 share on a portion of that?

20 A Did you say NetWare combined product?

21 Q NetWare and UnixWare, yes.

22 A Well, okay. The combined product had elements of NetWare
23 in it, but it wasn't a NetWare product. It was -- it was
24 components of network enabled Unix combined with some of the
25 technologies in UnixWare.

1 By the way -- or not UnixWare. The combined technologies
2 in OpenServer. That was SCO's product. And so which were
3 basically interface type elements which were coming from the
4 SCO. So yes. And there was a -- the way the schedule was set
5 up, that until SCO hits a certain target, there were no --
6 there was no sharing. And after they hit another target --
7 well, once they hit that target, however, then they would
8 share to a certain percentage. And then if they hit another
9 target, they would share at a higher percentage.

10 Q And this product that we're talking about, this is not
11 the old SVRX licenses. These are -- this is a new product
12 that's going to be developed after the APA by Santa Cruz;
13 correct?

14 A It was actually going to be developed by Santa Cruz with
15 contributions from Novell, and that included people and
16 money.

17 Q Okay. We'll get to that. But just so the jury is clear,
18 the part where there wasn't going to be any payment to Novell
19 until we hit a certain point, that's a new product that's
20 going to be developed by Santa Cruz; correct?

21 A Yes.

22 Q And the old licensing stream that was already existing at
23 Novell, that's the licensing stream in which Novell was
24 actually going to receive less money after the APA closed than
25 before; right?

1 A Yes.

2 Q Now, let's take a look at Novell Exhibit A1, which is the
3 APA without Amendment 1 and not Amendment 2. And if we could
4 go to Schedule 1.1(a), please. Now, in questions -- in
5 response to questions from Mr. Singer you said that this is a
6 schedule -- this is an asset purchase agreement, so it's --
7 the lawyers need to say what's in the deal and what's out of
8 the deal; right?

9 A Yes.

10 Q So you have a list, 1.1(a) and that's what is in the
11 deal; correct?

12 A Yes.

13 Q And then the next couple pages after that are Schedule
14 1.1B, which is what's not in the deal; correct?

15 A Yes.

16 Q And the reason for having those two schedules is so that
17 everybody knows what's being sold in 1.1(a) and what's not
18 being sold in 1.1(b); correct?

19 A Yes.

20 Q And what we see in schedule 1.1(a) is a listing of what
21 was included; correct?

22 A That's correct.

23 Q And you agree that what is listed in schedule 1.1(a) is
24 what was included in that, what was sold in the APA that went
25 from Novell to Santa Cruz in 1995; right?

1 A That's what 1.1(a) is, included assets.

2 Q If we can take a look at section 1.1(a) paragraph Roman
3 Numeral five. And this again is the section of the included
4 assets that is referencing intellectual property; right?

5 A Yes.

6 Q And what it says is what is included in the deal is
7 trademarks Unix and UnixWare to the extent held by seller,
8 excluding any compensation seller receives with respect of the
9 license granted in X/Open regarding the Unix trademark;
10 right?

11 A Yes.

12 Q That's it; right?

13 A Well, no. That's not it.

14 Q In the paragraph --

15 A Oh, in the paragraph. But, no, that's one of many
16 included assets.

17 Q In the paragraph in the included assets it says
18 intellectual property, all that's listed is trademarks Unix
19 and UnixWare; right?

20 A I see that, yes.

21 Q And you would agree with me that copyrights are
22 intellectual property?

23 A I would agree that copyrights are intellectual
24 property.

25 Q And in the APA that was executed in September of '95 and

1 closed in December of '95, in the included assets section
2 referring to intellectual property, the only intellectual
3 property mentioned is trademarks Unix and UnixWare; right?

4 A In paragraph five, but all the rest of that assets
5 provision talks about intellectual property.

6 Q But in the intellectual property section of 1.1(a)
7 there's no mention of copyrights. Would you agree with
8 that?

9 A I would agree that it says what it says.

10 Q Okay. Let's go to the corresponding section 1.1(b)
11 paragraph five. Now, schedule 1.1(b) -- so to make it clear,
12 this is an asset purchase agreement, and 1.1(a) is what is
13 sold and 1.1(b) is what is not sold, that is what is retained
14 by Novell; correct?

15 A Correct.

16 Q And there's a corresponding paragraph in section 1.1(b),
17 again, Roman Numeral five, that says intellectual property;
18 right?

19 A Yes.

20 Q And it reads in the first section-A what is --

21 MR. SINGER: Your Honor, I object. I think this
22 should be identified as to prior or replaced language.

23 MR. ACKER: I'll be perfectly clear.

24 Q (BY MR. ACKER) We're talking about the APA that was
25 signed -- or signed by the board of directors in September of

1 1995; right? That's what we're talking about?

2 A That is this document, yes.

3 Q And we're not talking about anything that happened after.

4 I'm focusing on September of 1995, okay?

5 A Okay.

6 Q In the intellectual property section of what was

7 excluded, 1.1(b), in (a), what's listed there is all

8 copyrights and trademarks, except for the trademarks Unix and

9 UnixWare; correct?

10 A Yes.

11 Q And that was what was excluded from the sale; correct?

12 A Well, I see that.

13 Q You see those words?

14 A I don't agree with it.

15 Q I understand you don't agree with it. I heard your

16 testimony, but you see the words, and those are the words in

17 the deal?

18 A I see the words.

19 Q Okay. And there's some symmetry between what we saw in

20 the included assets 1.1(a) paragraph five that said the

21 trademarks Unix and UnixWare went with the deal and this

22 portion of 1.1(b), the excluded assets, that say all the other

23 copyrights and trademarks stayed, except for trademarks Unix

24 and UnixWare, which are included in the included assets

25 1.1(a); right?

1 A Their symmetry? Well, I see that Unix and UnixWare
2 trademarks are mentioned in both.

3 Q And now you testified on direct that when you say -- when
4 you read the words all copyrights as being excluded, you
5 thought that just meant copyrights to NetWare; right?

6 A NetWare and other Novell core products, that's right.

7 Q Can you show me where in this section, intellectual
8 property, paragraph 5(A) of the excluded assets, it says
9 NetWare?

10 A Well, it doesn't say that.

11 Q I'm sorry?

12 A It does not say that.

13 Q So in the section talking about intellectual property and
14 what's excluded from the deal, there is no mention of NetWare;
15 right?

16 A Mr. Acker, if you refer to the whole previous page, the
17 entire previous page, it mentions nothing but NetWare and
18 TUXEDO. And so what I am -- I guess my answer to you is this.
19 The reason that our understanding, our negotiating team's
20 understanding, that -- on this provision is because the entire
21 page preceding that line talks about NetWare.

22 Q And my question was really pretty simple. In the section
23 of the excluded assets from the deal that talk about
24 intellectual property, it says all copyrights, and there's no
25 mention of NetWare?

1 A And my answer is equally simple. That made no sense. I
2 knew what the deal was. And the idea of delivering source
3 code, the idea of delivering these mountains of documentation
4 of this product, the entire business of Unix, to a company and
5 to somehow then suggest that you don't own the ability to use
6 that, just seems inconsistent. So that's my answer.

7 Q So it's your opinion that's inconsistent, but you don't
8 disagree that what the document actually says is that
9 copyrights were excluded from the deal?

10 A I don't disagree that this paragraph says copyrights are
11 excluded assets, but I do disagree that that had any bearing
12 on the transaction that we negotiated, the words that I said
13 to SCO, the words that I heard from Bob Frankenberg, and the
14 deal that we cut.

15 Q So it's your testimony that the actual language of the
16 agreement saying what is excluded have no bearing on what was
17 actually the deal was?

18 A It is not my testimony that the words have no bearing.
19 It is my testimony that these words do not accurately reflect
20 the transaction that I negotiated.

21 Q So now we're getting down to it. It's your testimony
22 that the actual deal, what was documented, what was signed,
23 what was approved by the board of directors, is inconsistent
24 with what you thought the deal was?

25 A It is my testimony that the APA is incomplete in that

1 there were a number of things that we modified in Amendment 1
2 and Amendment 2 to clarify this document.

3 Q All right. We'll ask you about Amendment 1, but you
4 didn't have anything to do with Amendment 2, did you?

5 A The negotiation of Amendment 2?

6 Q Yes.

7 A I did not negotiate Amendment 2.

8 Q So let me go back to my question. It's your testimony
9 that it's your opinion about what the deal was is inconsistent
10 with the language of the deal; correct?

11 A Yes, it is inconsistent with this language.

12 Q But you're not disputing that what the actual document
13 says that was approved by the board of directors says that
14 copyrights were excluded, are you?

15 A I'm not disputing that it says what it says.

16 Q And this is the deal that was approved by September of
17 1995 by the Novell board of directors; correct?

18 A I don't believe that.

19 Q Well, were you at the meeting?

20 A No. A member of my staff was at the meeting.

21 Q Did you listen to what was said to the members of the
22 board of directors before they approved the deal?

23 A A member of my staff was at the meeting.

24 Q My question was were you?

25 A No.

1 Q Did you hear what was said?

2 A I did not hear them speaking. I was not at the
3 meeting.

4 Q Did you hear the vote of the directors?

5 A I was not at the meeting.

6 Q Did you have authority to approve this deal?

7 A I did not.

8 Q Who did?

9 A Bob Frankenberg and the board of directors.

10 Q And they approved the deal; correct?

11 A They did.

12 Q At that meeting in September of '95; right?

13 A That's my understanding.

14 Q And you weren't there; correct?

15 A I was not there.

16 Q And this is the language that came out of that meeting;
17 right?

18 A No. No. This was the language that was in the document
19 that was signed by Bob Frankenberg. I have no idea -- as you
20 properly point out, I was not at the meeting, so I don't know
21 what language they reviewed.

22 Q And is it also true, isn't it, that you do not recall any
23 specific discussion leading up to the execution of the APA in
24 September 1995 about copyright ownership; correct?

25 A I do not recall parsing out copyright ownership as

1 separate and apart from the rest of the business.

2 Q Now, you said something in response to Mr. Singer's
3 question earlier, and I want to make sure -- I wrote it down,
4 and I want to make sure I heard your testimony correctly. You
5 said -- when he asked you whether the copyrights were part of
6 the deal, you said you assumed they were because Santa Cruz
7 was given the whole business. Was that testimony correct?

8 A Yes.

9 Q You assume they were; right?

10 A I did.

11 Q Let me show you another document, Exhibit T5. Have you
12 had a chance to look at that, sir?

13 A Yes.

14 Q And T5 is Amendment No. 1, which is a cleanup document
15 that was prepared between September of '95 and the closing of
16 the deal in September of '95; correct?

17 A Yes.

18 Q And so the jurors understand, what happens is this was
19 sort of a tight deal towards the end. There was tight
20 negotiations and the deal got papered or documented pretty
21 quickly; is that right?

22 A There was significant pressure to get it done quickly.

23 Q And then after it got approved on September 18th by the
24 board, there's a period of time where the lawyers kind of go
25 through the document to make sure that in the rush to get the

1 document done there weren't mistakes made; right?

2 A Among other things, yeah.

3 Q So not only are mistakes caught, but there actually can
4 be some substantive negotiation back and forth to actually
5 change some of the terms?

6 A And to clarify some of the terms, that's right.

7 Q And the idea is you want to gain clarity about what the
8 document is before it actually is closed and a bill of sale is
9 signed that transfers -- and the assets actually get
10 transferred; right?

11 A Yes.

12 Q And that's what this document memorializes; correct?

13 A This document is the first amendment to the ADA.

14 Q But what it is --

15 A The APA, sorry.

16 Q It's the cleanup for the APA that got signed by you in
17 December -- on December 6th, 2005; right?

18 A Yes, it is.

19 Q So did lawyers for Novell go through the document to make
20 sure that everything was right?

21 A I assume so.

22 Q And did lawyers for --

23 A I don't recall any specific discussion with any of the
24 lawyers on that point, but I assume that that's what they were
25 doing.

1 Q And the business people at Novell, did Ed Chatlos and
2 others go through it?
3 A For certain the business people did.
4 Q Ed Chatlos actually was in charge of this; right?
5 A Yes. Yes, he was.
6 Q And his counterpart at Santa Cruz also went through the
7 document, the APA, the one we looked at, Exhibit A1, and they
8 made their changes too; right?
9 A Yes.
10 Q And then they all got written down in this piece of
11 paper, and you looked at it December 6th and you signed it;
12 right?
13 A Yes.
14 Q Did you read it before you signed it?
15 A Yes.
16 Q All of it?
17 A All of it.
18 Q And if you take a look at -- if we could go to the
19 signature page, please.
20 A I'm getting there.
21 Q That's your signature, sir?
22 A Yes.
23 Q Now, if you go back to I believe it's page nine, if we
24 could highlight the middle section there. Are you there, sir,
25 page nine?

1 A Yes.

2 Q Now, this -- there's a letter (I) paragraph-I of this
3 cleanup document, right, in the middle of the page?

4 A Yes. Isn't that (L)?

5 Q You're right, it is (L). The frailty of my eyes. And
6 that (L) refers to changes that were made to the excluded
7 asset portion of the APA; right?

8 A Yes.

9 Q And you see that in the top it says in schedule 1.1(b)
10 item seven is amended to read as follows, and there's some
11 changes that are made; correct?

12 A Yes.

13 Q And the changes are made to paragraph seven of the
14 excluded assets; right?

15 A Yes.

16 Q But the paragraph about intellectual property that
17 excluded copyrights was paragraph five; right?

18 A Yes.

19 Q So after the lawyers for Novell and Santa Cruz went
20 through the APA, and they looked at the excluded asset
21 portion, they didn't make any changes to the paragraph that
22 excluded copyrights; right?

23 A Not at this time, that's right.

24 Q And you read the document in December of 2005; right?

25 A Yes.

1 Q I'm sorry, 2000 -- '95; right?

2 A 1995.

3 Q In 1995, correct, in December?

4 A Yes.

5 Q And you signed it; right? Correct?

6 A Yes, I did.

7 Q You thought it was accurate; right?

8 A Yes, it was.

9 Q And no changes were made to the 1.1(b) of the APA that

10 excluded copyrights; right?

11 A That's correct. These were the changes that were made in

12 Amendment 1.

13 Q And you did not recall any issue being raised during the

14 cleanup to the APA that resulted in Amendment No. 1 regarding

15 ownership of the Unix copyrights?

16 A No.

17 Q So no one from Santa Cruz came to anyone at Novell and

18 said, "Hey, the copyrights are excluded. That's not part of

19 the deal," right?

20 A Not to my knowledge. No one ever reported such a

21 discussion to me.

22 Q And by the way, this actually -- with the copyrights

23 excluded is actually a better deal for Novell than if the

24 copyrights had been included; correct?

25 A I don't exactly understand why it would be a better

1 deal.

2 Q Well, they're giving up less rights; correct?

3 A Well, they're conveying all the business. So I guess the
4 question is this. Was it a better deal in the sense that they
5 got anymore money? Could they go out and resell those items?
6 They'd already sold them once. I think it was the same deal.
7 It wasn't a better deal. It wasn't a worse deal. It was the
8 same deal.

9 And I'll be very clear on that. We had already delivered
10 source code, all copies of the source code to SCO. So they
11 had it. They were now the licensors under the agreement.
12 They had it. Novell was no longer the licensor. It was now
13 simply receiving the royalties under those licenses.

14 So I don't understand how it could be a better deal or a
15 worse deal. It was the same deal because all the business had
16 been sold.

17 Q So it's your belief that it was the same deal whether or
18 not the copyrights were included or excluded?

19 A It was the same deal. All the business was sold. That's
20 my understanding of what happened.

21 THE COURT: Mr. Acker, do you want me to instruct
22 the witness to answer your question without proffering
23 additional testimony?

24 MR. ACKER: No, Your Honor. We're doing fine, but I
25 appreciate the offer.

1 THE COURT: All right.

2 Q (BY MR. ACKER) Let me show you another document. You
3 signed another document in December of '95, a strategic
4 development agreement; is that right? Do you recall that?
5 Let me hand you what we've marked as V5. Exhibit V5 is a
6 strategic development agreement between Novell, Inc. and Santa
7 Cruz operation, Inc. And if you go to the last page, or page
8 15, you see your signature there?

9 A Yes.

10 Q And you executed this document on December 6, 1995, along
11 with the bill of sale and the other documents to close the
12 deal?

13 A Yes, I did.

14 MR. ACKER: Your Honor, I'd move for admission of
15 Exhibit V5.

16 MR. SINGER: No objection.

17 THE COURT: It will be admitted.

18 (Defendant's Exhibit V5 received in evidence)

19 Q (BY MR. ACKER) Now, Mr. Singer asked you some questions
20 about the technology licensing agreement. If we could bring
21 that up, please, SCO Exhibit 162. Do you have a copy there?

22 A I can see a copy on the screen.

23 Q I'll give you a hard copy too.

24 A Thanks.

25 Q Now, this is the document that you testified about that

1 after the deal Novell was given a license back to the
2 technology that had been included assets that were part of the
3 deal; right?

4 A Yes.

5 Q But the only assets that were licensed back to Novell
6 were licenses that were included in schedule 1.1(a) of the
7 asset purchase agreement; correct?

8 A Yes.

9 Q If we could bring up SCO exhibit 90, please. This is the
10 bill of sale; correct?

11 A Yes, it is.

12 Q And so that the jurors understand, the bill of sale is
13 the document that actually transfers ownership from Novell to
14 Santa Cruz; right?

15 A Yes.

16 Q And so business people and lawyers can get together and
17 negotiate a deal and can decide we're going to transfer these
18 assets, but until the bill of sale is actually transferred,
19 nothing is transferred; right?

20 A That's my understanding, yes.

21 Q And you executed this document in December of 1995;
22 right?

23 A Yes.

24 Q And if we could blow up the first two paragraphs, please.
25 And the first paragraph just gives us some background. It

1 says, "Reference hereby is made to that certain asset purchase
2 agreement by and between the Santa Cruz operation, Inc. and
3 Novell dated as of September 19th, 1995, as amended by
4 Amendment No. 1," which we've looked at, "to asset purchase
5 agreement as of December 6, 1993 together -- 1995, (together,
6 the agreement)." Do you see that?

7 A Yes.

8 Q And it says, "Capitalized terms used in this bill of sale
9 and not otherwise defined shall have the meanings ascribed to
10 such terms in the agreement," right?

11 A Yes.

12 Q And that's really lawyer speak for if it's got a capital
13 in front of it, it means you've got to find a definition for
14 it somewhere; right?

15 A Yes.

16 Q What this is telling you is for the definition you have
17 to go back to the asset purchase agreement; correct?

18 A Correct.

19 Q And then in the second paragraph it reads, "In accordance
20 with article 1.1(a)," which was the included -- or excuse
21 me -- "in accordance with article 1.1(a) of the agreement,
22 seller, for valuable and good -- for good and valuable
23 consideration, the receipt and sufficiency of which is hereby
24 acknowledged, does hereby transfer, convey, sell, assign and
25 deliver to buyer, without recourse, representation or warranty

1 except as otherwise expressly provided in the agreement all of
2 the assets," right?
3 A Yes.
4 Q And what's being transferred is the assets with a capital
5 (A); right?
6 A Yes.
7 Q And the assets with a capital (A) are what is the defined
8 assets in the asset purchase agreement; right?
9 A The 1.1(a) of the --
10 Q Yes.
11 A Yes.
12 Q So what got transferred, the only thing that got
13 transferred, is what was included in schedule 1.1(a) of the
14 asset purchase agreement as it existed on September 19th,
15 1995; right?
16 A Isn't it as it existed on December 6, 1995?
17 Q You're absolutely right. With Amendment No. 1, as
18 schedule 1.1(a) existed in December of 1995, as those assets
19 were defined in schedule 1.1(a), that's what went from Novell
20 to Santa Cruz?
21 A That's the way the agreement was set up, yes.
22 Q And that's all that went; right?
23 A Yes.
24 Q Show you another document that we've marked as zero 10.
25 Hand a copy of that to you, sir.

1 THE COURT: Mr. Acker, you said zero 10.

2 MR. ACKER: O-10, Your Honor.

3 Q (BY MR. ACKER) Have you had a chance to look at that,
4 sir?

5 A Yes.

6 Q Exhibit O-10 is an intellectual property assignment
7 between Santa Cruz and Caldera; correct?

8 A Yes.

9 Q And you were on the board of directors of actually both
10 companies at this point in time in 2001; is that right?

11 A No. Actually I think I was on the board of directors of
12 Santa Cruz operation only at this time.

13 Q Okay. And so Santa Cruz operations, so the jury follows,
14 is the company that got the assets from Novell in the APA and
15 then now we're six years later and they're going to turn
16 around and they've going to assign or transfer some of those
17 assets to Caldera, which becomes the plaintiff in this case,
18 SCO; right?

19 A Yes.

20 Q And that's what this document is; right?

21 A It appears to be what this is, yes.

22 Q Were you involved at all --

23 I'd move for admission of exhibit O-10, Your Honor.

24 MR. SINGER: No objection.

25 THE COURT: It will be admitted.

1 (Defendant's Exhibit O-10 received in evidence)

2 Q (BY MR. ACKER) And if you take a look at paragraph six of
3 that document -- I'm sorry, paragraph eight. If we could
4 highlight the paragraph eight-five, please.

5 THE COURT: Mr. Singer.

6 MR. SINGER: If he was not involved, I object on
7 lack of foundation.

8 MR. ACKER: We haven't gotten an answer yet, so
9 we'll see how we go.

10 Q (BY MR. ACKER) Now, let me lay a little background. When
11 the assignment of certain rights are made, or in this case
12 assets are made, the assets that Santa Cruz purchased from
13 Novell, they're going to assign them to Caldera, Caldera wants
14 some sort of representations from Santa Cruz that they
15 actually own those assets; right?

16 MR. SINGER: Objection, lack of foundation.

17 THE COURT: I think we better, before you ask any
18 questions about the agreement or the language of the
19 agreement, would you please establish the foundation so we can
20 admit it.

21 MR. ACKER: Sure. And this is background just in
22 terms of his knowledge of how deals work, and then I'll get to
23 his knowledge of this document.

24 The Court: Why don't you just focus on the deals of
25 the document because I'm not sure the jury can distinguish

1 between your background questions and --

2 Q (BY MR. ACKER) Okay. You know that when you were on the
3 board of Santa Cruz they transferred the assets that they had
4 purchased a few years earlier to Caldera; right?

5 A Yes.

6 Q And they did it by an assignment; correct?

7 A I wasn't clear on what the document was, the manner in
8 which they made -- frankly I haven't seen this document. I
9 don't remember seeing this document actually.

10 Q Was the board of directors involved in the decision to
11 transfer the assets -- the board of directors of Santa Cruz
12 involved in the decision to transfer the assets at Santa Cruz
13 that they had bought three years earlier from Novell?

14 A Yes.

15 Q You were involved in that decision?

16 A Yes.

17 Q And when that decision was made at the board level, did
18 you understand that those assets would be transferred by an
19 assignment?

20 A I don't remember having a specific understanding of how
21 the assets would be transferred, only that the assets would be
22 transferred.

23 Q And your understanding as a member of the board of Santa
24 Cruz was that the only assets that transferred to Caldera and
25 that are now the plaintiff's assets in this case are the

1 assets that Santa Cruz got in the APA; right?

2 A I'm trying to make sure I understand your question,
3 Mr. Acker. Are you asking me whether there were any other
4 assets that went as part of this other than those specific
5 assets which SCO obtained from Novell?

6 Q Right.

7 A I don't know the answer to that question.

8 Q All right. Do you know -- are you aware of any assets
9 being given to Caldera and now SCO other than what they
10 obtained from Novell by Santa Cruz?

11 A I'm not aware of any.

12 THE COURT: You're not going to offer it?

13 MR. ACKER: Well, I would offer to move O-10, Your
14 Honor. I think I already did. It's already admitted. I
15 think we did that.

16 The Court: well, all right.

17 MR. ACKER: I moved. He said no objection.

18 THE COURT: All right. It is admitted.

19 Mr. Singer, your question about it?

20 MR. SINGER: I was not questioning the document. I
21 just had an objection to --

22 THE COURT: Him being asked --

23 MR. SINGER: -- the question without foundation.

24 THE COURT: Are you going to pursue discussion of
25 zero -- O-10?

1 MR. ACKER: Not with Mr. Thompson, Your Honor.

2 THE COURT: Thank you.

3 Q (BY MR. ACKER) Now, you -- on direct examination Mr. Singer
4 showed you a Wall Street Journal article from 1995; right?

5 A Yes.

6 Q And is it your testimony to this jury that you have a
7 distinct memory of seeing that Wall Street Journal article 15
8 years ago?

9 A Well, I remember reading this article when it was issued
10 because it was something that my team had worked on, and we
11 wanted to make sure -- indeed, the press release -- working
12 out the press release is something my group had contact with
13 and involvement in, so I remember seeing this article, yes.

14 Q You're certain that you saw this exact article and these
15 exact words 15 years ago?

16 A My memory is that I saw the Wall Street Journal article
17 dated May 20th, 1995.

18 Q And you can remember that far back, and you can remember
19 that date, and you can remember that article?

20 A There are few things that I can remember that far back,
21 but this is one of them.

22 Q Okay. Let's take a look at it, SCO Exhibit 133. And if
23 we could highlight the first two paragraphs. Now, what the
24 words say are in the second paragraph, "The deal includes the
25 purchase by Santa Cruz Operation of most trademarks and

1 intellectual property," right? Those are the words?

2 A That's the reporter's words; right?

3 Q And the reporter used the word most; correct?

4 A The reporter is quoting someone quote "familiar with the
5 situation", and he says, "Most trademarks and intellectual
6 property."

7 Q Doesn't say all; right?

8 A No, he did not say all.

9 Q Let me turn your attention now to when you -- after you
10 went on the board of what -- Caldera, what became the
11 plaintiff in this case, SCO. At some point in late 2002 and
12 early 2003 the C.E.O., relatively new C.E.O. of SCO, Darl
13 McBride, came to the board and asked the board to approve a
14 SCOSource licensing campaign; correct?

15 A Yes, that's right.

16 Q And that the idea behind the SCOSource licensing campaign
17 is that SCO was going to take what it -- the intellectual
18 property it believed it owned and ask users of Linux to pay it
19 royalties; is that right?

20 A The SCOSource licensing program was a way for SCO to
21 license rights to users who were at that point in time using
22 Linux.

23 Q And Mr. McBride's theory was that there is some
24 violation, copyright violation, by Linux users because there
25 is some Unix -- protected Unix in Linux; right?

1 A That was the theory.

2 Q But at this point in time in December of 2002, SCO was
3 actually selling the Linux product; right?

4 A I don't have dates in mind on that issue.

5 Q But it's true, isn't it, that the rest of the business at
6 SCO was not going very well; correct?

7 A The company was struggling.

8 Q In fact the fiscal quarter ending in the end of October
9 of 2002 SCO had lost more than \$24,000,000; right?

10 A I don't have anything to -- the company was struggling.
11 It was a hard time for that company, yes.

12 Q And this was Mr. McBride's idea of how he was going to
13 turn the company around by using what he believed to be Unix
14 copyrights to sue everyone who used Linux; right?

15 A Well, no not to sue. This was Mr. McBride's idea on how
16 to gain some financial remuneration for intellectual property
17 that we believed SCO owned.

18 Q You wanted to increase revenues; correct?

19 A Yes.

20 Q The old model wasn't working, so this was a new plan;
21 correct?

22 A We wanted to increase revenues.

23 Q And the new plan was we'll use what we believe in Unix
24 and we'll send letters out to a thousand fortune 100 companies
25 and say you're using Linux. You've got to pay us money;

1 right?

2 A Did you say a thousand fortune 100 companies?

3 Q If I did, I misspoke. You sent out to over 1,000

4 companies in the top fortune 1,000 companies?

5 A I don't know how many letters. They sent out a lot of

6 letters.

7 Q A lot of letters; correct?

8 A Yes.

9 Q In fact they even sent a letter to Novell, didn't they?

10 A I do not know that.

11 Q But the board of directors approved this idea; right?

12 A We discussed and approved this initiative to try to go

13 out and license the Unix intellectual property, that's

14 right.

15 Q Fair to say this was sort of a Hail Mary for SCO?

16 A Your words, not mine.

17 Q Do you disagree with that?

18 A We're like every company in the United States that comes

19 on good times and bad times, how do we improve our business?

20 And we were looking for ways to improve our business.

21 Q And in fact before you -- this program was announced in

22 January of 2003, you were actually warned, weren't you, that

23 there would be a real problem with this because there was no

24 way there was actually any Unix in Linux? You were warned of

25 that concern?

1 A I was warned of that concern?

2 Q Yes.

3 A Personally?

4 Q Yes.

5 A Well, if you have something that could refresh my memory
6 on that warning and that time frame, I guess I'd take a look
7 at that.

8 Q Give me a minute. Let me hand you what we've marked as
9 G12. Have you had a chance to look at that?

10 A Yes.

11 Q It's an E-mail to you and a number of others from a Geoff
12 Seabrook; correct?

13 A It is.

14 Q And who is Mr. Seabrook?

15 A Geoff Seabrook, I don't know if he worked at SCO at this
16 time or if he had left the company at that time. Let me be
17 clear. At this point in time the company's name was
18 Tarantella -- Tarantella, the one down in Santa Cruz, the one
19 that had formerly been Santa Cruz Operation. And so Geoff
20 Seabrook had worked at that company. I don't know if he was
21 still an employee there at this time. So it's an E-mail from
22 Geoff Seabrook.

23 Q So somebody who worked there, and so we don't totally
24 confuse the jury, this company that you went to as a board of
25 director when you left Novell, Santa Cruz, that purchased what

1 it purchased in the asset purchase agreement; correct?

2 A Yes.

3 Q And he sends it to Alok Mohan; correct?

4 A It appears to be directed to Doug, and I assume that
5 means Doug Michels at Tarantella.

6 Q And who is Doug Michels at Tarantella?

7 A At that point in time Doug Michels -- well, he was a
8 senior executive at Tarantella. He actually may have been the
9 president at that point in time of Tarantella. He eventually
10 became the president of Tarantella. I don't know if he was at
11 that particular moment.

12 Q So the E-mail is to the president -- what you believe to
13 be the president at the time of Tarantella, or the old Santa
14 Cruz, as well as a number of board members?

15 A Yes, that's right.

16 Q And that includes yourself; correct?

17 A It does.

18 Q And he's giving you a warning about the SCOSource
19 program; correct?

20 A Well --

21 THE COURT: I think before you ask anymore
22 questions, let's see whether or not it can be admitted.

23 MR. ACKER: That was going to be my next question.

24 I move for admission of G12, Your Honor.

25 THE COURT: Any objection?

1 MR. SINGER: No objection.

2 THE COURT: It will be admitted.

3 (Defendant's Exhibit G12 received in evidence)

4 Q (BY MR. ACKER) He gave you a warning. This is January
5 13th, about a week before Darl McBride announced SCOSource;
6 right?

7 A I have no recollection of this E-mail.

8 Q Let's take a read. Let's look at the first paragraph.
9 If you could highlight that, please. "I thought this was a
10 bad idea when we discussed in the days when we ran SCO, and I
11 still think it is a bad idea. Guys who run protection rackets
12 occasionally make a short-term profit but never build a
13 long-term business, usually they are dead. New SCO has far
14 few enough friends anyway without pulling this stunt." You
15 see that?

16 A Yes.

17 Q And he's referring to SCOSource; right?

18 A What do you mean he's referring to SCOSource?

19 Q The stunt being SCOSource?

20 A I don't see what -- it doesn't say in this document.

21 Q Why don't you take a look at the -- the article that's
22 attached to the bottom of his E-mail is actually an article
23 that leaked out before SCOSource was actually announced;
24 correct?

25 A Are you asking me a question?

1 Q Yeah. I'm asking you to look at the press release or the
2 article at the bottom of this to refresh your memory of what
3 this E-mail is about.

4 A Okay. Is this an article from some publication?

5 Q It's the E-mail that you got. I'm just asking, it's
6 true, isn't it, that what he's talking about is SCOSource,
7 isn't it? Do you have any doubt about that?

8 A Well, it's a little hard to tell because he talks about
9 something that says from SCO enforced patents. So I -- that
10 doesn't ring a bell.

11 Q Let's go to the last paragraph of the E-mail itself.
12 Maybe that will refresh your memory. If we could go up to the
13 last paragraph of the E-mail, "A program".

14 A Yes.

15 Q In the last sentence he writes, "It would alienate the
16 whole Open Source community as well as users and potential
17 users. The main beneficiary will be Microsoft with Sun
18 possibly benefiting to a minor degree if they are aggressive
19 enough." Do you see that?

20 A Yes.

21 Q And you don't have any dispute that this was an E-mail
22 that you received before the SCOSource program was announced;
23 correct?

24 A I don't remember receiving this E-mail.

25 Q Do you have any reason to doubt that you received it?

1 A No.

2 Q Was that a consideration in the board before the decision
3 to go ahead with SCOSource --

4 A I'm sorry. I have to answer that previous question. It
5 has my name on it, but it doesn't necessarily mean I received
6 it. It doesn't have my E-mail address on it. It simply has
7 my name on it, which -- and I see here that it also has all of
8 the other -- well, not all the other. It has some other of
9 the SCO board members on it. But I guess what I'm trying to
10 suggest is I don't remember seeing this.

11 Q Let me just ask this. In the discussion leading up to
12 the announcements of SCOSource, was there a concern on the
13 board that you were going to alienate the Linux community?

14 A Yes.

15 Q And why was that a concern?

16 A Because the reason there was some sense that this would
17 be an irritation to the Linux community was because the Linux
18 community viewed this software as being free, that the code,
19 the software and everything that related to it was free.

20 Q Did you also understand that another problem with the
21 SCOSource program was actually proving that there was any
22 protected Unix in Linux? Did you understand that that was
23 going to be an issue?

24 A Which part of that question do you want me to answer,
25 that there was a problem with it or that that was one of the

1 issues that had to be shown?

2 Q We'll start -- in the discussion about SCOsource, did the
3 board discuss the fact that in order for this program to be
4 successful, SCO was going to have to prove that there actually
5 was protected Unix prevalent in Linux?

6 A Okay. The manner in which the issue came to the board of
7 new SCO was, is there any Unix software, any of the
8 copyrighted materials, any of the source code, in Linux? The
9 discussion at the board level was show us that there is some
10 of that code in Linux. And if there is, then this is a good
11 idea. If there isn't, then it's not a good idea.

12 Q But wasn't it true that even months later, when the
13 SCOsource program was floundering, there was still a real
14 question at SCO, inside SCO, about whether or not there was
15 protected Unix code that was prevalent in Linux?

16 A We asked for information that would lead us to conclude
17 that there was Unix software in Linux.

18 Q My question wasn't that. My question was after SCOsource
19 got going and rolling -- and you would agree with me that
20 there was an uproar in the Linux community; correct?

21 A There were a lot of people that didn't like this idea.

22 Q And there was --

23 THE COURT: Mr. Thompson, that question can be
24 answered yes or no. And Mr. Acker hasn't asked for it, but
25 I'm going to. When a question is asked that can clearly be

1 answered yes or no, answer it yes or no. If you feel that
2 something more has to be said, Mr. Singer will have an
3 opportunity on redirect to point that out, but I want the
4 question answered as directly as possible.

5 THE Witness: Thank you.

6 THE COURT: Because we have to move this along.

7 MR. ACKER: Thank you, Your Honor.

8 Q (By MR. ACKER) There was an uproar in the Linux community;
9 correct?

10 A Yes.

11 Q And many, many people in the Linux community said that
12 there is no copyright infringement here because there is no
13 protected Unix prevalent in Linux; right?

14 A Yes.

15 Q And that was a real problem with the SCOSource program;
16 correct?

17 A The uproar was a problem?

18 Q No. The fact that the people that were the potential
19 licensees, the people that were going to be asked to pay
20 money, said there is no protected Unix in Linux?

21 A That was their statement, yes.

22 Q And that created a real problem in order for there to be
23 any licenses taken; right?

24 A Yes.

25 THE COURT: Mr. Acker, how much more do you have?

1 MR. ACKER: About three questions, one more
2 document.

3 THE COURT: Okay.

4 Q (BY MR. ACKER) Let me show you what's marked as Q22. Sir,
5 I'm going to ask you about a specific portion, but you can
6 always feel free to look at any part of it. Q22 is a Form
7 10-K that SCO filed with the Securities and Exchange
8 Commission for the year-ended December -- or October 31st,
9 2003; right?

10 A Yes.

11 Q And you as a member of the board of directors, if you
12 take a look at the very last page of the document, your
13 electronic signature is there. Do you see that?

14 A Yes.

15 Q And when you did that, when you allowed your electronic
16 signature to be put there, you were certifying that the
17 statements in the document were true; correct?

18 A To the best of my knowledge, yes.

19 Q Why don't we take a look --

20 I move for admission of Exhibit Q22, Your Honor.

21 MR. SINGER: Object on the grounds of relevancy at
22 this point.

23 THE COURT: Well, the court will admit the
24 document.

25 (Defendant's Exhibit Q22 received in evidence)

1 Q (BY MR. ACKER) Why don't you take a look at page -- it's
2 page 19 I believe. I'm sorry, page 41 at the bottom. And I
3 will turn your attention to the paragraph -- no, 41. Do you
4 have that paragraph? Turn your attention to the paragraph
5 that begins with the word "notwithstanding".

6 A On page 41?

7 Q Yes. It's on the screen too.

8 A Oh, sorry, I'm looking at the page numbers on bottom
9 left, which does not line up. There we go. Okay. Okay, I
10 see that paragraph.

11 Q And to the best of your knowledge, that paragraph is
12 true; right?

13 THE COURT: Go ahead and take the time you need to
14 read it, Mr. Thompson.

15 THE WITNESS: Okay.

16 Q (By MR. ACKER) So let's walk through it. Do you believe
17 the statement is true as of October, 2003?

18 A Yes.

19 Q So after the SCOSource program has been going for about
20 ten months, the statements in this paragraph are still
21 accurate; right?

22 A I believe they are.

23 Q And the first sentence reads, "Notwithstanding our
24 assertions of full ownership of Unix-related intellectual
25 property rights, as set forth above, including copyrights, and

1 even if we are successful in our legal action against Novell,
2 the efforts of Novell and the other Linux proponents described
3 above may cause Linux end-users to be less willing to purchase
4 from us our SCOSource I.P. license authorizing their use of
5 our intellectual property contained in the Linux operating
6 system, which may adversely affect our revenue from SCOSource
7 initiatives. These efforts may also increase the negative
8 view some participants in our marketplace have regarding our
9 legal actions against IBM and Novell and our SCOSource
10 initiatives and may contribute to creating confusion in the
11 marketplace about the validity of our claim that the
12 unauthorized use of our Unix source code and derivative works
13 in Linux infringes on our copyrights. Increased negative
14 perception and potential confusion about our claims in our
15 marketplace could impede our continued pursuit of our
16 SCOSource initiatives and negatively impact our business."

17 It was true at this point, even in October of 2003, that
18 one of the reasons the SCOSource campaign was failing was
19 because Linux users did not believe there was Unix in Linux;
20 isn't that right?

21 A Yes.

22 Q And so after ten months, after ten months of SCOSource,
23 the campaign was still failing because people in the Linux
24 community did not believe SCO's claims of infringement;
25 right?

1 A I can't answer that yes or no.

2 Q Well --

3 A Because I don't agree it was failing. I agree that there
4 was tumult over this issue. We had licensed some of this to
5 other parties. And so the issue for me is was it failing?

6 Well, it wasn't a screaming success. Was there tumult in the
7 community? Yes, there was tumult in the Linux community.

8 Q And part of the reason that it was failing and there was
9 tumult in the community is because people who were using Linux
10 didn't believe SCO's claims that there was protected Unix in
11 Linux; right?

12 A I think that's correct.

13 Q And that has nothing to do with Novell's claim to
14 ownership of the Unix copyrights; right?

15 A Well, doesn't it have something to do with it? If Novell
16 owns those copyrights, then SCO would not have been able to
17 assert those claims.

18 Q But in terms of whether there is protected Unix code
19 prevalent in Linux, that issue has nothing to do with whether
20 Novell claims ownership --

21 A Yeah. If there's -- I think if the point you're asking
22 is if there is not Unix code in Linux, then it doesn't matter
23 who owns the Unix copyright.

24 Q And because of that, if the dispute and the problem out
25 in the Linux community is there is no protected Unix prevalent

1 in Linux, that issue has nothing to do with what Novell says
2 about who owns the copyrights; right?

3 A Well, Novell had said -- at first they said they owned
4 them, then they said they didn't own them, and then they said
5 they did own them. And that confusion had a bearing on how
6 successful SCO was in going out and licensing these items with
7 the Linux and the rest of the community.

8 Q But aside from that issue, aside from the ownership of
9 the Unix copyrights, there was tons of response from the Linux
10 community that we don't have to pay you a license because
11 there is no protected Unix in Linux; right?

12 A Okay, that's possible.

13 Q And that had nothing to do with Novell's claim that they
14 still owned the Unix copyrights; right?

15 A It had everything to do from SCO's point of view because
16 they were the ones that were trying to exercise the right. So
17 I guess the answer to the question is it may not have had
18 anything to do from the standpoint of Linux users. That's
19 their issue, not mine. It had everything to do from SCO's
20 point of view because we were trying to license, as a company,
21 license that technology into the marketplace.

22 Q And so the last question is from the Linux users point of
23 view, the fact that they did not believe that there was
24 protected Unix in Linux, that was a separate issue for them
25 unrelated to whether Novell or Unix owned the copyrights;

1 right?

2 A I'm not a Linux user, so this idea from the Linux users
3 own point of view -- my only point of view was SCO's point of
4 view. We couldn't license it with this cloud over the title.
5 That's the question from my perspective.

6 Q But what the Linux users were telling you was even if you
7 owned it, you can't -- I'm not going to pay you a license
8 because there is no protected Unix in Linux; right?

9 A Well, I think that was their position.

10 MR. ACKER: That's all I have, Your Honor.

11 The Court: Thank you. We'll take a 20 minute
12 recess and then come back for redirect.

13 (jury excused)

14 Mr. Thompson, my admonition to you worked for about three
15 questions.

16 Mr. Acker, I don't know whether or not you didn't request
17 that he answer the questions more directly because you were
18 simply being respectful or whether there's some other aim, but
19 I have an obligation to make sure this trial proceeds.

20 So I've got to again tell you, Mr. Thompson, that you
21 must answer the questions, particularly those from the
22 opposing attorney, directly and succinctly. And, again,
23 Mr. Singer will now have an opportunity to ask you additional
24 questions.

25 But I don't want a repeat of everything that he has

1 already given by way of his own answers to the questions posed
2 by Mr. Acker. So I want you to be careful in what you ask him
3 as well, Mr. Singer.

4 In the future I would encourage counsel, especially those
5 on cross-examination, when you think that the witness is not
6 being responsive to your questions, you certainly have a right
7 for me to instruct the witness to do so.

8 MR. ACKER: Appreciate that, Your Honor.

9 THE COURT: We'll take 20 minutes.

10 MR. SINGER: Your Honor, could I just -- I can raise
11 it now or later. My concern with this report is that parts of
12 it --

13 THE COURT: Which exhibit?

14 MR. SINGER: Q22, the S.E.C. report. Part of it
15 goes into the other litigation the court has excluded on
16 motions in limine. So before this goes to the jury, I would
17 think that that needs to be redacted so that --

18 THE COURT: What I would prefer is that you could
19 work together and only submit that part of the document that
20 is at all pertinent here, instead of giving them a huge stack
21 of paper with a whole bunch of black stuff in it, okay?

22 MR. ACKER: That's fine, Your Honor.

23 THE COURT: Thank you.

24 (Recess at 11:51 a.m.)

25 * * *