

1 (12:05 p.m.)
2 THE COURT: Are you ready, Mr. Brennan?
3 MR. BRENNAN: Yes. Thank you, Your Honor.
4 THE COURT: Ms. Malley, if you would.
5 Mr. Singer, when will you be getting the court a
6 response to defendant's motion about the door that you have
7 opened?
8 MR. SINGER: Well, I believe yesterday Your Honor
9 requested it by Monday morning and it was our intent --
10 THE COURT: All right.
11 MR. SINGER: -- to comply with that.
12 THE COURT: Thank you. Have you had a jury
13 instruction meeting since the court requested it?
14 MR. JACOBS: Your Honor, we have. We had probably an
15 hour long discussion last night. We talked about the
16 prospect of trying to put in a joint submission either today
17 or Monday.
18 THE COURT: All right.
19 MR. JACOBS: We decided that, um, given your action --
20 unfortunately we decided that we wouldn't be able to do
21 that. We thought we would still have SCO put in submissions
22 this afternoon and Novell will respond to it. We tried very
23 hard to come up with a format that would be helpful to the
24 court and the court's clerk, but we ended up thinking this
25 would still be the more --

1 THE COURT: So you will respond with your own set of
2 instructions today and then Novell by Monday?

3 THE CLERK: All rise for the jury, please.

4 (Whereupon, the jury returned to the courtroom.)

5 MR. ACKER: Yes, Your Honor.

6 MR. NORMAND: Yes, Your Honor.

7 THE COURT: Go ahead, Mr. Brennan.

8 MR. BRENNAN: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. BRENNAN:

11 Q. It is now good afternoon, Mr. Mattingly. My name
12 is Sterling Brennan. Have we met before?

13 A. Did you do my deposition here?

14 Q. Do you think I did?

15 A. I don't know. You answer the question for me.

16 Q. Actually, no. Do you think you and I have met
17 before?

18 A. I don't think so.

19 Q. Well, I am a little disappointed since you and
20 were classmates together at BYU.

21 A. Now, I remember. You used to cheat off of me.

22 Q. Well, I was an economics major and never made it
23 over to the engineering building. But the answer to your
24 question, no, I did not take your deposition. But that does
25 lead me to an important question. Do you recall that your

1 deposition was taken in this case on January 19th, 2007?

2 A. I do.

3 Q. Do you remember who did take your deposition?

4 A. I don't remember, but it was -- he had similar
5 features to you, he was a little bit darker.

6 Q. He must have been very good looking, no doubt.

7 Well, let me ask you this, do you recall that your
8 deposition was taken in this case on January 19th, 2007, and
9 that you were asked questions by Mr. Normand who is sitting
10 at counsel table here today?

11 A. Yes.

12 Q. Okay. And that deposition was more than two
13 years previous to today's date, right?

14 A. Correct.

15 Q. And did you remember facts and circumstances
16 involving the 1995 timeframe better a little more than two
17 years ago, than you do today?

18 A. Very likely.

19 Q. And that is because, of course, that would be two
20 years closer to the events than would today, right?

21 A. Correct.

22 Q. Since your deposition was taken on January 19th,
23 2007, have you had occasion to meet with any of SCO's
24 attorneys?

25 A. I have.

1 Q. Who have you met with?

2 A. I met with Ryan Tibbitts.

3 Q. When did you have that meeting or meetings?

4 A. You know, not meetings but, um, I was cleaning my
5 garage last year and came across some folders and they had
6 Sleigh Ride and Rhine River on them which were the code
7 names for these divestitures. So when I found those
8 documents there, I contacted Ryan.

9 Q. Now you say these code names, Sleigh Ride was the
10 code name for the transaction that ultimately came about
11 between Novell and Santa Cruz Operation; right?

12 A. Yes.

13 Q. And Rhine River was another transaction involving
14 Hewlett-Packard, right?

15 A. Yes.

16 Q. And so you came across some documents; is that
17 correct?

18 A. Yes.

19 Q. And you brought those with you today?

20 A. I did.

21 Q. May I have them, please? At least see them?

22 A. Sure. You want to see them again? I should them
23 to you ten minutes ago.

24 Q. You did. Thank you. I did a quick read. And
25 the documents that you brought here today, are these all of

1 the documents that you found in your garage?

2 A. No. I found a big folder that had Sleigh Ride
3 and Rhine River documents.

4 Q. What did you do with those other documents that
5 you didn't bring with you today?

6 A. I just have them.

7 Q. Did you ever give them to Mr. Tibbitts or any
8 other representatives of SCO?

9 A. No.

10 Q. What is in those other documents?

11 A. You know, a lot of legal docs, some MOU drafts, a
12 lot of power point presentations, just typical deal
13 collateral.

14 Q. So why did you decide to bring to court today the
15 folder of documents that you brought but not the other ones?

16 A. Well, I think that that one had some information
17 at this September 15th board memo that is interesting, and
18 it also has kind of what the final executable documents were
19 on the 19th.

20 Q. In addition to -- let me back up. You say that
21 you found some documents in your garage and you then
22 contacted Mr. Tibbitts and said I found some documents?

23 A. Yes.

24 Q. And when did you have that discussion with
25 Mr. Tibbitts you have identified?

1 A. My guess would be it would have been probably in
2 the fourth quarter of last year sometime.

3 Q. So that would have been sometime October,
4 November, December of --

5 A. Yeah, possibly.

6 Q. -- 2009?

7 A. Yes.

8 Q. Now just so we are all clear, Mr. Tibbitts is
9 this handsome man to my left, is that right? Right next to
10 Mr. -- Mr. Tibbitts, do you mind standing for just a minute?
11 Is this Ryan Tibbitts?

12 A. Yes, it is.

13 Q. Thank you. Did you meet with Mr. Tibbitts in
14 person to talk about this case?

15 A. He came to my office and I just showed him the
16 documents.

17 Q. And how long did your meeting last with him then?

18 A. Probably 15, 20 minutes.

19 Q. And since then, have you had any other
20 communications with any attorneys representing The SCO
21 Group?

22 A. Just Ryan.

23 Q. And when was your last meeting with Mr. Ryan
24 Tibbitts?

25 A. I think we probably went to lunch sometime this

1 year.

2 Q. Sometime in 2010?

3 A. Yeah.

4 Q. And during that lunch meeting, did you talk about
5 the case?

6 A. A little bit. Ryan is pretty -- just look at
7 him, he doesn't say much, he is pretty stuffy. But it was
8 kind of some old teammates, we kind of got together for a
9 lunch.

10 Q. And during this lunch meeting you talked about
11 this case that brings us here today?

12 A. No. No, we had a mixed group of former athletes.

13 Q. So just so I'm clear, at any time this year prior
14 to your appearing in court this morning, have you had any
15 discussions with Mr. Tibbitts about this case?

16 A. Yes.

17 Q. Tell me what you and Mr. Tibbitts have talked
18 about regarding this case?

19 A. Well, we have had some phone conversations
20 regarding these documents that you have in your possession,
21 and kind of their interest level to me, and whether they
22 would be of interest to Ryan and the SCO case.

23 Q. Now, at any time this year have you had any
24 communications with any Novell attorneys?

25 A. I have not.

1 Q. Have you had any communications with any Novell
2 attorneys since your sworn testimony was taken on January
3 19th, 2007?

4 A. You know, probably superficial meetings or
5 crossings with someone like Jim Lundberg who is in the room.
6 That would probably be the only attorney that I would have
7 crossed with from Novell. Maybe Greg Jones, if he is still
8 a Novell attorney, over at the gym.

9 Q. Have you ever talked with Mr. Lundberg or
10 Mr. Jones about this case?

11 A. No.

12 Q. Okay. Now I want to ask you a little bit about
13 your relationship with -- with The SCO Group. You indicated
14 in response to Mr. Singer's questions that you're a SCO
15 stockholder; right?

16 A. Yes.

17 Q. And I think you told me you have 9,000 shares of
18 SCO Group stock?

19 A. A little north than that.

20 Q. How much north of that?

21 A. I am not sure. I mean there was 9,000 and some
22 change probably in here somewhere exactly how many shares I
23 got through the Voltis transaction.

24 Q. And when you talk about this Voltis transaction,
25 this was a situation where The SCO Group was going to buy

1 this other company called Voltis; right?

2 A. Yes.

3 Q. And your role in that transaction was essentially
4 as a business broker essentially?

5 A. No. I was on the board of Voltis at one point.
6 And so, um, then when the Canopy Group did an investment in
7 Voltis, I am not sure if I was still on the board or not but
8 I had an equity position in Voltis.

9 Q. And in connection with that transaction you dealt
10 with an individual by the name of Darl McBride; right?

11 A. Yes.

12 Q. Who do you understand Darl McBride to be in
13 connection with the SCO Group?

14 A. He was the CEO of The SCO Group.

15 Q. Did you have any form of dispute with Mr. McBride
16 regarding how The SCO Group was treating the shares that you
17 hoped to get out of the Voltis transaction?

18 A. Um, yes. Basically the SCO stock had, if I can
19 recall, had some appreciation. And so the number of shares
20 that you are getting in consideration goes down if the stock
21 price goes up. And when you -- when we had structured some
22 type of an arrangement there, um, as the stock went up, of
23 course SCO was trying to present less shares to the Voltis
24 shareholders.

25 Q. So let me see if I understand what you're telling

1 me. When you thought that Voltis and The SCO Group had
2 entered into some form of an agreement, you thought that the
3 compensation should be fixed based on the number of shares
4 when you reached the agreement, right?

5 A. Right.

6 Q. And The SCO Group stock increased, and as you
7 understood it, SCO was claiming well the stock is worth more
8 so we shouldn't have to give you as many shares; right?

9 A. Correct.

10 Q. You disagreed with that, right?

11 A. Yes.

12 Q. You didn't think that was fair, did you?

13 A. No.

14 Q. You thought that was contrary to the agreement
15 that you had reached with Mr. McBride at The SCO Group,
16 right?

17 A. Well, I didn't reach that agreement with McBride.
18 It was the company that was negotiating with SCO, I don't
19 know, general counsel or employees.

20 Q. So you thought that -- thank you for correcting
21 me. So you thought that The SCO Group was in essence
22 welching on an agreement that it had entered into with
23 Voltis relative to the number of shares that not only Voltis
24 would get, but that you would get in SCO, right?

25 A. No, I wouldn't say welching is the correct

1 characterization of that. But in negotiation, if you have
2 a, you know, if you establish a collar, then shares can
3 float within that. But I don't recall if they had a collar
4 or anything as sophisticated as that. And so absent
5 something like that, it comes down to if you can negotiate
6 something that inures to your benefit.

7 Q. Explain that answer to me, please.

8 A. I think it is pretty explanatory. Well, if you
9 don't have a collar and the price goes up, you can go to
10 them and still say hey, look, we cut this deal on this date
11 so the stock was at this price that date so you should give
12 me X number of shares instead and not take advantage of the
13 appreciation. If the stock had gone down, um, I wouldn't be
14 here telling you you got to give me a lot more.

15 Q. So the way to avoid that sort of dispute is if
16 The SCO Group and Voltis had had a written agreement, right?

17 A. Correct.

18 Q. So if in that transaction before this dispute
19 arose, if Voltis and the other principals that you were
20 involved in and representing had a written agreement with
21 The SCO Group, then you wouldn't have had to have a fight
22 over what had been agreed to or not agreed to, correct?

23 A. Depends on how -- how definitive that written
24 agreement was.

25 Q. How well the agreement was written, right?

1 A. Correct.

2 Q. So would you agree with me that having a clearly
3 written agreement is important to make sure that later on
4 when there is a dispute you could look back to the written
5 agreement to see what had actually been agreed to?

6 A. As long as it is consistent with the intent and
7 spirit of what the transaction relationship was.

8 Q. Now you have been involved in investing in other
9 business ventures for a number of years, right?

10 A. Yes.

11 Q. You have been a party to written contracts,
12 right?

13 A. Yes.

14 Q. And the reason that you have been a party to
15 written contracts in your business dealings is for some of
16 the reasons we have talked about here today. You wanted to
17 make sure that there was a clear understanding regarding
18 what the actual terms of the agreement were so that when
19 later on, there may have been a change of circumstances, or
20 a question about what people agreed to, or maybe a loss of
21 memory, you could go back to the written agreement and you
22 could look at what the parties had agreed to at the time
23 they reached their agreement, right?

24 A. Yes.

25 Q. So you recognized the importance of written

1 agreements, fair?

2 A. Yes.

3 Q. Now, with respect to your -- your business
4 dealings, I would like to pick up from what you told
5 Mr. Singer. You left Novell in 1997, correct?

6 A. Correct.

7 Q. Do you remember the month that you left Novell?

8 A. I don't. Probably summertime.

9 Q. And what was your first source of employment or
10 business venture immediately upon leaving Novell?

11 A. A joint venture between NetScape Communications
12 and Novell.

13 Q. And that joint venture was called Novonyx,
14 N-O-V-O-N-Y-X?

15 A. Novonyx.

16 Q. Thank you. And what was your connection with
17 Novonyx?

18 A. Well, I authored the idea and completed that
19 joint venture between NetScape and Novell.

20 Q. And in connection with your involvement with
21 Novonyx, you became involved in a dispute with Novell;
22 right?

23 A. Yes.

24 Q. In fact, you and Novonyx threatened to sue
25 Novell, right?

1 A. I don't know if we threatened to sue them. We
2 retained counsel when we disagreed about their valuation.

3 Q. Did the counsel that Novonyx retain, did they
4 threaten to sue Novell?

5 A. I don't think anyone threatened to sue Novell. I
6 think it was about trying to get representation to make sure
7 that the valuation process by which Novell, the majority
8 shareholder in a small little company, valued the small
9 amount of shares that they didn't own and how they valued
10 those shares and therefore bought them.

11 Q. Now, you indicated that you and others at Novonyx
12 retained legal counsel, right?

13 A. Yes.

14 Q. That is what you told us here, right?

15 A. Yes.

16 Q. And the purpose for retaining legal counsel was
17 to make sure that your legal rights could be protected,
18 correct?

19 A. Correct.

20 Q. You're not a lawyer, right?

21 A. No.

22 Q. And so you would look to legal counsel to make
23 sure that your interests were best advocated and protected,
24 right?

25 A. Reasonably, yes. I mean, when you say that, you

1 know, I think when you look at something like that you can
2 -- you can take that legal representation a long way and
3 actually get into litigation. But that is not what we were
4 trying to do. We actually had -- we had legal counsel that
5 represented us to make sure that, you know, if there is any
6 give and take inside of their rights under the agreements,
7 that we could try and maximize those.

8 Q. Now, in your business career, including the
9 Novonyx situation that you have described and other
10 settings, you have been around lawyers, right?

11 A. Yes.

12 Q. And let's take your time at Novell. You
13 understood that Novell hired lawyers, both in-house
14 corporate lawyers and outside legal counsel, to best protect
15 the interests of the corporation, right?

16 A. Right.

17 Q. And did you understand when you were at Novell
18 that the best interests that were to be protected were those
19 of the shareholders?

20 A. Yes.

21 Q. That is the owners of the business?

22 A. Yes.

23 Q. And so while you are at Novell working with
24 Mr. Frankenberg, I think you told us about, or Mr. Noorda?

25 A. Yes.

1 Q. Both of whom had been at one point in time the
2 chairman of the Board of Directors of Novell, you understood
3 that those individuals as chairman of the board, their first
4 obligation was to protect the interests of the shareholders
5 of Novell, right?

6 A. To create shareholder value for the shareholders
7 of Novell.

8 Q. And in order to create shareholder value?

9 A. When you say protect, you're taking a legal
10 approach. The idea -- the idea is that, you know, they're
11 supposed to maximize shareholder value. That is their
12 charter.

13 Q. Thank you. And you're right, I am taking a legal
14 approach it is an occupational hazard. I apologize.

15 A. Yes, it is.

16 Q. But as you have worked with lawyers, you have
17 understood as they have represented to the corporation that
18 their role is, I suppose as you have put it to, to best
19 represent shareholder value, right?

20 A. Correct.

21 Q. You mentioned David Bradford. You said that he,
22 at a point in time, was the general counsel of Novell,
23 right?

24 A. Yes.

25 Q. And you understood that his role was to best

1 protect shareholder value from Novell, right?

2 A. Yes.

3 Q. Now, you said that you're, I think, a friend of
4 Mr. Bradford, right?

5 A. Yes.

6 Q. You respect him?

7 A. Yes.

8 Q. You admire him?

9 A. I do.

10 Q. You believe him to be an honest man?

11 A. Yes.

12 Q. From your observation do you think he was a good
13 lawyer?

14 A. I don't know. I am not a lawyer.

15 Q. So you don't know how to judge that?

16 A. I don't know how to judge that.

17 Q. In your role while you were at Novell, you
18 observed Mr. Bradford work with the Board of Directors of
19 Novell?

20 A. Yes.

21 Q. Now, I want to ask you a few questions about the
22 transaction that brings us into court today. And I would
23 like to have you focus on the time period of 1995. You are
24 familiar in 1995 that Novell had some negotiations with a
25 company called The Santa Cruz Operation; right?

1 A. I am.

2 Q. And your involvement was not focused on the
3 details on that transaction, was it?

4 A. No, I was more the high level strategy guy.

5 Q. Now, when you say high level strategy guy, you
6 were not involved in any of the negotiations of any
7 particular provision of what ultimately became the Asset
8 Purchase Agreement signed by Novell and The Santa Cruz
9 Operation on September 19th, 1995, were you?

10 A. Well, I don't agree with your characterization of
11 that. I mean I was heavily involved with the MOU phase of
12 that, that is why we had, you know, six to eight weeks on
13 the ground negotiating face-to-face with their team.

14 That document is the input to the legal process where
15 they kicked out the Asset Purchase Agreement not the
16 Licensing Agreement.

17 Q. You used an acronym MOU. That sounds for
18 memorandum --

19 A. Memorandum of understanding.

20 Q. So your suggestion here today in court is that
21 you were involved in the drafting of the memorandum of
22 understanding?

23 A. No, not in the drafting, in the input into the
24 drafting. So we had a team out there, Ed Chatlos that you
25 have referenced, and clearly he has been up on the stand.

1 Q. Let me pause you right there. How do you know
2 that Mr. Chatlos has clearly been up on the stand?
3 A. Well, because you guys have talked with him.
4 Q. How do you know that?
5 A. I am just sure he has.
6 Q. Has somebody told you that Mr. Chatlos has been a
7 witness in this trial?
8 A. Yes.
9 Q. Who told you that?
10 A. A friend of mine.
11 Q. Who?
12 A. Lee Johnson.
13 Q. Do you know what Mr. Chatlos' testimony has been?
14 A. I don't.
15 Q. What did Mr. Johnson tell you about Mr. Chatlos?
16 A. Just that he was up on the stand.
17 Q. Anything else?
18 A. No.
19 Q. Now, back to this memorandum of understanding,
20 you said that you did not actually draft any provisions, you
21 provided input, right?
22 A. Correct.
23 Q. But let's set a time reference here. Do you
24 understand that the Asset Purchase Agreement dated
25 September 19th, 1995 was signed both by Novell and The Santa

1 Cruz Operation on September 19th, 1995?

2 A. Yes.

3 Q. Did you observe the signature of that document?

4 A. I don't think so.

5 Q. But it is your understanding that it happened;

6 right?

7 A. Yes.

8 Q. So let's use that as a point in time. How

9 further in advance of September 19th, 19 -- excuse me,

10 September 19th, 1995 were you involved in the process of

11 this memorandum of understanding?

12 A. Well, all the way until the point where we

13 reached a meeting of the minds and agreement around the

14 substantive business terms and that is when it was kicked

15 over to the legal teams. Whether that was one week, two

16 weeks, I don't recall.

17 Q. Well, it was several weeks before the Asset

18 Purchase Agreement was signed at a minimum, right?

19 A. If you say so.

20 Q. Well, I'm asking you?

21 A. I don't recall.

22 Q. Do you recall answering that question at your

23 deposition?

24 A. I do not.

25 Q. Well, we will turn to that in a minute.

1 In your own words you were not the detail contract guy
2 in connection with the Asset Purchase Agreement, right?

3 A. As I have previously stated, yes.

4 Q. And your role in the discussions concerning the
5 transaction between Novell and The Santa Cruz Operation
6 related only to a high-level business strategy, right?

7 A. Well, the business strategy and the whole purpose
8 of why we were engaging in this transaction with SCO.

9 Q. You weren't involved in the details of the actual
10 legal document that was created that set forth the terms and
11 conditions of the parties agreement, namely, the
12 September 19th, 1995 Asset Purchase Agreement, right?

13 A. That is correct.

14 Q. You didn't help write or craft any of the
15 provisions of that referenced Asset Purchase Agreement; did
16 you?

17 A. No.

18 Q. You didn't participate in any of the so-called
19 wordsmithing or specific language that was used in the Asset
20 Purchase Agreement, did you?

21 A. No.

22 Q. You didn't make any contribution whatsoever to
23 the terms or conditions of the September 19th, 1995 Asset
24 Purchase Agreement, did you?

25 A. No.

1 Q. In fact, your so called high-level strategy
2 involvement with respect to what ultimately became the
3 transaction, that is the September 19th, 1995 Asset Purchase
4 Agreement, took place at least two to three weeks before
5 that agreement was signed, right?

6 A. That sounds reasonable.

7 Q. And, in fact, your observation, although you have
8 been involved in some high-level discussions, it was at
9 least two to three weeks after your involvement ended before
10 the Asset Purchase Agreement was finalized, right?

11 A. Well, other than the fact that I presented at the
12 board meeting the day before it was finalized some of the
13 substantive terms.

14 Q. And during this two to three week period between
15 when your involvement ended and when the Asset Purchase
16 Agreement was signed, you were generally aware that there
17 was a back and forth of many drafts of the Asset Purchase
18 Agreement, right?

19 A. Yes.

20 Q. And who did you think that those various drafts
21 were being passed back and forth between?

22 A. Well, the legal teams was Ed Chatlos being the
23 detailed business guy that remained there for continuity.

24 Q. Now Ed Chatlos was at that point a Novell person,
25 right?

1 A. Yes.

2 Q. And who were the lawyers who were involved for
3 Novell during that two week period or three week period of
4 sending drafts back and forth?

5 A. Well, there was a, you know, I don't remember
6 everyone's name. There was a Michael Hoffman who was the --
7 one of the primary attorneys that was out there in
8 California on the ground and unfortunately he has passed
9 away. I don't recall who all of the other attorneys were.

10 Q. Well, you knew, for example, that the law firm of
11 Wilson Sonsini was involved, right?

12 A. Sure. You said Novell, so if there were outside
13 counsel, he is Wilson. And so yeah, Tor Braham would have
14 been one of the main guys there, or the main guy.

15 Q. When you say "the main guy," you mean that he was
16 the primary first drafts person of the Asset Purchase
17 Agreement, right?

18 A. I don't know if he was the primary drafter. But
19 Tor Braham was the senior attorney from Wilson Sonsini and
20 did a lot if not all of Novell's transaction.

21 Q Let me ask you about that. During the time
22 period that you worked for Novell from 1992 to about 1997,
23 to your observation the law firm of Wilson Sonsini was
24 Novell's primary outside counsel on corporate matters,
25 right?

1 A. Yes.

2 Q. And Tor Braham was the lead attorney for Novell
3 in those various transactions, right?

4 A. Yes.

5 Q. Tor Braham essentially was the lawyer that Novell
6 turned to to document corporate transactions; right?

7 A. Yes.

8 Q. He was a trusted attorney?

9 A. Yes.

10 Q. And to your observation, Tor Braham was the key
11 component to the drafting of the actual terms and conditions
12 of the Asset Purchase Agreement, correct?

13 A. You know, I don't know. Again, as I stated, I
14 don't know if he was the key draftsman, if he had some of
15 his other people drafting. He was the senior attorney so he
16 may have looked at it from a high level and had others doing
17 the drafting work or the detail work.

18 Q. We referenced your deposition a bit earlier.
19 There is a transcript of your deposition. I would ask you
20 if you would like to turn to page number 89 of your
21 deposition. Again, this was taken on January 19th, 19 --
22 excuse me, 2007.

23 And Your Honor, with the court's permission, I would
24 like to display the lines and pages that I'll now state on
25 the record.

1 THE COURT: Do you have any objection to that,
2 Mr. Singer?

3 MR. SINGER: I do not, Your Honor.

4 THE COURT: All right. You may go ahead, Mr. Brennan.

5 MR. SINGER: I would only ask that he tell us what
6 lines he plans to --

7 MR. BRENNAN: I am about to do that. Thank you,
8 Mr. Singer.

9 Q. (By Mr. Brennan) I'm going to be reading from
10 Page 89 Line 23 through page 90 line five. Do you have that
11 in front of you or you can see it on the screen, either way.

12 A. Yes.

13 Q. Question, "is it your understanding that Tor
14 Braham from Wilson Sonsini was actually drafting the, what
15 became this September 19, 1995 Asset Purchase Agreement?"
16 Your answer, "I don't know that he was drafting the APA. I
17 think he was -- he was certainly a key component there, so I
18 would think he would be working with the Novell legal team,
19 which was Michael Hoffman and someone from New Jersey, I
20 would assume."

21 That was your understanding when you gave this
22 testimony?

23 A. Yes.

24 Q. Do you now agree with me that by your own
25 previous testimony Tor Braham was the key component to the

1 drafting of the Asset Purchase Agreement?

2 A. You know, I am reading where it says I don't know
3 that he was drafting the APA, so I don't know what you're
4 wanting me to agree to.

5 Q. I'm simply want you to agree --

6 A. I think it is consistent with what he said there
7 with what I just verbally stated which is he was the senior
8 guy. Does that mean that he is the guy drafting the
9 agreement? I don't know.

10 Q. Now during -- during the preparation of the Asset
11 Purchase Agreement, you understood that Mr. Braham took the
12 lead role in drafting that agreement, fair?

13 A. Well, being responsible for the drafting, sure.

14 Q. Well, don't you think that he took the lead on
15 drafting the definitive ultimate agreement between the
16 parties?

17 A. We're disagreeing on semantics and definition.
18 When I hear you say drafting, I don't believe he was sitting
19 there at a keyboard typing stuff in, do you?

20 Q. You know --

21 THE COURT: Mr. Mattingly, you don't get to ask
22 questions.

23 THE WITNESS: Okay.

24 THE COURT: You answer the questions.

25 THE WITNESS: We're just kind of rat-holing on this

1 one.

2 Q. (By Mr. Brennan) I can only take you at your
3 previous word. Let's look now at Page 91 of your deposition
4 and I will be reading from lines two through nine on
5 Page 91. May I proceed, Your Honor?

6 THE COURT: You may.

7 Q. (By Mr. Brennan) Question, "does reviewing that
8 paragraph refresh your recollection as to Tor Braham's
9 involvement in drafting the agreement? Answer, yeah.
10 According to this, it looks like Tor was the lead on
11 drafting the definitive and -- which would still be
12 consistent with what I suggested that, you know, he would
13 doing that with input from the team, including potentially
14 Michael Hoffman, as well as attorneys from Summit."

15 Do you see that?

16 A. Yes.

17 Q. Would you agree that Tor Braham took the lead on
18 drafting the definitive Asset Purchase Agreement?

19 A. Well again, definitionally, I think consistent
20 with at that time I am still consistent that he was
21 primarily responsible for the drafting. But I don't believe
22 that he was actually typing on the keyboard.

23 Q. And you understand that what we're reading into
24 the record is your previous words under oath. You
25 understand that, right?

1 A. Yes.

2 Q. I'm not quoting somebody else, I'm quoting you.

3 A. I think I understand that.

4 Q. Okay. Now, you were not a member of any

5 transition team that was formed after the Asset Purchase

6 Agreement was signed, were you?

7 A. No.

8 Q. In fact, you had no further involvement with the

9 Asset Purchase Agreement after it was signed, did you?

10 A. I did not.

11 Q. Now, did you ever read the Asset Purchase

12 Agreement?

13 A. Um, I probably read it. I'm sure that I have a

14 copy of it in the folder that you have and was sent that so

15 I would have read it slash, perused it, skimmed it, either

16 before or after the close.

17 Q. When did you first skim or peruse or glance at

18 the Asset Purchase Agreement?

19 A. I would imagine when it showed up in my inbox

20 sometime ago.

21 Q. Now when would that have been?

22 A. I don't know, sometime in that two to three week

23 period prior to the close.

24 Q. I'm going to -- I am going to select from the

25 documents you brought today, one of them is a document

1 entitled Asset Purchase Agreement By and Between The Santa
2 Cruz Operation, Inc. and Novell, Inc. dated as of September,
3 then it has a blank, 1995. This is one of the documents you
4 brought with you to court today?

5 A. I believe so if you pulled it out of that manila
6 folder that I had.

7 MR. BRENNAN: I will represent to you that that is
8 where it came from. Your Honor, with your permission, I
9 would like to have this labeled for identification as
10 Novell's Exhibit 045.

11 THE COURT: Mr. Singer?

12 MR. SINGER: I have no objection to it being labeled
13 for identification.

14 MR. BRENNAN: Your Honor, with permission of the
15 court, I would like to display this on the ELMO projector?

16 THE COURT: Well, you asked for it to be marked.

17 MR. BRENNAN: Yes.

18 THE COURT: You have not asked for it to be admitted.

19 MR. BRENNAN: That is correct.

20 THE COURT: Are you going to seek its submission?

21 MR. BRENNAN: I will in just a moment. Thank you,
22 Your Honor.

23 Q. (By Mr. Brennan) Now, do you recall,
24 Mr. Mattingly, whether this document that I have identified
25 which has been marked as Defendant's Exhibit 045 is a

1 document that you received previous to the Asset Purchase
2 Agreement being signed?

3 A. If it is a draft, then that would have been
4 previous to it.

5 Q. Is this the copy of the draft that you looked at?

6 A. It would have been a paper or online to an
7 electronic format.

8 MR. BRENNAN: Your Honor, I do move the admission of
9 Defendant's 045.

10 MR. SINGER: No objection.

11 THE COURT: It will be admitted.

12 (Whereupon, Defendant's Exhibit 045 was received
13 into evidence.)

14 MR. BRENNAN: May I now present it on the ELMO, Your
15 Honor?

16 THE COURT: You may.

17 MR. BRENNAN: Thank you.

18 Q. (By Mr. Brennan) Now, we have just displayed to
19 the jury through this technology the first page of
20 Defendant's Exhibit 045. And I would now like to turn to a
21 portion of that document which is entitled Schedule 1.1(b)
22 Excluded Assets and in particular, I will show that first,
23 I'll try to keep my fingers out of the screen, but do you
24 see that page there?

25 A. Yes.

1 Q. And on the version of the document that you see,
2 it says, let me lower it just a little bit, do you see where
3 it says "draft" stamped on the top?

4 A. Yes.

5 Q. I know it is a little difficult to see but there
6 appears to be a handwritten date to the right 9/16/95; do
7 you see that?

8 A. Yes.

9 Q. Is that your handwriting?

10 A. I don't think so.

11 Q. Does this suggest to you that you had possession
12 of this document at least as early as September 16th, 1995?

13 A. That would be reasonable.

14 Q. And so did you understand that in this draft at
15 least that what is set forth in this schedule Excluded
16 Assets were Novell assets that would not transfer to Santa
17 Cruz Operation under the Asset Purchase Agreement then being
18 considered?

19 A. Yes.

20 Q. I'm now going to turn to Page 2 of that draft
21 Schedule 1.1(b). Excuse my big hands there. You will see,
22 I know it is a little difficult, but there is a Roman
23 numeral five Intellectual Property. Are you able to make
24 that out on the screen?

25 A. Yes.

1 Q. And it has three parts; correct?

2 A. Yes.

3 Q. One is labeled capital letter A and it says
4 patent licenses, parenthesis, i.e. Pike and all others
5 associated with the UNIX System, in parenthesis, do you see
6 that?

7 A. Yes.

8 Q. Did you understand that the draft under
9 consideration several days before the Asset Purchase
10 Agreement was signed was to exclude all patent licenses?

11 A. Sure.

12 Q. That is what it says, right?

13 A. That is what it says.

14 Q. And the draft that you had in your possession
15 several days before the final agreement was signed had that
16 exclusion, right?

17 A. That is correct.

18 Q. And September 16th, 1995 would have been before
19 the Novell Board of Directors meeting that was held on
20 September 18th, 1995, correct?

21 A. Yes.

22 Q. So you would have had in your possession at least
23 two days before the Novell Board of Directors meeting a
24 draft of the Asset Purchase Agreement that listed at least
25 these proposed exclusions from transfers of assets by Novell

1 to Santa Cruz, correct?

2 A. Yes.

3 Q. Let's then look at Item B, all copyrights and
4 trademarks, except for the trademarks UNIX and UnixWare. Do
5 you see that?

6 A. Yes.

7 Q. So is it correct then that as with the patent
8 licenses you had in your possession a draft of the Asset
9 Purchase Agreement at least two days before the board
10 meeting that listed as excluded assets, that is assets that
11 would not be transferred to Santa Cruz Operation, a document
12 that showed all copyrights and trademarks except for the
13 trademarks UNIX and UnixWare?

14 A. If that was delivered to me on the date that the
15 -- somebody wrote 9/16 then I would have had it at least two
16 days before the board meeting.

17 Q. So even before you went into the board meeting,
18 you would have had access to a draft of the Asset Purchase
19 Agreement that clearly stated that -- no, let's put it back
20 just so we have no mistake here, clearly would have stated
21 that contemplated to be excluded are all copyrights and
22 trademarks except for the trademarks UNIX and UnixWare;
23 right?

24 A. As long as it wasn't delivered at the board
25 meeting and actually copied on the 16th.

1 Q. When did you tell me you got this document?
2 A. I don't know. You just said that it was on the
3 16th.
4 Q. Now, just so that we're clear here, I showed you
5 the previous page that had a date?
6 A. Written.
7 Q. I asked you and we can go back to that, we're
8 back to the first page of the draft and I asked you about
9 the reference to the date 9/16/95, and unless I misheard
10 you, I thought you told me that you believed that was the
11 date that you got this. Did I misunderstand?
12 A. That is the date it was written. I don't know --
13 you asked me if I wrote that and that is not my writing. So
14 I wouldn't have written 9/16/95 there. So someone did it on
15 that date, I assume. And whether it was delivered to me on
16 a Saturday, or whether I received it Monday as part of the
17 board package, I don't know the answer.
18 Q. I am going to show you the original that I have
19 in front of you. I would like you to look at the date.
20 Does that appear to be written in handwritten ink?
21 A. Yes.
22 Q. That is not a photocopy, is it?
23 A. It is not. But if you look at the fax date on
24 the bottom, what does the fax date on the bottom say?
25 Q. There is a fax date on the bottom, it says

1 September 18, 1995, right? Now, are you saying you got this
2 by fax?

3 A. I don't know. I am just saying it has that
4 written on the bottom so, you know, you're trying to
5 establish whether I got it on the 16th, I don't know. Does
6 it have 9/16 written in handwriting? Yes, it does.

7 Q. In original ink, right?

8 A. Well, I don't know. Well, I don't know if that
9 is original ink, original or a photocopy.

10 Q. Let's take a look, I apologize. I thought we
11 cleared that up. Let's go back and have another look at it.

12 A. But my point is, is whether I got it on the 16th
13 or the 18th as part of the board meeting, I don't recall.

14 Q. If you would like to take another look,
15 Mr. Mattingly, does that appear to be original ink rather
16 than a copy or a facsimile?

17 A. No, it looks to me like it is a photocopy of
18 original ink.

19 Q. That is your best observation?

20 A. Yeah.

21 Q. Now, before you -- before you entered the board
22 meeting you had access to this document, right?

23 A. Well, or at the board meeting. As I stated, I
24 don't know if it was before or if it was at the board
25 meeting.

1 Q. Let's take a look at what has been marked as
2 defendant's, excuse me, SCO Exhibit 570. This is the
3 September 15th, 1995 package.

4 And is it your testimony that you received a copy of
5 this document?

6 A. Yes.

7 Q. And when did you receive it?

8 A. Well, again, it is dated September 15th, so I
9 would assume that that being a Friday, I might have received
10 that on the 15th.

11 Q. And did you review that document at the time you
12 received it?

13 A. I'm sure I did.

14 Q. Let's look at the -- now you were not a member of
15 the Board of Directors of Novell, were you?

16 A. No.

17 Q. Never were?

18 A. No.

19 Q. You weren't a voting member of the board, right?

20 A. No.

21 Q. And in the board meeting that you attended on
22 September 18th, 1995 it was not your purpose to vote on any
23 resolution, right?

24 A. No.

25 Q. So let's look at this package that you were given

1 a copy of. It says, if we can highlight the first full
2 paragraph, "dear board member" and then the first full
3 paragraph. It says quote, "we are in the process of
4 negotiating long-term business relationships with SCO and
5 Hewlett-Packard for the purpose of strengthening UNIX on the
6 Intel Platform."

7 Now let me just pause right here. Did you believe as
8 of September 15th that it was the intention of Novell to
9 sell its entire UNIX and UnixWare business to SCO?

10 A. Yes.

11 Q. Let's go back then to Exhibit 570, the next
12 sentence. Quote, "one of the key steps in this process is
13 the sale of a portion of our UnixWare business to The Santa
14 Cruz Operation."

15 Now certainly when you read this document you
16 understood that what was being considered was a sale of a
17 portion of the business, right?

18 A. Well, yes, because we were retaining the royalty
19 stream from the SVRX royalties.

20 Q. In fact, that is referenced in the next sentence,
21 right?

22 A. Yes.

23 Q. And that next sentence which is a parenthetical
24 reads, "for example, we will be retaining our traditional
25 royalty stream from UNIX SVRX source code which we -- which

1 was approximately \$50,000,000 for FY 1995;" correct?

2 A. Yes.

3 Q. And that suggests that the Novell royalty
4 payments that it received for UNIX SVRX source code alone
5 was about \$50 million; is that right?

6 A. For that year.

7 Q. Fiscal year 1995, right?

8 A. Correct.

9 Q. So you understood going into the board meeting,
10 that Novell had a very keen important interest in
11 maintaining that royalty stream; right?

12 A. To an extent, yes.

13 Q. Well, that was critical to Novell, right?

14 A. Well, the revenue was clearly critical, right.

15 Q. And so you understood, for example, Mr. Bradford
16 and other members, excuse me, Mr. Frankenberg and other
17 members of the board in order to maintain and enhance
18 shareholder value would have felt a duty and obligation to
19 do everything that they reasonably could to protect that
20 royalty payment stream, right?

21 A. That is what you would assume if you didn't
22 understand what we were trying to accomplish from a higher
23 level strategic initiative.

24 Q. Let me see if I understand what you're saying.
25 By your own testimony you believe that one of the things

1 that was a part of the transaction between Novell and SCO,
2 excuse me, Santa Cruz, was a provision whereby the royalty
3 payments that Novell was receiving, \$50 million according to
4 this fiscal year in 1995, after the Asset Purchase Agreement
5 would continue to come to Novell, right?

6 A. Yes.

7 Q. That was very important to Novell, right?

8 A. Yes.

9 Q. And so back to my question, that was a
10 fundamental part of the transaction, right?

11 A. It was.

12 Q. And so Novell and its officers and directors,
13 including its general counsel, Mr. Bradford, in your
14 estimation would have been acting within the scope and duty
15 of their offices in taking whatever reasonable and
16 appropriate steps were available to them to protect that
17 royalty stream, right?

18 A. Within the framework of the strategic objectives.
19 If you would like for me to elaborate on that, I would be
20 happy to briefly --

21 Q. Just answer my question. That is all I need.

22 A. Well, then the answer would be no.

23 Q. So it is your testimony under oath that it was
24 not within the purview of the members of the Board of
25 Directors of Novell and its officers, including its general

1 counsel, to take all reasonable steps to protect Novell's
2 interest in that royalty stream? Is that your testimony
3 under oath here today?

4 MR. SINGER: Objection, that is a compound question.

5 THE WITNESS: I'm trying to answer your question so
6 quit badgering me.

7 MR. BRENNAN: I did not intend to badger you.

8 THE WITNESS: The intention here and the strategic
9 realm of what we're trying to do is to establish a common
10 UNIX operating environment on Intel processors. So while we
11 absolutely wanted this \$50,000,000 in revenue and it's very
12 important to Novell because it was very heavy margin, that
13 is almost 50,000,000 that goes right to the bottom line,
14 very important, but more importantly for Novell was to try
15 and get a common UNIX platform out there on Intel so that
16 there was a viable alternative to what Microsoft was
17 offering that was eroding NetWare away aggressively.

18 So in the greater context of things, okay, sometimes
19 short-term sacrifices for long-term gains have to take
20 place. And so the purpose here is there would have been
21 nothing better for Novell than if SCO had been very
22 successful with this UNIX business that they had acquired in
23 successfully unifying the entire industry around their UNIX
24 offering on X86 architecture.

25 If they could have done that, that would have eroded

1 our revenue streams here from this SVRX old royalties. But
2 in the greater strategic contest, that would have been a
3 fantastic tradeoff for Novell.

4 Q. (By Mr. Brennan) Now let me --

5 A. So that is what I'm referring to when I say
6 they're trying to look after shareholder value. You can't
7 take a rifle shot of an isolated thing and try to badger me
8 on that.

9 Q. Well, I apologize if you think you're being
10 badgered.

11 A. I was being badgered.

12 Q. I do hope that you can answer my questions. Now,
13 in terms of the business objective that you understood of
14 SCO, excuse me, Santa Cruz Operation when this transaction
15 was being contemplated, what did you think Santa Cruz
16 Operation was going to do with the development of the UNIX
17 or UnixWare code?

18 A. They were going to create a merged product. They
19 were going to try and establish an opportunity for all of
20 the other OEM's that were out there, some of which were
21 paying royalties that counted into this 50,000,000, to
22 entice them to adopt this new version of an operating
23 environment for their hardware platform and unify UNIX on
24 Intel.

25 Q. Your basic understanding was that what Santa Cruz

1 Operation would do is take whatever rights they got to
2 UnixWare and seek to further develop it and develop a
3 product that would be a benefit to its customers; right?

4 A. Well, to their customers and the industry.

5 Q. The industry.

6 A. And therefore, we established this agreement in a
7 fashion that NetWare components would be part of this future
8 merged UNIX. So if you could get HP and Sun and Fujitsu and
9 Hitachi and everyone using that version of UNIX that had
10 NetWare in it, then all of a sudden we could, you know, drag
11 in and be the de facto networking standard inside of these
12 UNIX operating environments.

13 Q. You did not understand that the purpose of the
14 transaction was so that Santa Cruz Operation or any of its
15 successors could turn on users of Linux, right?

16 A. Well, that wasn't -- that wasn't even discussed
17 at that point.

18 Q. Now, let's go back to what we were looking at,
19 namely Exhibit 570. The next line in this board memo that
20 Mr. Bradford says we are currently finalizing the terms of
21 an Asset Purchase Agreement which would result in Novell
22 owning, on a post transaction basis, about 16 percent of
23 SCO. Do you see that?

24 A. Yes.

25 Q. And then it says, SCO's current market cap is

1 \$300,000,000 at \$10 a share. Do you see that?

2 A. Yes.

3 Q. Now, when you were involved back in 1995, did you

4 think that this transaction that was being discussed was one

5 where SC -- excuse me, Santa Cruz Operation, abbreviated SCO

6 here, would be paying Novell about \$125,000,000 in cash?

7 A. Well, I don't know about cash but consideration.

8 In my mind, it seemed like it was about \$125,000,000 deal

9 that came in various forms of consideration of which I think

10 we looked at earlier.

11 Q. Well for example, 16 percent of SCO's stock at

12 \$10 a share, how much would that be?

13 A. I don't know.

14 Q. Far less than 125,000,000, right?

15 A. Sure. But there were multiple components that

16 added up to what I recall to be that amount.

17 Q. Do you recall at your deposition you thought that

18 the deal was such that SCO would be paying Novell

19 \$125,000,000 in cash? Do you remember being asked that?

20 A. Yes.

21 Q. And you told the answer I think it is 125,000,000

22 in cash?

23 A. Yes, I probably volunteered the 125. I didn't

24 stay in cash.

25 Q. Then you asked at you deposition are you even in

1 the ball park? Do you remember that?

2 A. Yeah, I do.

3 Q. So when your deposition was taken two years ago,
4 you didn't even know what the financial terms of the
5 agreement were, right?

6 A. I don't recall what it was that built up to what
7 in my mind seemed like it was about \$125,000,000
8 transaction.

9 Q. Now, you were asked about the meetings of the
10 Board of Directors. I would like to turn back, if you
11 could, to what has been entered into evidence as Exhibit Z3.
12 Now, let me ask you a question while you're looking at that.
13 Who was present in the board meeting?

14 A. Those listed in the first paragraph.

15 Q. Do you recall each of those individuals being
16 present?

17 A. Um, well yeah, they were all pretty good about
18 showing up for the meetings.

19 Q. My question is, do you recall each of those
20 individuals being present?

21 A. I don't.

22 Q. Did Larry Sonsini speak at the meeting?

23 A. Well, Larry usually speaks at any meeting he
24 participates in. So is he here?

25 Q. Let me ask you this. Without reading the minutes

1 themselves, are you able to answer my question as to whether
2 Mr. Sonsini spoke at the meeting?

3 A. I'm sure he spoke at the meeting.

4 Q. What did he say?

5 A. I don't remember.

6 Q. Did David Bradford speak at the meeting?

7 A. I'm sure he did.

8 Q. What did he say?

9 A. I don't remember.

10 (Whereupon, the reporter requested the
11 attorney to slow down.)

12 Q. (By Mr. Brennan) I'll slow down. Did Robert
13 Frankenberg speak at the meeting?

14 A. I'm sure he did.

15 Q. What did he say?

16 A. I don't remember.

17 Q. Did Jack Messman speak at the meeting?

18 A. I'm sure he did.

19 Q. What did he say?

20 A. I don't remember.

21 Q. Did Elaine Bond speak at the meeting?

22 A. I'm sure she did.

23 Q. What did she say?

24 A. I don't remember.

25 Q. Did Alan Ashton speak at the meeting?

1 A. Alan Ashton? I don't think so. Was he there?

2 Q. Well, let me ask you. Do you remember whether he

3 was even there?

4 A. I don't. It looks like it was a telephonic

5 conference call.

6 Q. Well, you're aware that Mr. Ashton was a

7 participant in the meeting, right?

8 A. I am now. He was a member of the board member

9 but at some point he got off of the board and --

10 Q. So without looking at the minutes, are you able

11 to tell me whether Mr. Ashton was even a board member at the

12 time?

13 A. Sure. I think he was a board member until we

14 divested of WordPerfect.

15 Q. Thank you. Do you remember anything about

16 Mr. Ashton or his participation at the meeting?

17 A. I don't remember. He did not necessarily

18 participate a lot verbally at meetings.

19 Q. Okay. You're familiar with a board member by the

20 name of Ian Wilson, right?

21 A. Yes.

22 Q. Did Mr. Wilson speak at the meeting?

23 A. I don't remember.

24 Q. Are you familiar with a board member by the name

25 of John Young, right?

1 A. Yes.

2 Q. Did Mr. Young speak at the meeting?

3 A. I'm sure he would have spoken.

4 Q. What did he say?

5 A. I don't remember.

6 Q. You just don't remember what any of these
7 individuals said?

8 A. I do not.

9 Q. Are you aware that at the Board of Directors
10 Meeting, that David Bradford and Larry Sonsini reviewed the
11 terms of the Asset Purchase Agreement?

12 A. I am sure they would have.

13 Q. So they --

14 A. That was the purpose of the meeting.

15 Q. They would have gone through the terms of the
16 agreement, right?

17 A. Yes.

18 Q. And so to your recollection, the Board of
19 Directors would have had the benefit of two attorneys, Larry
20 Sonsini and David Bradford going through the terms of the
21 Asset Purchase Agreement; right?

22 A. Correct.

23 Q. And the Asset Purchase Agreement that was before
24 the board included the exclusions of all copyrights and
25 trademarks except the trademarks UNIX and UnixWare, right?

1 A. That is what the document states.

2 Q. Well, do you remember that?

3 A. I remember that as I read it.

4 Q. So now looking at the minutes of the Board of
5 Directors Meeting, your memory is refreshed, and you recall
6 that Mr. Bradford, general counsel, Larry Sonsini, a member
7 of the board, and also a senior partner at Wilson Sonsini
8 went through with the board the terms and conditions of the
9 Asset Purchase Agreement, right?

10 A. Well, I think that they would have reviewed the
11 high-level terms and conditions in the Asset Purchase
12 Agreement. They would have not gone through the agreement
13 and gone on a line-by-line basis.

14 Q. Well, do you remember one way or the other?

15 A. I don't, but I guarantee you they wouldn't have
16 done that.

17 Q. You guarantee it, but you just don't remember?

18 A. I don't remember. But we would never take a 50,
19 60 page document and review that on a line-by-line basis.

20 Q. Now --

21 A. Never in the four years that I attended board
22 meetings would we do that.

23 Q. Would the most important aspects of the
24 transaction be reflected in the resolution of the board?

25 A. They should be.

1 Q. So to your understanding, the most critical parts
2 of the Asset Purchase Agreement put before the board would
3 have been those that the board reached specific resolution
4 on, right?

5 A. Yes.

6 Q. So then let's look at the actual resolutions
7 reached by the board. They're on Page 2. And we're going
8 to focus on the third paragraph where it says, "Novell will
9 retain." If I could have that highlighted. Our patient
10 jury has seen this language several times. "Novell will
11 retain." So if I understand your testimony correctly, the
12 most important parts of the transaction would be part of the
13 resolutions, right?

14 A. Yes.

15 Q. It says here as part of resolved, quote, "Novell
16 will retain all its patents, copyrights and trademarks
17 (except for the trademarks UNIX and UnixWare)" right?

18 A. Yes.

19 Q. And that -- that is almost verbatim if not
20 exactly the language that was in the draft Asset Purchase
21 Agreement that you and other people attending the board
22 meeting received in advance of the board meeting, right?

23 A. Correct.

24 Q. There was no surprise, right?

25 A. Well, I think once again, as I talked about when

1 you were trying to badger me about the \$50,000,000, you
2 can't take a rifle shot in a two month negotiation and a 60
3 page document and try and zero in on that. This is
4 referring to the fact that Novell bundled a number of its
5 products that it retained that weren't part of this Asset
6 Purchase Agreement. And Novell obviously would retain that
7 intellectual property, those copyrights and trademarks with
8 those products that they retained. That is what this is
9 stating.

10 Q. What I'm trying to find out from you is the
11 following. First, there was -- there was no surprise
12 foisted on the board with language that would appear in the
13 ultimate signed Asset Purchase Agreement that would state
14 that the excluded assets would include all copyrights and
15 trademarks except the trademarks UNIX and UnixWare. Would
16 you agree with that?

17 A. In a perfect world that should be the case.

18 Q. But would you agree with me that the members of
19 the board and other participants in the meeting, including
20 yourself, were provided with the draft of the asset purchase
21 agreement before the board meeting that included the very
22 language I have been focusing on?

23 A. Yes.

24 Q. So would you agree with me then that there was no
25 attempt by Mr. Bradford or anyone else to try to somehow

1 surprise or trick the board?

2 A. I don't believe it would have been their
3 intention, but I want to emphatically state that at this
4 point in time, this is the eleventh hour, 59th minute and
5 59th second to all of the sudden assume that the UNIX
6 copyrights weren't part of this transaction that we had been
7 selling for two months would have definitely raised
8 eyebrows. That is not inconsistent with this because Novell
9 is going to retain its patents and copyrights for NetWare,
10 for Groupwise, or any of those products that they bundled
11 with UnixWare.

12 Q. Well, again, just so we can be very clear on
13 these minutes, one of the resolutions was that the explicit
14 exclusion that we have talked about was a part of the
15 resolution by the board, right?

16 A. Well, on the Novell patents or the Novell
17 patents, copyrights and trademarks pertaining to Novell's
18 retained products.

19 Q. Now --

20 A. I disagree with you saying that that applies to
21 UNIX.

22 Q. Well I -- I appreciate the fact that that is your
23 argument here today. My question is --

24 A. It is not my argument. It is what I spent two
25 months out in California negotiating with SCO, with 12 other

1 people from Novell and 12 from SCO.

2 Q. Now do you know whether --

3 A. There was never confusion in my mind.

4 THE COURT: Mr. Mattingly, please. If you have
5 something more that you would like to say, you will be given
6 an opportunity with Mr. Singer who will have another
7 opportunity to ask you questions. Please just answer
8 Mr. Brennan's questions as directly as you can.

9 THE WITNESS: I apologize.

10 Q. (By Mr. Brennan) Now, there was also additional
11 resolutions. If we could go down to the resolution on the
12 bottom of page 2 where it says reserve -- excuse me,
13 resolved further?

14 A. Uh-huh (affirmative).

15 Q. Next one down. Next one. So there was an
16 additional resolution, quote, "That the terms and conditions
17 of the Asset Purchase Agreement as set forth therein are
18 hereby approved, subject to such changes and modifications
19 of a non-material nature as the proper officers of Novell
20 may consider appropriate or necessary." Do you see that?

21 A. Yes.

22 Q. Now do you know whether the language that
23 appeared in the Asset Purchase Agreement, excluding all
24 copyrights and trademarks except the trademarks UNIX and
25 UnixWare were changed prior to the signing of the Asset

1 Purchase Agreement by either Novell or Santa Cruz Operation?
2 A. I don't know.
3 Q. Did you have any involvement whatsoever in any
4 amendments to the Asset Purchase Agreement?
5 A. I did not.
6 Q. You played no role in any of that; right?
7 A. No.
8 Q. You have no personal knowledge about any of that,
9 right?
10 A. No. Well personal knowledge, I do have the
11 knowledge that there was an Amendment 2 that tried to
12 clarify some of the ambiguous legal work.
13 Q. Somebody told you that?
14 A. Sure, it was front page news.
15 Q. But you don't -- you weren't involved in any of
16 that, right?
17 A. No.
18 Q. Now, I would like to ask you a bit about an
19 individual I think that Mr. Singer asked you about, Duff
20 Thompson. You're familiar with Mr. Thompson?
21 A. You bet.
22 Q. Mr. Thompson became your boss after you stopped
23 working for Bob Frankenberg; right?
24 A. Yes.
25 Q. And you had a chance in your role working for

1 Mr. Thompson to observe his work habits?

2 A. Yes.

3 Q. You began working for Mr. Thompson when?

4 A. I'm not sure exactly what the time frame was, but

5 after I stopped working for Bob Frankenberg then I took a

6 job with him as vice-president of corporate development and

7 strategic relationships.

8 Q. In that role, you would have had that position

9 with Mr. Thompson before you engaged in any discussions with

10 Santa Cruz Operation; right?

11 A. Yes.

12 Q. And you would have continued working with

13 Mr. Thompson until he left the company; right?

14 A. Yes.

15 Q. When did Mr. Thompson leave Novell?

16 A. I am not sure exactly. It would have been after

17 the WordPerfect divestiture.

18 Q. Sometime in 1996?

19 A. That sounds reasonable.

20 Q. Okay. So is it fair to say that from the time

21 period at least before any discussions were had with Santa

22 Cruz Operation and until at least when Mr. Thompson left in

23 1996 you worked with and for him?

24 A. Yes.

25 Q. Now based on your observation of him, would you

1 agree that Mr. Thompson was not really involved with the
2 details of the Novell Santa Cruz transaction?

3 A. No. Duff had specific responsibilities as the
4 senior executive overseeing that and participated in all of
5 the high-level senior executive type meetings. He was not
6 on the ground for two months out in California day-to-day
7 like the rest of the team was.

8 Q. If we could go back to your deposition, let's
9 look, again this is your deposition taken more than two
10 years ago on January 19th, 2007?

11 A. Yes.

12 Q. If you would turn with me to Page 70 and counsel
13 we're going to read from Line 17 through 22 on Page 70. Do
14 you have that, Mr. Mattingly?

15 A. Yes.

16 Q. The question, "Is it fair to say that, based on
17 your personal knowledge, that Duff Thompson was not really
18 involved in the details of the Novell, Santa Cruz
19 transaction?" Do you see that question?

20 MR. SINGER: Your Honor, I would ask that the entire
21 answer be shown to the witness and blown up on the computer
22 screen.

23 MR. BRENNAN: Well, I'm happy to do that. That is not
24 a problem.

25 THE COURT: All right.

1 Q. (By Mr. Brennan) And then we'll see your answer
2 that does spill over to the top of Page 71.

3 Your answer, "you know, I would say that that's
4 probably a fair statement because the real detail guy in
5 this was Ed Chatlos, and of course, Ed and I were peers and
6 reported to Duff. But he was a general counsel and formerly
7 with WordPerfect and was the senior or executive vice
8 president of Corporate Development at Novell."

9 So would you agree with me today, as I believe you
10 agreed with Mr. Brakebill who asked you this question, that
11 Mr. Thompson was not really involved with the details of the
12 transaction?

13 A. Well, as I stated there in my deposition and as I
14 earlier stated today, he was the senior executive overseeing
15 the transaction, but that doesn't mean that he is the detail
16 guy that is negotiating every aspect of the transaction. So
17 I think it is all consistent with what I said back then. It
18 is consistent with the dialogue you and I had about whether
19 Tor was drafting the APA or whether he was just focussing --

20 THE COURT: Mr. Mattingly, thank you.

21 THE WITNESS: -- overseeing the drafting.

22 THE COURT: Thank you.

23 Q. (By Mr. Brennan) Is it true that in fact to your
24 observation Duff Thompson was quote "checked out" unquote
25 from Novell during this time period?

1 A. No.

2 Q. Did you ever hear anyone suggest that?

3 A. Yes.

4 Q. So just so I understand, you have heard people at
5 Novell suggest that Duff Thompson was checked out during
6 that time frame; right?

7 A. Yes.

8 Q. And to your observation, was it commonly known at
9 Novell during this timeframe, that is discussions about the
10 Novell Santa Cruz Operation transaction, that Mr. Thompson
11 was checked out?

12 A. No.

13 Q. Okay. Let's look at your deposition, again, if
14 we might. This time we'll turn to Page 71. And if I could
15 direct your attention, I'll be reading from lines 18 through
16 23.

17 Question, "would you say it was commonly known amongst
18 the people who were working on the Novell, Santa Cruz
19 transaction that Duff was checked out? Answer, yeah. I
20 would think that -- I would think that generally people
21 would have agreed with that sentiment."

22 MR. SINGER: Your Honor I would ask the prior question
23 and answer also be presented to the witness.

24 MR. BRENNAN: Your Honor, they certainly will have
25 that opportunity on their redirect, but if he would like I'm

1 happy to do the same thing.

2 MR. SINGER: I think this falls under the completeness
3 rule, Your Honor.

4 THE COURT: I think we probably ought to have you do
5 it now.

6 MR. BRENNAN: I'm happy to do it right now.

7 Q. (By Mr. Brennan) So let's look on Page 71 the
8 question at line seven through the answer that continues to
9 line 17.

10 Question, "and what was your understanding of what
11 that meant, Duff was checked out during this period of time
12 preceding the Novell -- during the Novell, Santa Cruz
13 transaction? Answer, well, Duff came into Novell and
14 assumed that position of, you know, senior executive over
15 corporate development, but he was not in the office that
16 often and participated in the senior executive level
17 meetings inside of Novell, as well as the senior executive
18 level meetings when we had high level meetings with, you
19 know, maybe Alok Mohan and Doug Michels." Do you see that?

20 A. Yes.

21 Q. Now, were you also aware of a circumstance during
22 the course of discussions over The Santa Cruz Operation
23 where you yourself believed that he had checked out?

24 A. No.

25 Q. Do you remember an all hands meeting held in

1 California where Mr. Thompson didn't show up?

2 A. Yes.

3 Q. And you considered that to be in your own mind
4 evidence that he had checked out?

5 A. No. Um, time frame wise, you asked if that was
6 during that SCO transaction and I don't believe that was
7 during it. I think it was after.

8 Q. So you thought that Mr. Duff Thompson was checked
9 out after the SCO transaction?

10 A. Well, I think that is what people understood him
11 to be.

12 Q. Now, you believed that under the Asset Purchase
13 Agreement all UNIX related patents transferred to Novell,
14 right, excuse me, from Novell to Santa Cruz Operation,
15 right?

16 A. Say that again, please.

17 Q. Yes. You believed that under the Asset Purchase
18 Agreement that all UNIX related patents transferred from
19 Novell to Santa Cruz, right?

20 A. Well, as I stated, I think it was relevant
21 because I think Novell retained -- well as we read earlier,
22 Novell retained patents but they were some specifically that
23 we referenced like the Pike patent that were pretty
24 significant that Novell retained.

25 Q. Let me see if I understand what you're telling

1 me. You believe that under the Asset Purchase Agreement
2 Novell retained patents, right?

3 A. Yes.

4 Q. Did it transfer any patents?

5 A. I don't believe so unless there were some that
6 were possibly relevant to UNIX.

7 Q. And your -- the basis for your belief that Novell
8 retained patents and didn't transfer any is premised on
9 what?

10 A. Well, I knew that we had acquired this patent
11 from USL around overlapping windows. And if we had that
12 patent, there was a company by the name of Microsoft that
13 had a pretty nice business in overlapping windows that I
14 felt like we should have executed our rights against that.

15 Q. Well, were you aware that under the Asset
16 Purchase Agreement signed on September 19th, 1995 that one
17 of the excluded assets was all patents?

18 A. I am now.

19 Q. What do you mean you are now?

20 A. We just read that earlier.

21 Q. Well, just so we're clear, what we looked at
22 earlier was a draft unsigned version of the Asset Purchase
23 Agreement. Let's actually look at the final version of the
24 Asset Purchase Agreement signed on September 19th, 1995 and
25 we'll look in particular at the final version of Schedule

1 1.1(b) that was entered into by the parties on
2 September 19th, 1995.

3 Here it says, and again I'll represent to you that
4 this is from the executed version of the final Asset
5 Purchase Agreement signed on September 19th, 1995. And
6 under intellectual property it says, "all copyrights and
7 trademarks except for the trademarks UNIX and UnixWare," do
8 you see that?

9 A. Yes.

10 Q. And that is exactly the same language that
11 appeared in the draft that you got before the board meeting;
12 right?

13 A. Yes.

14 Q. But there also is an exclusion of all patents;
15 right?

16 A. Correct.

17 Q. So is this what tells you that no patents
18 transferred?

19 A. Yes.

20 Q. Isn't this also what tells you that no copyrights
21 or trademarks except for the trademarks UNIX and UnixWare
22 transferred?

23 A. Well, once again, in a rifle shot you would
24 assume that.

25 Q. Well, are you aware of any other provision that

1 one would look to in the Asset Purchase Agreement signed on
2 September 19th, 1995 to show that some copyrights or
3 trademarks did pass to Santa Cruz Operation?

4 A. No.

5 Q. Did you have any involvement in the preparation
6 of the schedule of either included or excluded assets?

7 A. No.

8 Q. Do you know who did?

9 A. I do not.

10 Q. Do you believe, based on the role that you played
11 as compared to the role that, for example, Tor Braham played
12 in the preparation of the Asset Purchase Agreement, that you
13 or he would better know what was actually written in the
14 final version of the agreement?

15 A. It would be Tor.

16 Q. Now, we have talked earlier about the documents
17 that you brought with you to court today as well as other
18 documents that you found in your garage?

19 A. Yes.

20 Q. And that upon finding those, you immediately
21 called Ryan Tibbitts at SCO, right?

22 A. I don't think it was immediately, but I did talk
23 with him.

24 Q. And these were documents that you obtained during
25 the course of your employment at Novell; right?

1 A. Yes.

2 Q. These are documents that you would have obtained
3 while you were vice-president of Novell, right?

4 A. Yes.

5 Q. Why didn't you call Novell and tell Novell that
6 you found some documents?

7 A. SCO is the company that actually subpoenaed me
8 and drove this entire deposition process. And as I stated
9 earlier, I have a 30 year relationship with Ryan Tibbitts as
10 a former teammate.

11 Q. So because of your relationship with
12 Mr. Tibbitts, you thought you would call him?

13 A. Well, that would be part of it. Clearly he is a
14 friendly face. But I absolutely -- you asked the question,
15 I absolutely believe that Novell is wrong in what they're
16 trying to allege here.

17 Q. Do you have any concern about our holding the
18 documents that you brought today to give us a chance to look
19 at them?

20 A. No, as long as I get them back.

21 Q. Um, and after we have a chance to look at them,
22 if we have any further questions would you be willing to
23 return so we could ask you about those?

24 A. Sure.

25 Q. Now, the other documents in addition to those

1 that you brought, you still have those, right?

2 A. I do.

3 Q. And those are at your home?

4 A. They are.

5 Q. Would you be willing to provide those documents

6 to Novell's counsel to look at?

7 A. Absolutely.

8 Q. We would ask that you do that as well. Um, when

9 do you think you might be able to do that?

10 A. Whenever you guys come down.

11 Q. Okay. I am sure we will come tomorrow. Now just

12 a few more questions, Mr. Mattingly, I do appreciate your

13 patience with me today.

14 I believe you said earlier that in response to a

15 question by Mr. Singer that you thought that a majority of

16 the UNIX business had been sold by Novell. Did I hear that

17 correctly?

18 A. I don't know if I said a majority but yes.

19 Q. And so if one were to want to find out what

20 assets were sold and which ones weren't, where would you

21 recommend one look to make that determination?

22 A. I would say you could look at the contracts and

23 all amendments to the contracts that clarify that.

24 Q. So you believe that in order to find out what

25 assets Novell actually transferred to Santa Cruz Operation

1 one should look to the contract, right?

2 A. That would be the first place.

3 Q. Can you think of any other source other than the
4 contract?

5 A. Sure. If ambiguity showed up, then you would
6 probably talk to the deal team to understand what the spirit
7 and intent of that contract was.

8 Q. So if one wanted to talk to the deal team, one
9 would first talk to those who wrote the deal, right?

10 A. Depends on who you know. You might talk to them,
11 you might talk to Ed Chatlos.

12 Q. And you know that one of the persons involved in
13 writing the deal was Tor Braham; right?

14 A. Yes.

15 Q. Did you ever ask Mr. Braham about this
16 transaction?

17 A. I have not spoken with Tor about this.

18 Q. Have you gone to him and said I would like to
19 understand what this transaction meant in terms of assets
20 that were transferred?

21 A. No.

22 Q. But you do believe that he would be one that you
23 would want to ask that about to find out what was really
24 meant by the written word, right?

25 A. Yes.

1 MR. BRENNAN: Thank you. I appreciate your time
2 Mr. Mattingly.

3 THE COURT: Mr. Singer?

4 MR. SINGER: Thank you, Your Honor. I only have a
5 couple of questions.

6 REDIRECT EXAMINATION

7 BY MR. SINGER:

8 Q. Mr. Mattingly, who do you think has a better
9 understanding of what this deal constituted, specifically
10 with whether the UNIX copyrights were being sold, you and
11 the other individuals who negotiated the deal for two months
12 in California, or Mr. Braham, Tor Braham, and the lawyers
13 who were supposed to document what you negotiated?

14 A. I think collectively the business team would
15 understand what the strategy and the implementation of that
16 strategy should have been better than Tor Braham.

17 MR. BRENNAN: Okay. Thank you very much.

18 THE WITNESS: Collectively.

19 MR. SINGER: Thank you.

20 MR. BRENNAN: Your Honor, that just invites a question
21 or two, if I might.

22 THE COURT: Go ahead.

23 RE-CROSS-EXAMINATION

24 BY MR. BRENNAN:

25 Q. Now Mr. Mattingly, there were two parties to this

1 transaction, right?

2 A. Yes.

3 Q. Novell on one hand, correct?

4 A. Yes.

5 Q. Santa Cruz Operation on the other, right?

6 A. Yes.

7 Q. And they both had lawyers representing them,
8 correct?

9 A. Yes.

10 Q. We have talked about Wilson Sonsini. You have
11 been asked questions about Mr. Braham.

12 A. Yes.

13 Q. Who was representing Santa Cruz Operation?

14 A. Um, I can't remember the name. Was it Brobeck
15 or --

16 Q. Well, you're doing pretty well. I will go back
17 to the file of documents you brought with you today. And
18 one of them is a fax cover sheet dated September 18th, 1995
19 and it is on the letterhead of Brobeck Phleger,
20 P-H-L-E-G-E-R and Harrison. Does that refresh your
21 recollection as to who the lawyers were that were
22 representing Santa Cruz Operation?

23 A. Yes.

24 Q. Do you know how large the law firm of Brobeck
25 Phleger & Harrison was in September of 1995?

1 A. No, but they were a large credible firm.

2 Q. Did you understand that they had more than 500
3 lawyers at that time?

4 A. I did not know how many they had.

5 Q. And did you ever have any dealings with the
6 Brobeck firm?

7 A. No.

8 Q. Did you understand that Santa Cruz Operations had
9 both in-house lawyers and a very sophisticated large law
10 firm representing it in this transaction?

11 A. Sure, yes.

12 Q. Would you have expected that Santa Cruz Operation
13 officers, directors and in-house counsel and in particular
14 outside lawyers would have reviewed the Asset Purchase
15 Agreement before it was signed?

16 A. Yes.

17 Q. And you would expect that if Santa Cruz Operation
18 believed that there was a provision in the Asset Purchase
19 Agreement signed by Alok Mohan, the chairman of its Board of
20 Directors on September 19th, 1995, that those lawyers would
21 have protected the interests of Santa Cruz just as Novell's
22 lawyers would have been represented?

23 A. To the best of their abilities, yes.

24 Q. And would you expect that if there was a problem
25 in the agreement, particularly with respect to what the

1 included or excluded assets were, that the Brobeck firm
2 would have been well-equipped to advise and protect Santa
3 Cruz against a mistake?

4 A. They should have been.

5 Q. Any reason to believe they didn't?

6 A. Well, just because it is -- we're here today.
7 Pretty good evidence that the legal work on both sides was
8 sloppy and did not represent the intent of the business
9 agreement.

10 Q. Now, you say the work was sloppy. Just so we can
11 perhaps end here, when we looked at the minutes of the Board
12 of Directors, the resolution of the Board of Directors was
13 that the Asset Purchase Agreement that was signed by Robert
14 Frankenberg was one that was in the best interest of the
15 shareholders of Novell, right?

16 MR. SINGER: This is way beyond.

17 THE COURT: I'll sustain the objection.

18 MR. BRENNAN: Thank you, Your Honor. No further
19 questions.

20 THE COURT: Mr. Mattingly, it is possible that you may
21 be recalled. So if you would keep yourself available for
22 that eventuality. And I do have to instruct you
23 specifically please do not have a conversation with any
24 other witness in this case, either someone who has been
25 called or will be called, and please do not discuss your

1 testimony with anyone who will be a witness in this case.

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: All right. Thank you, Mr. Mattingly.

4 THE WITNESS: Thank you. We're done?

5 THE COURT: You're done, yes.

6 Ladies and gentlemen, we're going to go ahead and
7 recess for the weekend. I do want to, because of its
8 importance, read to you again the instruction that you were
9 given the very first day of trial about your conduct.

10 First, I again instruct you that during the trial you
11 are not to discuss the case with anyone including fellow
12 jurors or permit anyone to discuss it with you. Again, I
13 stress if anyone attempts to make any conversation about
14 this case with you, you need to bring it to my attention
15 very, very quickly.

16 Until you retire to the jury room at the end of the
17 case to deliberate on your verdict, you simply are not to
18 talk about this case. Not talking about this case means not
19 talking about it in any way including by internet, e-mail,
20 text message and instant communication devices or services
21 such as cell phones, blackberries, I-phones, social
22 networking websites including Facebook, Twitter, et cetera.

23 Second, do not read or listen to anything touching on
24 this case in any way. Do not watch or listen to any news
25 reports concerning this trial on television or on the radio.

1 And do not read any news accounts of this trial in the
2 newspaper, on the internet or on any instant communication
3 device including again Facebook, Twitter and so on.

4 Third, and perhaps most importantly right now because
5 you have heard a week of testimony, do not form any opinion
6 until all of the evidence is in. Keep an open mind until
7 you start your deliberations at the end of the case. And
8 finally, do not do any research or make any investigation
9 about the case on your own.

10 I hope you all have a nice weekend. I hope that you
11 have some basketball teams left that you can at least watch
12 basketball. If you want to cheer for Utah State, by the
13 way, I won't mind that.

14 Ms. Malley, would you please assist the jury to the
15 jury room.

16 THE CLERK: All rise for the jury, please.

17 (Whereupon, the jury left the courtroom.)

18 THE COURT: Counsel, do you have anything before we
19 recess?

20 MR. HATCH: Your Honor, we have one thing.

21 THE COURT: Go ahead, Mr. Hatch.

22 MR. HATCH: Um, I would like to ask Your Honor to
23 revisit at least a small portion of the ruling earlier today
24 on the Groklaw. And the only thing I would ask is if Your
25 Honor would reconsider allowing at least the striking of the

1 text, I mean the part of the deposition that would start at
2 Page 64 Line 23 through 65 line 3.

3 I think that they end up getting everything that they
4 need in, what Your Honor intended to have them get in, and
5 this would take out one of the references. And I think
6 those lines don't add anything because the person is
7 mentioned elsewhere in the testimony you have allowed. So
8 we would ask that you reconsider at least striking those.

9 THE COURT: Again Line 23 on Page 64 --

10 MR. HATCH: Starting on -- I guess you would start on
11 the question so line 22.

12 THE COURT: Line 22.

13 MR. HATCH: Through Line 3 on the next page.

14 THE COURT: Who wishes to respond?

15 MR. BRENNAN: Your Honor, I would be happy to. Just
16 let me take a quick look. Just so I'm clear, the suggestion
17 is Page 64 Line 22 through what Mr. Hatch?

18 MR. HATCH: Line 3 on the next page.

19 MR. BRENNAN: Well, Your Honor, here is the issue with
20 it. It gives context to the suggestion above regarding who
21 PJ is. And it indicates, as well, that what PJ is doing is
22 operating a website that in essence is a source or place of
23 news information that Ms. O'Gara is essentially competing
24 with. The real issue here, and the reason for the
25 testimony, is as the court may be aware, that Ms. O'Gara

1 makes a claim that Mr. Stone made a certain statement based
2 on a telephone conversation. Novell believes that it is
3 entitled to present evidence to the jury that Ms. O'Gara is
4 not an objective journalist and that she has a certain
5 relationship with SCO that led her to be less than objective
6 in her report of this conversation with Mr. Stone. This
7 fits in with that. We have already agreed to take out other
8 matters that would be extraneous, but this particular
9 reference gives context to who PJ is. He is essentially a
10 competing journalist.

11 MR. HATCH: Your Honor, it does that. We haven't
12 taken that out. If you note, the very next clip identifies
13 PJ as Pamela Jones and it goes on from there. The reason he
14 has given is some of the exact reasons why he shouldn't be
15 here because, you know, he wants to mention this cite which
16 they'll go to. And, you know, we think that is
17 inappropriate because we think it is inconsistent with what
18 Your Honor has ordered and been concerned about in the past.
19 And these couple sentences really don't add any of the
20 flavor that he has already got from the other designations
21 that Your Honor has allowed.

22 THE COURT: Um, go ahead, Mr. Brennan.

23 MR. BRENNAN: Well briefly. Your Honor, what this
24 does is first of all the argument assumes that the jury is
25 going to disregard the court's very careful instructions

1 that have been repeated every day of trial. Second of all,
2 there are other publications that have been referenced and
3 will be referenced during the course of trial and one is the
4 Wall Street Journal. A juror having heard reference to a
5 particular publication could just as easily go to the Wall
6 Street Journal or any other source.

7 Third, the reason for this particular reference is
8 that it mentions it is a website that follows the SCO case.
9 Now, we have to assume that the jury is going to disregard
10 the court's instruction for this to be an issue, but it
11 gives that very context as to why Ms. O'Gara may have lost
12 her objectivity and thus her statement is not credible.

13 THE COURT: The court has to presume that the jury is
14 going to follow the instructions that the court gives to it.
15 Otherwise, we are in very serious trouble. And so the court
16 is going to deny the request of Mr. Hatch that those
17 additional lines be excluded. The court believes that the
18 jury should be trusted to that extent. But more
19 importantly, again, the probative value of this testimony is
20 very important. There is a slight possibility of there
21 being something that would stick in a juror's mind that may
22 lead them to disobey the court and go home and look up the
23 website but I just think that it is so highly unlikely I
24 cannot allow the probative value to be ignored.

25 MR. HATCH: Can I raise one last suggestion? I know I

1 am trying your patience. But could we at least have the
2 scrolling turned off during this playing of this deposition
3 so they don't see the spelling?

4 THE COURT: I think that would be reasonable.

5 MR. BRENNAN: Very well.

6 THE COURT: If nothing else in the scrolling leave it
7 blank where the name is referred to.

8 MR. BRENNAN: We'll do that, Your Honor. Thank you.

9 THE COURT: All right. Are you happy now?

10 MR. HATCH: I got a crumb. You know as long as I
11 leave for the weekend with a crumb, I'm happy.

12 THE COURT: All right. Counsel, let me point out
13 something. Let me ask something first of all. Are we back
14 on schedule?

15 MR. SINGER: Not quite. We were planning to be at the
16 end of the day, but we thought we would get through
17 Mr. Mattingly much quicker than we did. So we have
18 Mr. Maciaszek and some depositions that didn't come in today
19 that will be put into next week.

20 THE COURT: But Mr. Davis is not going to be
21 testifying so you --

22 MR. SINGER: That saves some time. I am sure that
23 would not have been a short examination.

24 THE COURT: Yeah, that is what I would have thought as
25 well.

1 MR. JACOBS: Could we have an indication for Monday
2 and Tuesday?

3 MR. SINGER: Yes. And the first witness that we will
4 call is Kimberly Madsen. She is traveling from --

5 MR. JACOBS: After Mr. Maciaszek?

6 MR. SINGER: No. No, before Mr. Maciaszek.
7 Ms. Madsen will be our first witness. We will then go to --
8 probably to Steve Sabbath's deposition and then pick up with
9 either Mr. Maciaszek or Mr. Nagel in some order.

10 MR. JACOBS: And after that?

11 MR. SINGER: Um, well, if we get beyond that, there is
12 several other depositions which we haven't played and, you
13 know, Mr. McBride would be probably the next witness after
14 that.

15 MR. JACOBS: So am I to understand, I'm sorry to being
16 doing this in front of Your Honor, am I to understand that
17 Mr. Maciaszek will not be called?

18 MR. HATCH: He just listed him.

19 MR. SINGER: I thought I listed him. We're talking in
20 terms of live witnesses on Monday. Ms. Madsen,
21 Mr. Maciaszek, Mr. Nagle. If we get through that, then we
22 would also go through Mr. McBride. That is optimistic.

23 THE COURT: There are no hearings this afternoon so
24 you can leave here what you want to. And if you would
25 please retrieve these three Broderick depositions the court

1 would appreciate it.

2 MR. BRENNAN: Yes, Your Honor.

3 THE COURT: We will be in recess until 8:30 Monday
4 morning.

5 MR. ACKER: Have a good weekend, Judge.

6 (Whereupon, court adjourned for the day at 1:30 p.m.

7 The jury trial will continue on Monday, March 15th
8 at 8:30 a.m.)

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