

1 IN THE UNITED STATES DISTRICT COURT
2 DISTRICT OF UTAH, CENTRAL DIVISION
3
4 THE SCO GROUP, INC., a Delaware)
5 corporation,)
6 Plaintiff,)
7 vs.) Case No. 2:04-CV-139TS
8 NOVELL, INC., a Delaware)
9 corporation,)
10 Defendant.)
11 _____)
12 AND RELATED COUNTERCLAIMS.)
13 _____)

14
15 BEFORE THE HONORABLE TED STEWART
16 -----
17 March 15, 2010
18 Jury Trial
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24 REPORTED BY: Patti Walker, CSR, RPR, CP
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1 A P P E A R A N C E S

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1	I N D E X		
2	Witness	Examination By	PAGE
3	Kimberlee Madsen	Mr. Normand (Direct)	
4		Mr. Jacobs (Cross)	
5		Mr. Normand (Redirect)	
6		Mr. Jacobs (Recross)	
7	Stephen Sabbath Deposition		
8	Darl McBride	Mr. Singer (Direct)	
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1 EXHIBITS RECEIVED INTO EVIDENCE:

PAGE

2 Plaintiff's:

3 29

4 30

5 521

6 127

7 199

8 163

9 95

10 672

11 675

12 678

13

14

15 Defendant's:

16 N-5

17 C-6

18 D-11

19 A-24

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1 SALT LAKE CITY, UTAH; MONDAY, MARCH 15, 2010; 8:30 A.M.

2 PROCEEDINGS

3 THE COURT: Good morning, counsel.

4 I want to deal, first of all, with the motion by
5 defendant to allow evidence responding to plaintiff's
6 allegation that Novell's slander continues to this very day.
7 The Court is going to deny the motion. The Court believes
8 that the questions that were asked and the statements that
9 were made in opening were unwise and inappropriate, but did
10 not bring enough attention to the jury that it justify
11 opening up the Court's prior ruling on denying the
12 opportunity for prior Court rulings to be introduced.

13 The Court is concerned primarily with the fact
14 that it would be very difficult to present to the jury in a
15 fair and accurate fashion the legal history of this case.
16 And to do so would, I think, become ultimately very
17 confusing to the jury and would be very prejudicial, and the
18 probative value to the defendants would be minimal.

19 The Court will, however, state that plaintiffs had
20 better be very, very careful not to come close to the line
21 again because this ruling could be revisited. And,
22 secondly, the Court will try to make sure that in the jury
23 instructions it gives to the jury that it is very, very
24 clear to the jury that any issue of, say, scienter, has to
25 focus on that period of time when the statements, allegedly

1 evidencing malice, took place.

2 Are there any questions, counsel?

3 MR. BRENNAN: Your Honor, thank you.

4 Novell does move for a mistrial on the grounds set
5 forth in the papers, Your Honor.

6 THE COURT: Do you wish to respond, Mr. Singer?

7 MR. SINGER: We believe, for all the reasons the
8 Court has stated in denying the motion, that the motion for
9 mistrial should be denied.

10 THE COURT: The Court will take the issue of
11 mistrial under advisement and will issue a ruling at an
12 appropriate time.

13 Do we have anything else, counsel, before we bring
14 the jury in?

15 MR. SINGER: Your Honor, I just want to report
16 that Mr. Jacobs and his jury instruction group and our jury
17 instruction group met over the weekend. I think we made
18 some progress in resolving points of disagreement between
19 the respective sets of jury instructions. There are certain
20 jury instructions as to which we indicated we would take a
21 further look and some that Novell was going to take a
22 further look. We hope that continuing process is acceptable
23 to the Court. We hope to be able to submit a narrow set of
24 areas of disagreement to the Court as soon as possible.

25 THE COURT: By when do you think, Mr. Singer?

1 MR. SINGER: I think if we had a couple of days,
2 perhaps two days, they might be in a position where we could
3 submit those. We are in disagreement on the verdict form,
4 and we do plan to go ahead and submit that to the Court to
5 begin considering.

6 THE COURT: All right, counsel. The Court will
7 give you until Wednesday, but no later than Wednesday
8 because we need to do what work we'll have that remains and
9 try to get you something by the end of the week. So you
10 have over the weekend to look at what we consider to be the
11 appropriate packet, and then we can deal with the further
12 objections next week. So if you can get them to us by five
13 o'clock, Wednesday, all right, Mr. Singer?

14 MR. SINGER: We'll do so. Thank you.

15 THE COURT: I do want to express gratitude to both
16 sides for making this additional effort. I hope it remains
17 your attitude throughout the remainder of this trial to,
18 where possible, cooperate and try to solve these dilemmas.

19 Mr. Brennan, do you have anything before we bring
20 the jury in?

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

22 THE COURT: Remind me where we're going to start
23 today, Mr. Singer.

24 MR. SINGER: Your Honor, our first witness is Kim
25 Madsen, she's a life witness, followed by deposition

1 testimony of Steve Sabbath. That is approximately one hour
2 with designations from both sides. And after that we would
3 call Darl McBride as a life witness.

4 THE COURT: All right. Thank you.

5 Ms. Malley, if you would please bring the jury in.

6 Mr. Singer, what is your new Exhibit 748?

7 MR. SINGER: This is a document that was
8 inadvertently omitted from the exhibit list that was used in
9 the deposition of Mr. McBride. It is a July 2003
10 presentation with respect to the SCOSource program.

11 THE COURT: Are defendants aware of it? Are we
12 going to have any special problem regarding it?

13 MR. SINGER: It was a document used in
14 cross-examination of Mr. McBride at his deposition.

15 MR. ACKER: We'll see what they try to use it for.
16 It's hearsay. We're going to object to it as we go along.
17 In terms of surprise, we'll deal with it on an evidentiary
18 basis, as we did.

19 (Jury present)

20 THE COURT: Good morning, ladies and gentlemen of
21 the jury. I hope you had a pleasant weekend. I need to ask
22 whether or not any of you violated those instructions that
23 you have been given as to your conduct in any way or in any
24 respect?

25 Good.

1 Mr. Singer, if you would, please.

2 MR. NORMAND: Your Honor, we call Kimberlee Madsen
3 as our next witness.

4 THE CLERK: Ms. Madsen, do you want to come
5 forward.

6 KIMBERLEE MADSEN,
7 Having been duly sworn, was examined
8 and testified as follows:

9 THE CLERK: If you would please state and spell
10 your name for the Court.

11 THE WITNESS: My name is Kimberlee Madsen.
12 Kimberlee, K-i-m-b-e-r-l-e-e, Madsen, M-a-d-s-e-n.

13 DIRECT EXAMINATION

14 BY MR. NORMAND:

15 Q Good morning, Ms. Madsen.

16 A Good morning.

17 Q Could you briefly describe your educational background?

18 A Yes. I attended the University of California at Santa
19 Cruz and graduated with a bachelor's degree in politics and
20 English literature.

21 Q Could you briefly describe your work experience up to
22 the present?

23 A Yes. I worked for -- my senior year in college I
24 worked for a small family law firm. And then I worked for
25 the Santa Cruz Operation. I believe that started at the end

1 of 1990. And the Santa Cruz Operation became Tarantella
2 after it sold the UNIX assets to Caldera. I remained with
3 Tarantella, and left there -- I believe it was in August of
4 2004. And I went to work for a CRM software company called
5 Accordant. I stayed there for about a year. Then I went to
6 work for Apple, and I am currently employed at Apple.

7 Q What is your title at Apple?

8 A I'm senior contracts manager at Apple.

9 Q Could you summarize your responsibilities?

10 A Yes. I negotiate enterprise contracts. Those are
11 contracts where Apple is selling product directly to Fortune
12 100 companies for their own internal corporate use. I also
13 negotiate reseller contracts where Apple is selling products
14 to Fry's or Best Buy for resell to end-user customers.

15 Q Now you said you were at Santa Cruz in 1995?

16 A Yes, I was.

17 Q How many attorneys were in the Santa Cruz legal
18 department in 1995?

19 A One.

20 Q Who was that?

21 A Steve Sabbath.

22 Q What was your title at Santa Cruz at that point?

23 A In 1995, I believe it was manager of law and corporate
24 affairs.

25 Q In brief, what were your responsibilities at Santa Cruz

1 at that point?

2 A I had a variety of responsibilities, primarily
3 pertaining to corporate law, so preparing SEC filings,
4 mergers and acquisitions to the extent that SCO engaged in
5 those activities. I did a little bit of HR, legal, but it
6 was mainly supporting SCO's corporate legal work.

7 Q Is that work that you did with Mr. Sabbath?

8 A Yes, I worked directly for Mr. Sabbath.

9 Q Did there come a time in 1995 when you became involved
10 with a potential transaction between Novell and Santa Cruz?

11 A Yes.

12 Q Who was the buyer and who was the seller?

13 A SCO was the buyer and Novell was the seller.

14 Q What was the nature of your involvement in the events
15 leading up to that transaction?

16 A I supported Mr. Sabbath and was involved in the
17 negotiations with Novell.

18 Q Where did those discussions that you participated in
19 take place?

20 A There were discussions in New Jersey at Novell's
21 facilities. There were also discussions in Santa Cruz at
22 SCO's facilities, and discussions at the law firms in Palo
23 Alto. I think they were primarily at the Brobeck Phleger &
24 Harrison law firm, but there may have been some
25 conversations at Wilson Sonsini as well.

1 Q Who do you recall participating in those discussions?

2 A Oh, there was quite a cast of characters. For SCO, I
3 remember Steve Sabbath of course, as well as Jim Wilt and
4 Jeff Seabrook, Doug Michels.

5 Q Do you recall who you participated in discussions with
6 on the Novell side?

7 A I remember discussions with Burt Levine, John
8 Maciaszek, Ed Chatlos. I'm sure there were others. Their
9 names just don't come to mind.

10 Q Do you recall if Novell had outside counsel in
11 connection with this transaction?

12 A Yes. The Wilson Sonsini law firm represented Novell.

13 Q Do you recall participating in any discussions with
14 those attorneys?

15 A I do.

16 Q Did you participate in discussions in which Steve
17 Sabbath, the general counsel at Santa Cruz, was not present?

18 A I remember a couple of conversations where Steve was
19 not present.

20 Q Did you develop an understanding during these
21 discussions as to what assets Santa Cruz was acquiring?

22 A Yes.

23 Q To your understand, what were those assets?

24 A Apple was purchasing all of the UNIX --

25 Q Did you say Apple?

1 A I'm sorry. Different life.

2 SCO was purchasing all of the UNIX and UnixWare assets.

3 Q Was it your intent, as a representative of Santa Cruz,
4 to acquire the copyrights of that business?

5 A Yes.

6 Q Was it your understanding and belief after the
7 transaction was completed that Santa Cruz had acquired those
8 copyrights?

9 A Yes.

10 Q In any discussion in which you participated before the
11 agreement was signed, did you ever hear any discussion about
12 the prospect of Novell retaining any UNIX or UnixWare
13 copyrights?

14 A No.

15 Q Before the agreement was signed, did anyone from Novell
16 ever say to you that Novell would retain any UNIX or
17 UnixWare copyrights?

18 A No.

19 Q Would you have remembered that if they would have said
20 something like that?

21 A Yes, that would have been a significant deal point and
22 I would have recalled that.

23 Q Before the agreement was signed, did anyone from Santa
24 Cruz ever say to you that Novell would retain the UNIX or
25 UnixWare copyrights?

1 A No.

2 Q Would you have remembered that if they would have said
3 something like that?

4 A Yes.

5 Q Did you have any understanding during these discussions
6 as to whether Novell would retain its intellectual property
7 in NetWare?

8 A Yes. That was very important to Novell to retain that
9 business.

10 Q Did you have an understanding as to why?

11 A Well, that was their crown jewels, that was their
12 going-forward business. I don't know much more about
13 NetWare or even what it really does.

14 Q Do you recall any discussion about a license back to
15 Novell?

16 A Yes.

17 Q Just, in general, what can you recall about those
18 discussions?

19 A I know that Novell wanted to retain rights to the UNIX
20 and UnixWare technology for use in NetWare and for its own
21 corporate use, so SCO licensed back certain rights -- use
22 rights to Novell.

23 Q Do you know if there was a meeting with the Santa Cruz
24 board of directors in which the approval of this transaction
25 was discussed?

1 A Yes.

2 Q Did you attend that meeting?

3 A I did.

4 Q Did Mr. Sabbath attend the meeting?

5 A Yes, he did.

6 MR. NORMAND: Mr. Calvin, can you put SCO Exhibit
7 29 on the screen.

8 BY MR. NORMAND:

9 Q Is the document on the screen in front of you,
10 Ms. Madsen?

11 A Yes, it is.

12 Q Do you recognize this document?

13 A Yes, I remember this.

14 Q Do you see your name toward the bottom half of the
15 document?

16 A Yes.

17 Q I think you said you do recall participating in this
18 meeting?

19 A I have a general recollection, yes.

20 MR. NORMAND: Your Honor, I move SCO Exhibit 29
21 into evidence.

22 THE COURT: Any objection?

23 MR. JACOBS: No objection, Your Honor.

24 THE COURT: It will be admitted.

25 (Plaintiff's Exhibit 29 was received into

1 evidence.)

2 MR. NORMAND: Mr. Calvin, would you show the jury
3 the top of the document so they see what it is.

4 BY MR. NORMAND:

5 Q So, Ms. Madsen, these are the minutes of the meeting of
6 the board of directors on September 19th, 1995. This is the
7 meeting you at least have a general recollection of
8 attending?

9 A Yes.

10 Q And if we look at the names identified who are part of
11 the quorum of the board of directors, who was Doug Michels?

12 A Doug Michels, I believe he was -- his title was
13 executive vice president.

14 Q Who was Alok Mohan?

15 A Alok was the CEO.

16 Q And do you see the next paragraph identifying who was
17 also present at the meeting?

18 A Yes.

19 MR. NORMAND: Mr. Calvin, if we could bring up
20 that paragraph also present.

21 BY MR. NORMAND:

22 Q Do you see the reference in the second line to the
23 Brobeck firm, Ms. Madsen?

24 A Yes.

25 Q Who was the Brobeck firm?

1 A Brobeck represented SCO in the acquisition of the UNIX
2 and UnixWare technology from Novell.

3 Q Do you see the next line down towards the right side
4 there is a reference to Jim Wilt?

5 A Yes.

6 Q Who was Jim Wilt?

7 A He was the vice president of business development and
8 one of the lead negotiators for SCO.

9 Q In the next line down there is a reference to Steve
10 Sabbath. Who was Steve Sabbath again?

11 A Steve Sabbath was the vice president of law and
12 corporate affairs, and my supervisor.

13 MR. NORMAND: Mr. Calvin, would you take that
14 away, and let's bring out the bottom, beginning with project
15 sleigh ride.

16 BY MR. NORMAND:

17 Q Ms. Madsen, do you see the reference to project sleigh
18 ride?

19 A Uh-huh. (Affirmative)

20 Q What was project sleigh ride?

21 A Project sleigh ride was the code name. We always had
22 code names for various projects. So it was the code name
23 for the acquisition.

24 Q I see reference to Jeff Seabrook presented a detailed
25 overview of project sleigh ride?

1 A Yes.

2 Q Who was Jeff Seabrook?

3 A Jeff Seabrook was vice president of strategic planning
4 along with Jim Wilt, one of the lead negotiators for SCO.

5 Q And to your knowledge, in this discussion to the board,
6 did Mr. Seabrook say that Novell had retained any UNIX or
7 UnixWare copyrights?

8 A No.

9 MR. JACOBS: Objection, Your Honor, hearsay.

10 MR. NORMAND: It's not going in for the truth of
11 the matter. It's going in for her recollection and opinion.

12 THE COURT: The Court will overrule the objection.

13 Ms. Madsen, if, however, during the course of your
14 examination here while or after a question has been raised,
15 if Mr. Jacobs, who just stood up, stands up again, I want
16 you to not answer the question until he's had a chance to
17 address the Court.

18 THE WITNESS: Okay.

19 BY MR. NORMAND:

20 Q Ms. Madsen, do you recall any discussion at all in the
21 meeting about the prospect of Novell retaining UNIX or
22 UnixWare copyrights?

23 A No.

24 Q During this board meeting, what did you understand that
25 Santa Cruz was acquiring under the asset purchase agreement?

1 A I understood that SCO was acquiring all right, title
2 and interest in UNIX and UnixWare.

3 Q To your understanding, at the time of this meeting, did
4 that include UNIX and UnixWare copyrights?

5 A Yes.

6 Q Ms. Madsen, did you participate in any negotiation
7 meetings in which representatives discussed the issue of
8 patents?

9 A Yes.

10 Q And did you develop an understanding from those
11 meetings as to whether Novell would sell any patents under
12 the asset purchase agreement?

13 A No. Novell was very clear that it would not be selling
14 any patents.

15 Q And did you have an understanding at that time as to
16 whether patents were an important part of the UNIX or
17 UnixWare business?

18 A They weren't important to SCO.

19 Q Why was that, to your recollection?

20 A Well, because there was no patent covering all of UNIX.
21 Patent covers a specific routine. So it was really the
22 copyrights that were fundamental to the business, not the
23 patents. I'm not even sure that Novell had acquired all of
24 the patents from AT&T. So it just wasn't -- it wasn't that
25 important to SCO, but I do recall Novell being very specific

1 that it would not be transferring any patents that were
2 associated with the technology.

3 Q Do you recall any discussion of copyrights in
4 connection with the discussion of patents?

5 A No.

6 Q Is that something that you would have remembered?

7 A Yes.

8 Q Was there a transition period after the execution of
9 the asset purchase agreement in which Novell transferred the
10 UNIX and UnixWare business to Santa Cruz?

11 A Yes.

12 Q Did you participate in that process?

13 A I did. There was a transition team set up and I was a
14 member of that team.

15 MR. NORMAND: Mr. Calvin, can you show the witness
16 N-5. If you could show the witness two or three pages in.
17 One more.

18 BY MR. NORMAND:

19 Q Ms. Madsen, do you recognize this document?

20 MR. JACOBS: Your Honor, are we going to receive
21 copies of exhibits?

22 THE WITNESS: Yes. I remember this closing
23 checklist.

24 BY MR. NORMAND:

25 Q Do you recall receiving it?

1 A I have a general recollection.

2 MR. NORMAND: Let's go back two pages, Mr. Calvin.

3 BY MR. NORMAND:

4 Q Ms. Madsen, do you see your name on the fax cover
5 sheet?

6 A Yes.

7 MR. NORMAND: Your Honor, this is a document on
8 Novell's list of exhibits, I would move into evidence.

9 MR. JACOBS: No objection, Your Honor.

10 THE COURT: N-5 will be admitted.

11 (Defendant's Exhibit N-5 was received into
12 evidence.)

13 MR. NORMAND: Let's go to the first page, Mr.
14 Calvin. Let's show the jury the top half. I'm sorry, the
15 very first page of the document.

16 BY MR. NORMAND:

17 Q So, Ms. Madsen, this is a fax cover sheet from Wilson
18 Sonsini. Who was Wilson Sonsini again?

19 A Wilson Sonsini represented Novell in the asset purchase
20 agreement. However, Wilson Sonsini was also SCO's corporate
21 attorneys.

22 Q Now what is the date of this document?

23 A November 22nd, 1995.

24 THE COURT: Just one second.

25 Mr. Jacobs.

1 MR. JACOBS: Could we have a quick side-bar?

2 THE COURT: Do you want this on the record?

3 MR. JACOBS: Yes, please.

4 (Side-bar conference held outside the hearing of
5 the jury)

6 MR. JACOBS: We had a specific discussion about
7 this in our counsel meeting yesterday. We have to be
8 concerned there is an implication of an improper conflict
9 here. In fact, as I believe SCO will readily agree, there
10 was a waiver on all sides -- a written waiver by SCO there
11 is an ethical wall internally at Wilson Sonsini to deal with
12 the Novell representation versus the Santa Cruz
13 representation. I'm very concerned there is going to be an
14 implication of something improper in her answer.

15 MR. NORMAND: This is not what I think she was
16 implying. Certainly not what we intended to show. Part of
17 the discussion at trial was you read the APA, it's
18 self-evident that copyrights are not included. Whether
19 there was an ethical wall, I think it's relevant to show
20 that Wilson Sonsini subsequently participated with Santa
21 Cruz in creating documents showing the copyrights
22 transferred. So whether the same attorneys were involved or
23 not, I think it's of probative value.

24 THE COURT: I would agree, but I do believe that
25 the jury will have heard that and immediately have the same

1 question that Mr. Jacobs just addressed. I don't know
2 whether or not you want to deal with it with some voir dire
3 right now or whether or not you, Mr. Normand, want to do
4 what you must to make it clear that this was not some
5 oversight by the law firm, that it was a clear addressing of
6 the issues or something. I think we need to do something.

7 MR. NORMAND: Trying to do that without leading
8 will be a challenge. I can try. Why don't we try for a few
9 minutes. I really don't think the point --

10 THE COURT: I'm not worried about if it was her
11 point, I'm worried about that the jury --

12 MR. NORMAND: My point, Your Honor, because it
13 wasn't her point, I don't think it will take that long to
14 clarify it.

15 MR. JACOBS: I believe the appropriate thing is
16 for Mr. Normand to stand up and say the following words:
17 Ladies and gentlemen of the jury, Ms. Madsen alluded to
18 Novell's role in representing -- I'm sorry, Wilson Sonsini's
19 role in representing Novell in the transaction and to the
20 fact that it was also Santa Cruz's outside counsel. On
21 behalf of SCO, we wish to stipulate that Wilson Sonsini had
22 permission from both companies, a written waiver, so both
23 companies understood the role it would play in this
24 particular transaction.

25 MR. NORMAND: Whether you prefer that or whether

1 you want me to do that through the witness, Your Honor.

2 THE COURT: I think it would be more efficient if
3 you would do it. All right.

4 MR. NORMAND: I'll make sure I get those words
5 out.

6 (Side-bar conference concluded)

7 MR. NORMAND: Ladies and gentlemen of the jury,
8 just to clarify, you may have heard Ms. Madsen answer a
9 question regarding the involvement of the Wilson Sonsini
10 firm in both negotiating and participating in negotiations
11 of the APA on behalf of Novell and then also representing
12 Santa Cruz in connection with its corporate work. What we
13 want the jury to be clear about is that there is no
14 suggestion from the witness that Wilson Sonsini was acting
15 inappropriately in any respect in undertaking both of those
16 representations. Is that clear?

17 THE COURT: There was, in fact, apparently -- it
18 had been addressed by the parties, there was a written
19 acknowledgment, and procedures were put in place to make
20 certain that the same attorneys were not representing both
21 sides, and there was a clear firewall between those who were
22 representing Novell and those who were representing Santa
23 Cruz.

24 Mr. Jacobs, does that address everything do you
25 think?

1 MR. JACOBS: Yes, Your Honor. Thank you very
2 much.

3 THE COURT: Thank you, Mr. Normand.

4 MR. NORMAND: Thank you, Your Honor.

5 BY MR. NORMAND:

6 Q Ms. Madsen, we were talking about the transition
7 process after the signing of the APA in September 1995. Do
8 you recall that?

9 A Yes.

10 Q I think you were starting to say you did participate in
11 that transition process; is that right?

12 A Yes.

13 Q And do you recall --

14 MR. NORMAND: Mr. Calvin, can you pull up pages 5
15 and 6 of this document.

16 BY MR. NORMAND:

17 Q Do you generally recall what aspects of the transition
18 process you were involved in?

19 A Is it possible to make this a little larger?

20 Q It is.

21 A Thank you.

22 So specifically relating to the items on this
23 checklist?

24 Q Well, we can do it that way, or if you generally
25 recall, we can do it that way as well.

1 A Okay. I remember some general involvement in the HSR
2 filing.

3 Q What's an HSR filing the first?

4 A The Hart-Scott-Rodino filings. Those are filings to
5 make sure that -- you have to get Hart-Scott-Rodino approval
6 to make sure there are no violations of antitrust laws.

7 I was involved in finalizing the disclosure schedules,
8 amending the asset purchase agreement. I may have reviewed
9 the NetWare license. I don't have any specific
10 recollection.

11 Q Were you involved, as part of this transition process,
12 in registering the shares of Santa Cruz stock in Novell's
13 name?

14 A Yes, I was.

15 MR. NORMAND: Mr. Calvin, if we could bring up
16 Exhibit C-6.

17 BY MR. NORMAND:

18 Q Do you recognize this document?

19 A Yes.

20 MR. NORMAND: Mr. Calvin, could you focus in on
21 this text of the letter for the witness.

22 BY MR. NORMAND:

23 Q Do you recall making the request referenced in the
24 first line of this document?

25 A Yes.

1 MR. NORMAND: Your Honor, I move Exhibit C-6 into
2 evidence.

3 MR. JACOBS: No objection, Your Honor.

4 THE COURT: It will be admitted.

5 (Defendant's Exhibit C-6 was admitted into
6 evidence.)

7 BY MR. NORMAND:

8 Q What is the date of this document, Ms. Madsen?

9 A December 14th, 1995.

10 MR. NORMAND: Mr. Calvin, bring out the text of
11 the letter.

12 Let's see the address as well, Mr. Calvin.

13 BY MR. NORMAND:

14 Q So this letter says in the first sentence, Ms. Madsen,
15 at the request of Kim Madsen, enclosed please find original
16 stock certificate FBU 17088 representing 6,127,500 shares of
17 common stock of The Santa Cruz Operation, Inc. registered in
18 the name of Novell, Inc. Do you see that language?

19 A Yes.

20 Q Did you direct that request to Ms. Zenit of the Wilson
21 Sonsini law firm?

22 A Yes.

23 Q And why did you do that?

24 A The shares were a part -- were one component of the
25 consideration under the asset purchase agreement.

1 Q To your understanding what were the other components of
2 this payment or compensation?

3 A I don't remember all of the specific details, but my
4 general recollection is in addition to the six million
5 shares -- 6,127,500 shares, that Novell was also retaining a
6 portion of the binary royalties -- SVRX binary royalties,
7 and that there were certain sales thresholds. And if those
8 thresholds were met, additional monies would be paid to
9 Novell.

10 Q Do you ever recall hearing from anyone that Novell
11 would keep the UNIX and UnixWare copyrights because Santa
12 Cruz did not have enough cash?

13 A No. The binary royalties were the mechanism that we
14 used to provide additional consideration.

15 Q Ms. Madsen, in the course of your responsibilities at
16 Santa Cruz, did you work on annual reports?

17 A Yes.

18 Q In general, what is an annual report?

19 A Well, it's just that. It's a report that's prepared
20 annually. It is filed with the SEC. And it is sent out to
21 the shareholders or it's incorporated by reference in the
22 proxy statement that is sent out to all of the shareholders.

23 MR. NORMAND: Mr. Calvin, could we show the
24 witness SCO Exhibit 30.

25 //

1 BY MR. NORMAND:

2 Q It's not the best resolution, Ms. Madsen, but do you
3 recognize this document?

4 MR. NORMAND: Why don't we page a couple pages in,
5 Mr. Calvin.

6 THE WITNESS: Yes.

7 BY MR. NORMAND:

8 Q Did you have any involvement in reviewing this document
9 before it was made public?

10 A Yes. I would have reviewed, you know, commented,
11 edited the document, or at least portions of it.

12 MR. NORMAND: Your Honor, I move SCO Exhibit 30
13 into evidence.

14 MR. JACOBS: No objection, Your Honor.

15 THE COURT: It will be admitted.

16 (Plaintiff's Exhibit 30 was received into
17 evidence.)

18 BY MR. NORMAND:

19 Q So the jury is now looking at the document, Ms. Madsen.
20 At the top, do you see the language, the Santa Cruz
21 Operation, Inc. 1995 annual report? Do you see that
22 language?

23 A Yes.

24 Q I wanted to direct your attention to page 3 of the
25 document.

1 MR. NORMAND: Let's bring out that middle
2 paragraph in the middle column, Mr. Calvin.

3 BY MR. NORMAND:

4 Q Do you see the language, looking into the future, SCO
5 will play a more central role in the UNIX market. In
6 addition to our well established packaged product market for
7 UNIX Business Critical Servers, the acquisition of the UNIX
8 technologies and UnixWare business places us in a much more
9 strategic position to license technology to the computer
10 manufacturers and system providers. Do you see that
11 language?

12 A Yes.

13 Q How does that reference to the acquisition of the UNIX
14 technologies and UnixWare business compare to your
15 understanding of the assets that Santa Cruz had acquired
16 under the asset purchase agreement?

17 THE COURT: Mr. Jacobs.

18 MR. JACOBS: Lacks foundation. It doesn't
19 establish any relationship between this witness and this
20 letter.

21 THE COURT: I will sustain the objection.

22 BY MR. NORMAND:

23 Q The question, Ms. Madsen, is how does this language
24 compare to your understanding of the assets that had been
25 acquired?

1 THE WITNESS: Can I answer?

2 THE COURT: You may. Go ahead.

3 THE WITNESS: This reflects the transaction in the
4 asset purchase agreement. This language reflects that.

5 BY MR. NORMAND:

6 Q Did you draft this language? Do you recall drafting
7 that language?

8 A No, I don't recall drafting this language.

9 Q Did there come a time in 1996 when you learned of a
10 dispute between Novell and Santa Cruz concerning the scope
11 of Novell's rights under the asset purchase agreement?

12 A Yes.

13 Q In general, to the best of your recollection, what was
14 the dispute?

15 A The dispute involved some expanded UNIX rights that
16 Novell had offered to IBM that were contrary to the rights
17 that SCO had acquired under the asset purchase agreement.

18 Q Do you recall any discussions with Novell about that
19 issue?

20 A Yes.

21 Q What, in general, was your recollection of those
22 discussions? Who did you speak with?

23 A I remember speaking with Larry Bufford of Novell and
24 Allison -- I think her last name was Lisbon. She was an
25 attorney at Novell. And we subsequently entered into an

1 amendment to the asset purchase agreement to clarify SCO's
2 rights.

3 Q Now to your recollection, at any time during that
4 dispute as a defense to what it had done with respect to
5 IBM, did Novell ever assert that it owned the UNIX or
6 UnixWare copyrights?

7 A No, it did not.

8 Q Is that something you would remember?

9 A It's something that I would remember, yes.

10 Q Did you remember any discussions with Novell about UNIX
11 or UnixWare copyrights at all during the course of this
12 dispute?

13 A No.

14 Q Do you recall the execution of Amendment No. 2 to the
15 asset purchase agreement?

16 A I have some general memory.

17 Q Did you draft the language of Amendment No. 2?

18 A I wasn't the author, but I would have reviewed and
19 commented on it.

20 Q Do you have any specific recollection of any specific
21 discussions with Mr. Sabbath about Amendment No. 2?

22 A No specific recollections, just general recollections.

23 Q Did you have a view, as of 1996, as to what copyrights
24 were required for Santa Cruz to operate its UNIX and
25 UnixWare business?

1 A We would have acquired all the copyrights.

2 Q Now how long did you remain at Santa Cruz after
3 Amendment No. 2 had been signed?

4 A Well, the history of SCO is a little bit confusing
5 because SCO sold -- subsequently sold the UNIX business to
6 Caldera. Caldera then assumed the name SCO, but the legal
7 entity remained the same and changed its name to Tarantella.
8 So I remained with Tarantella. So, you know, SCO -- I
9 stayed with SCO until it sold the technology in 2001 -- I
10 can't remember the specific date, and then I stayed with
11 Tarantella until 2004.

12 Q And during the time when you were at Santa Cruz, when
13 it was called Santa Cruz, did you have occasion to work with
14 any form 10-Ks?

15 A Yes. I would have reviewed and edited those.

16 Q To the best your recollection, what is a form 10-K?

17 A A form 10-K is an annual financial filing with the SEC.

18 Q What is SEC?

19 A The Securities and Exchange Commission.

20 MR. NORMAND: And, Mr. Calvin, could you put SCO
21 Exhibit 521 up for the witness.

22 BY MR. NORMAND:

23 Q It may be a little hard to see, but do you recall
24 seeing this document before, Ms. Madsen?

25 A Yes, I'm sure that I did.

1 Q Is this Santa Cruz's form 10-K for the fiscal year
2 ended September 30th, 1996?

3 MR. NORMAND: I think that's reflected on the next
4 page, Mr. Calvin.

5 THE WITNESS: Yes. Yes.

6 BY MR. NORMAND:

7 Q Now would you have reviewed this document before it was
8 filed with the Securities and Exchange Commission?

9 A Yes, I would have.

10 MR. NORMAND: Your Honor, I move SCO Exhibit 521
11 into evidence.

12 MR. JACOBS: Your Honor, we don't object as a
13 reflection of Santa Cruz's state of mind. We do object on
14 hearsay grounds for the truth of the matter asserted.

15 THE COURT: All right. The Court will allow the
16 document to be introduced, but I think on cross-examination
17 you perhaps need to explore that a little bit, Mr. Jacobs.

18 (Plaintiff's Exhibit 521 was received into
19 evidence.)

20 MR. NORMAND: So, Mr. Calvin, let's show the jury
21 the top half of the document and see what it is.

22 BY MR. NORMAND:

23 Q Do you see the reference at the top, Ms. Madsen, for
24 the fiscal year ending September 30th, 1996?

25 A Yes.

1 Q What does that mean?

2 A Well, we would report on the year ending, we would
3 report on our financials for the year ending in
4 September 30th, 1996.

5 MR. NORMAND: Mr. Calvin, on page 2, I think it's
6 toward the bottom -- next page -- previous page, Mr. Calvin,
7 at the bottom -- very bottom.

8 BY MR. NORMAND:

9 Q Do you see the bottom line, quote, as of December 16th,
10 1996?

11 A Yes.

12 Q So was this document filed after December 16th, 1996?

13 A Yes.

14 Q Now let's go to page 57.

15 A Can I clarify something?

16 Q Of course.

17 A While the financial report concerns the time period
18 ending September 30th, 1996, my recollection of the SEC
19 requirements is that if there is something material that
20 occurs subsequent to that, you would include that in the
21 financial filing as well. So that's why you would see a
22 date that is subsequent to the time period of the filing.

23 Q Thank you.

24 We're going to show you and the jury, Ms. Madsen, page
25 57. I think it's the bottom paragraph. This is the

1 language saying, quote, UNIX business in December 1995, the
2 company -- who's the company being referred to here?

3 A SCO, or the Santa Cruz Operation.

4 Q The company acquired certain assets related to the UNIX
5 business including the core intellectual property from
6 Novell, end quote. Do you see that language?

7 A Yes.

8 Q How does that statement compare with your
9 understanding, as of this time, as to the intellectual
10 property that Santa Cruz had acquired from Novell under the
11 agreement?

12 A That is my understanding. That's what the asset
13 purchase agreement was to accomplish.

14 Q To your understanding, did the core intellectual
15 property of the UNIX business include the UNIX and UnixWare
16 copyrights?

17 A Yes.

18 Q Now did an outside law firm represent Santa Cruz in
19 connection with this transaction?

20 A In connection with the asset purchase agreement or in
21 connection with this filing?

22 Q With this filing. I'm sorry.

23 A Yes. Wilson Sonsini would have represented us and
24 assisted in the preparation of this filing.

25 Q Now, to the best of your understanding, was it

1 appropriate for Wilson Sonsini to be representing Santa Cruz
2 at that time?

3 A Yes.

4 Q After October 1996 when Amendment No. 2 was signed, did
5 any dispute arise between Santa Cruz and Microsoft?

6 A Yes.

7 Q And can you recall the general nature of that dispute?
8 Did it concern royalties?

9 A Yes, it did. Microsoft was imposing a royalty on SCO
10 and a compatibility requirement that all versions of UNIX
11 remain compatible with some ancient version of -- I can't
12 remember the technology specifically, but there was this
13 ongoing compatibility requirement. And in order to maintain
14 that compatibility, we also had to always remit a royalty to
15 Microsoft.

16 Q Were you involved in any discussions about what actions
17 Santa Cruz would take with respect to Microsoft?

18 A Yes, I was.

19 MR. NORMAND: Now, Mr. Calvin, can we bring up SCO
20 Exhibit 127.

21 BY MR. NORMAND:

22 Q Ms. Madsen, do you recognize this document?

23 A Yes, I do.

24 Q In general terms, what is this document?

25 A This was an application with the European Union's

1 anticompetition division.

2 Q And did you have occasion to review this petition in
3 the course of your job responsibilities?

4 A I did.

5 MR. NORMAND: Your Honor, I would move SCO Exhibit
6 127 into evidence.

7 MR. JACOBS: Your Honor, objection on hearsay
8 grounds. Again, if they are offering this to prove that
9 something occurred during the asset purchase agreement as a
10 matter of fact, then it's hearsay. If they want to have
11 another document in to show Santa Cruz's state of mind, that
12 would be different.

13 MR. NORMAND: Your Honor, of course the document
14 goes to the parties' course of performance which, under Mr.
15 Jacobs' definition, would all be stricken because it's
16 hearsay. It's course of performance.

17 MR. JACOBS: It is not course of performance, Your
18 Honor. It's a unilateral statement made by Santa Cruz to a
19 regulatory body in Europe with no showing that Novell had
20 anything to do with it whatsoever.

21 MR. NORMAND: There is no requirement for course
22 of performance that the parties' conduct be bilateral, Your
23 Honor.

24 THE COURT: The Court will overrule the objection
25 and allow the admission of the document.

1 (Plaintiff's Exhibit 127 was received into
2 evidence.)

3 BY MR. NORMAND:

4 Q Now I think the jury can see the document, Ms. Madsen,
5 so we'll go through briefly what it is. It says in the
6 front, application for the initiation of proceedings
7 pursuant to Article 3 of Regulation 17/62 to establish the
8 existence of infringements Articles 85 and 86 of the Treaty
9 of Rome. Sounds important.

10 What was your recollection about where this was filed?

11 A This was filed with the anticompetition division of the
12 European union.

13 MR. NORMAND: Mr. Calvin, show the jury the middle
14 part of the document on the front.

15 BY MR. NORMAND:

16 Q When was this document filed?

17 A January 31st, 1997.

18 Q So how long after Amendment No. 2 is this being filed?

19 A I think it was just a couple months.

20 Q Let's go to Section 3.4. First sentence of section
21 3.4, it says, as a result of the chain of transactions
22 described below, SCO has now acquired ownership of the UNIX
23 program itself so that it no longer requires a license from
24 anyone to produce UNIX products. Do you see that language?

25 A That's right.

1 Q Is that language consistent with your understanding of
2 what SCO had acquired under the asset purchase agreement?

3 A Yes, it is.

4 Q Let's look at section 4.9. The next sentence of
5 section 4.9 says, quote, because it has acquired ownership
6 of the copyrights to UNIX from AT&T, SCO should be free to
7 develop new UNIX based works without the necessity of a
8 license from anybody. Do you see that language?

9 A Yes.

10 Q How does that assertion compare with your understanding
11 of what Santa Cruz had acquired under the asset purchase
12 agreement?

13 A That matches my understanding.

14 MR. NORMAND: Let's go to the top of page 12, Mr.
15 Calvin.

16 BY MR. NORMAND:

17 Q There is a reference in the top paragraph in the second
18 sentence, quote, whereas Microsoft is free to innovate and
19 change its Windows product line as it sees fit and price
20 them as it chooses, the copyright owner of UNIX is required
21 to include unnecessary features for a common product that no
22 longer exists and bear a royalty charge for the required
23 inclusion of such features.

24 The reference to the copyrights owner of UNIX, who is
25 that referring to?

1 A That's referring to SCO.

2 MR. NORMAND: Now, Mr. Calvin, let's look at the
3 last page of this document. We can bring out all of that
4 text.

5 BY MR. NORMAND:

6 Q You see the reference on the bottom left, Ms. Madsen,
7 to Brobeck Phleger & Harrison?

8 A Yes.

9 Q Is that the same firm that represented Santa Cruz in
10 connection with the asset purchase agreement?

11 A That's correct.

12 Q Let's go back to section 4.9. We had look before,
13 Ms. Madsen, at the statement, because it has acquired
14 ownership of the copyrights to UNIX from AT&T. Do you see
15 that language?

16 A Yes.

17 Q Is this statement consistent with your understanding of
18 Santa Cruz's ownership rights just after the execution of
19 Amendment No. 2?

20 A Yes, it is.

21 Q Do you know if Santa Cruz and Microsoft came to enter
22 into a settlement concerning the dispute reflected in this
23 petition?

24 A Yes, we did.

25 MR. NORMAND: Mr. Calvin, can we bring up SCO

1 Exhibit 199.

2 BY MR. NORMAND:

3 Q Ms. Madsen, do you recognize this document entitled
4 settlement agreement?

5 A Yes, I do.

6 Q Are you familiar with the settlement referenced in this
7 agreement, when it occurred?

8 A Yes.

9 Q Did you have occasion to review this settlement
10 agreement in the course of your job responsibilities?

11 A Yes, I did.

12 MR. NORMAND: Your Honor, I move SCO Exhibit 199
13 into evidence.

14 MR. JACOBS: Your Honor, same objection. This is
15 unilateral statements by SCO out of court about something
16 they claim there is probative value here, but this is not
17 showing Novell had anything to do with this.

18 MR. NORMAND: Your Honor, it goes to the same
19 argument I made before, and really the same as the document
20 we just went through and that was admitted into evidence.

21 THE COURT: The Court will overrule the objection
22 and admit Exhibit 199.

23 (Plaintiff's Exhibit 199 was received into
24 evidence.)

25 //

1 BY MR. NORMAND:

2 Q Ms. Madsen, the jury can see the document.

3 MR. NORMAND: Mr. Calvin, let's bring out the
4 title in the first paragraph of the document. Let's start
5 at the very stop, Mr. Calvin, so they see what this is.

6 BY MR. NORMAND:

7 Q This document is titled Settlement Agreement, and it is
8 made on what date, Ms. Madsen?

9 A May 29th.

10 Q Which year?

11 A 1998.

12 MR. NORMAND: Let bring that down, Mr. Calvin, and
13 look at the recitals. Down to the paragraph B.

14 BY MR. NORMAND:

15 Q Now do you see, Ms. Madsen, among the recitals in
16 paragraph B stating, quote, SCO has acquired AT&T's
17 ownership of the copyright in the UNIX System V operating
18 system program and is the successor in interest of AT&T and
19 the Centaur agreement, as subsequently amended?

20 A Yes, I do.

21 Q How does this language compare with your understanding
22 at the time as to what assets Santa Cruz had acquired under
23 the asset purchase agreement?

24 A It matches my understanding.

25 MR. NORMAND: Can we look at the last page of the

1 document, Mr. Calvin. Let's bring out the signature blocks.

2 BY MR. NORMAND:

3 Q Do you see the signature block for the Santa Cruz
4 Operation, Inc., Ms. Madsen?

5 A Yes.

6 Q Whose signature is that?

7 A Steve Sabbath's.

8 Q What was Mr. Sabbath's position as of the asset
9 purchase agreement?

10 A He was the senior vice president of law and corporate
11 affairs.

12 Q Did you ever have any discussion with Mr. Sabbath at
13 any time about the prospect that Novell had retained any
14 UNIX or UnixWare copyrights?

15 A No, I did not.

16 Q Did Mr. Sabbath ever say to you that Santa Cruz had
17 acquired only a license to the UNIX or UnixWare copyrights?

18 A No.

19 Q Now, in connection with Amendment No. 2, did Mr.
20 Sabbath ever say to you that Santa Cruz had agreed to a
21 process whereby Santa Cruz could ask Novell to transfer UNIX
22 or UnixWare copyrights?

23 A No.

24 Q In 1995, was it your understanding and intent that
25 Santa Cruz had acquired the UNIX and UnixWare copyrights?

1 A Yes, it was.

2 Q Did your understanding or intent ever change?

3 A No.

4 MR. NORMAND: No further questions, Your Honor.

5 THE COURT: Mr. Jacobs.

6 CROSS-EXAMINATION

7 BY MR. JACOBS:

8 Q The thickness is not representative of how long.

9 A Thank you.

10 Q But I do want you to have your deposition transcript in
11 case we have to refer to it.

12 A Okay. Thank you.

13 Q Ms. Madsen, good morning. I'm Michael Jacobs. I'm one
14 of the counsel for Novell in this action.

15 A Good morning, Mr. Jacobs.

16 Q So let's start at the beginning. You joined Santa Cruz
17 in the early '90s?

18 A Yes. I think it was 1990.

19 Q At that time Santa Cruz was already in the UNIX
20 business, wasn't it?

21 A It was.

22 Q It had a product called Open Server?

23 A I don't think Open Server was available when I first
24 started in 1990, but it did develop Open Server, yes.

25 Q There was a UNIX product available in 1990?

1 A Yes.

2 Q Santa Cruz developed that product as a flavor of UNIX,
3 correct?

4 A Yes.

5 Q It did so under a license originally from AT&T?

6 A Yes. I'm sorry.

7 Q Go ahead.

8 A And it also had a license from Microsoft.

9 Q The license from AT&T transferred to Novell when Novell
10 bought the UNIX subsidiary of AT&T, correct?

11 A I believe so.

12 Q Isn't that kind of key to your understanding of the
13 whole chain of transactions here, Ms. Madsen, that Novell
14 acquired the UNIX business originally from AT&T?

15 A Yes.

16 Q So at that point Santa Cruz was a licensee of Novell
17 under the original AT&T, Santa Cruz license, correct?

18 A Yes.

19 Q Santa Cruz was developing its flavor of UNIX under a
20 license from Novell?

21 A SCO had a license with Novell. It also had a license
22 from Microsoft. It developed its flavor of UNIX pursuant to
23 those agreements.

24 Q Santa Cruz had developed a pretty substantial business
25 around its flavor of UNIX at that time, correct?

1 A Yes.

2 Q And it had -- I think we've been told in court that

3 Santa Cruz had about a thousand employees at that point?

4 A That sounds right.

5 Q Doing about \$200 million a year in business?

6 A 200 million was what it probably did at its peak.

7 Q It did so insofar as the UNIX product -- the UNIX

8 flavor was concerned, it did so under a license from

9 AT&T-Novell and a license from Microsoft, correct?

10 A Yes.

11 Q So at that point there was no issue that Santa Cruz

12 didn't own the copyrights to the underlying UNIX code, did

13 it?

14 A Not at that time, no.

15 Q Now you have said, as have many witnesses in this trial

16 so far, that you understood that Santa Cruz was acquiring

17 the whole UNIX business from Novell; is that right?

18 A Yes.

19 Q Let me ask you to take a look at an internal Santa Cruz

20 announcement from the time of the asset purchase agreement.

21 THE COURT: What is this identified as, Mr.

22 Jacobs?

23 MR. JACOBS: This is SCO Exhibit 163, Your Honor.

24 THE COURT: SCO 163.

25 //

1 BY MR. JACOBS:

2 Q Take a look at the first -- as much as you want, but
3 take a look at the first two pages of that, Ms. Madsen. I
4 don't know that you've seen it recently, so take a moment.
5 The highlighting, by the way, Ms. Madsen, comes from Santa
6 Cruz.

7 Ms. Madsen, were you at Santa Cruz on September 19th,
8 1995?

9 A Yes.

10 Q You were an employee of Santa Cruz?

11 A I was.

12 Q And you likely received this announcement by Alok
13 Mohan, the CEO of Santa Cruz, in connection with the
14 acquisition of the UNIX business from Novell, correct?

15 A I have no specific recollection of receiving this, but
16 I have no reason to doubt that I did.

17 MR. JACOBS: Your Honor, we move SCO Exhibit 163
18 into evidence.

19 THE COURT: Mr. Normand.

20 MR. NORMAND: No objection, Your Honor.

21 THE COURT: It will be admitted.

22 (Plaintiff's Exhibit 163 was received into
23 evidence.)

24 BY MR. JACOBS:

25 Q So just to review, Ms. Madsen, this is a message from

1 Alok Mohan, the CEO of Santa Cruz, correct?

2 A Yes.

3 Q It's dated September 19th, 1995, and the subject is the
4 acquisition of the UNIX business from Novell and
5 relationship announcement to all SCO employees. Do you see
6 that?

7 A Yes.

8 Q I would like to focus your attention on the portions
9 that SCO, when it marked the exhibits, has highlighted. So
10 let's look at the first box there, Ms. Madsen. Do you see
11 Mr. Mohan represents to the company, today, we announced the
12 purchase of the UNIX business from Novell? Do you see that?

13 A Yes.

14 Q So I'm just going to try my hand at a little drawing,
15 Ms. Madsen, to see if we can help the jury understand this.
16 If we imagine there is a UNIX business, that announcement
17 suggests that that whole business -- or that portion of the
18 announcement suggests that whole business is going to Santa
19 Cruz, right?

20 A Yes.

21 Q So we announced the purchase of the UNIX business from
22 Novell. That would be a pretty simple transaction. We
23 bought the whole UNIX business. Here's the pie. The
24 business goes from Novell to Santa Cruz, correct?

25 A Yes.

1 Q But, in fact, the transaction was more complicated than
2 that, wasn't it?

3 A It was.

4 Q So let's look at what Mr. Mohan says in the next
5 portion that SCO highlighted when they marked this exhibit,
6 and let's take it literally word by word, Ms. Madsen. SCO
7 has signed an agreement with Novell whereby we become the
8 owner of the UnixWare product line and UnixWare licensing to
9 OEMs. Do you see that?

10 A Yes.

11 Q Then he says, in addition, we will manage the licensing
12 business for UNIX prior to UnixWare 1.0 (SVRX). Do you see
13 that?

14 A I do.

15 Q Mr. Mohan, as he gets a little more detailed, is now
16 dividing up our pie, isn't he, Ms. Madsen? Isn't he really
17 dividing the pie between UNIX and UnixWare?

18 A No, I don't think that is a fair characterization.

19 Q Doesn't he say that we're acquiring the UnixWare
20 business, it looks like that portion of the business is
21 going to go to Santa Cruz under this announcement, but as to
22 UNIX, Mr. Mohan is saying, we get a little sliver of it
23 because we're going to manage the licensing business, but
24 we're not doing anymore than that as to UNIX? Doesn't it
25 say that, Ms. Madsen?

1 A No, that's not my understanding of what he's trying to
2 convey.

3 Q Ms. Madsen, isn't he going to say we're going to manage
4 the licensing business much as you might hire a manager for
5 a piece of property to rent out apartments to potential
6 tenants?

7 A No, that's not my understanding of the intent of what
8 he's trying to say here.

9 Q Isn't it true that Santa Cruz was, with respect to the
10 System V Release X UNIX product licenses from Novell, merely
11 Novell's agent in managing that property?

12 A No.

13 Q Let's take a look, please, Ms. Madsen, at Exhibit D-11.
14 This is a different Securities and Exchange Commission
15 filing, the form 10-K from right around the time -- I'm
16 sorry. This is from Caldera after the acquisition under its
17 agreement with Santa Cruz. So this is a form 10-K filed by
18 Caldera, the plaintiff in this action. Do you see that,
19 Ms. Madsen?

20 A Yes.

21 Q Take a look at page --

22 MR. JACOBS: Let's move this exhibit into
23 evidence, Your Honor.

24 THE COURT: Any objection?

25 MR. NORMAND: I am not sure we've layed a

1 foundation yet.

2 THE COURT: Let's have a few more questions.

3 BY MR. JACOBS:

4 Q You conveyed to Caldera, that is you, Mr. Sabbath and
5 others at Santa Cruz, your understanding of the relationship
6 between Santa Cruz and Novell under the asset purchase
7 agreement, didn't you, Ms. Madsen?

8 A I am not sure I understand the question.

9 Q Did you have discussions with Caldera, which became
10 SCO, the plaintiff in this action, did you have discussions
11 with them about your understanding of the asset purchase
12 agreement and how it worked?

13 A Yes.

14 Q So let's turn to page 42 of this form 10-K.

15 After all, Caldera wasn't there in 1995 and 1996,
16 correct?

17 A Correct.

18 Q So what they learned, they learned from the documents
19 and from what you and others at Santa Cruz told them about
20 the asset purchase agreement?

21 A We would have been one source of knowledge. I can't
22 say that we would have been their only source.

23 MR. JACOBS: Your Honor, this is a 10-K filed by
24 the plaintiff in this action. We would move it into
25 evidence as an admission of a party opponent, Exhibit D-11.

1 MR. NORMAND: I'm not sure a foundation has been
2 laid with this witness. She hasn't testified to any
3 personal involvement.

4 MR. JACOBS: I don't believe we need a foundation
5 for an admission by a party opponent, and I could ask her
6 whether this admission comports with her understanding, such
7 as Mr. Normand did with documents that Santa Cruz filed.

8 MR. NORMAND: Your Honor, if we have that
9 understanding going forward, that's okay, but we've been
10 trying to lay foundation with witnesses to date.

11 THE COURT: Were you still with -- after Caldera
12 obtained the assets from Santa Cruz, were you with -- did
13 you go with Caldera or did you stay with what remained of
14 Santa Cruz?

15 THE WITNESS: I stayed with what remained of Santa
16 Cruz.

17 THE COURT: Do you have any other witness that
18 will be able to have -- if you can tell me you will be able
19 to establish a foundation for this subsequently, I'm going
20 to allow you to go ahead. Will you be able to do that?

21 MR. JACOBS: We will, Your Honor. We'll establish
22 it.

23 THE COURT: I'll allow the admission of D-11 based
24 upon the representation that a better foundation will be
25 laid in the future.

1 (Defendant's Exhibit D-11 was received into
2 evidence.)

3 BY MR. JACOBS:

4 Q Do you see the discussion on page 42 of this exhibit,
5 Ms. Madsen, about the arrangement with Novell?

6 A Which section in particular are you referring to.

7 Q It's called restricted cash and royalty payable to
8 Novell, Inc.?

9 A Yes.

10 Q It says, the company has an arrangement with Novell in
11 which it acts as an administrative agent in the collection
12 of royalties for customers who deploy SVRX technology. Do
13 you see that?

14 A I do see that.

15 Q It says, under the agency agreement, the company
16 collects all customer payments and remits 95 percent of the
17 collected funds to Novell and retains five percent as an
18 administrative fee. Do you see that?

19 A I see those words.

20 Q And the agency agreement that's been referred to is the
21 asset purchase agreement, correct?

22 A I don't know. I am unaware of any agency relationship.

23 Q So when Mr. Mohan -- back to 163 -- said, in addition,
24 we will manage the licensing business for UNIX prior to
25 UnixWare 1.0 (SVRX), you didn't understand that that was

1 managing as Novell's agent?

2 A I didn't understand that there was an agency
3 relationship, no.

4 Q You understood that -- are you disputing the truth of
5 that sentence, Ms. Madsen?

6 A I'm not disputing it, I'm just saying I have no
7 knowledge --

8 THE COURT: Which sentence? The one in the
9 agreement or the one in the 10-K?

10 MR. JACOBS: Sorry, Your Honor.

11 BY MR. JACOBS:

12 Q In addition, we'll manage the licensing business for
13 UNIX prior to UnixWare 1.0. Are you disputing the truth of
14 that sentence, Ms. Madsen, the accuracy of it?

15 A I think you were saying two different things. You keep
16 talking about an agency relationship, of which I have no
17 specific knowledge, or general knowledge. With respect to
18 Mr. Mohan's statement, he sent out a memo to all employees,
19 so he is giving a general overview of the transaction for
20 that audience. This wasn't prepared for attorneys review or
21 executives review, but for all employees.

22 Q So it's a simplification?

23 A I wouldn't disagree with that.

24 Q As is the sentence we're purchasing the UNIX business
25 from Novell a simplification?

1 A Simplification, sure. It's one sentence that is
2 describing a complicated transaction.

3 Q A complicated transaction documented in a lot of
4 complicated transactional documents, isn't it, Ms. Madsen?

5 A I'm sorry. What was the question?

6 Q It's a complicated transaction documented in
7 complicated transactional documents, the asset purchase
8 agreement?

9 A It is a complicated transaction, yes, I'll agree with
10 that.

11 Q So I'm going to hand you SCO Exhibit 1, Ms. Madsen.
12 SCO Exhibit 1 is the asset purchase agreement with its two
13 amendments, Amendment No. 1 and Amendment No. 2. I'll hand
14 to you the last piece of paper in this stack.

15 A Okay.

16 Q I would like to -- if we go back to the pie chart a
17 little bit, I would like to start with your understanding of
18 the transaction as refreshed by the asset purchase
19 agreement, or whatever else you have in mind. Let's start
20 with the UNIX portion of this and the portion that was
21 simplified by Mr. Mohan in his sentence, in addition, we
22 will manage the licensing business for UNIX prior to
23 UnixWare?

24 A Uh-huh. (Affirmative)

25 Q So if you turn to section 4.16(b) in particular,

1 Ms. Madsen --

2 A I'm sorry. 4.16(b) of what?

3 Q Of SCO Exhibit 1, the asset purchase agreement?

4 A I'm sorry. I thought you had referred me to Amendment

5 No. 2.

6 Q No. I was just describing the package.

7 A Oh, okay.

8 Yes.

9 Q This is about SVRX licenses, correct?

10 A Yes.

11 Q And Mr. Mohan, in his message to the troops, refers to

12 managing the licensing business for UNIX prior to UnixWare

13 1.0 (SVRX)? Do you recall that?

14 A Yes.

15 Q It says, buyer shall not, and shall not have the

16 authority to, amend, modify or waive any right under or

17 assign any SVRX license without the prior written consent of

18 seller. Do you see that?

19 A I do.

20 Q Then it says, in addition, at seller's sole discretion

21 and direction, buyer shall amend, supplement, modify or

22 waive any rights under, or shall assign any rights to, any

23 SVRX license to the extent so directed in any manner or

24 respect by seller. Do you see that?

25 A I do.

1 Q And you've worked on a lot of transactional documents,
2 you had some experience in '95 and '96, you understand the
3 meaning of the words sole discretion and direction, correct?

4 A I understand what those words mean.

5 Q They mean that, here, seller, Novell, in its sole
6 discretion and direction, can tell buyer, SCO, what to do
7 under these licenses, doesn't it?

8 MR. NORMAND: Your Honor, this is calling for a
9 legal conclusion, which is not something I asked.

10 BY MR. JACOBS:

11 Q That was your understanding at the time, wasn't it, Ms.
12 Madsen, when your eyes passed over these words?

13 THE COURT: I will overrule the objection.

14 THE WITNESS: No, that was not my understanding of
15 the transaction. It was so that it could modify or amend
16 the royalties related to the SVRX license.

17 BY MR. JACOBS:

18 Q Do you see that word reflected here, Ms. Madsen?

19 A No.

20 Q So are you relying, for your understanding, on the
21 language of the asset purchase agreement or on something
22 else?

23 A I'm relying on the intent of the agreement.

24 Q The intent from where? Intent isn't in the air, is it,
25 Ms. Madsen? It comes from somewhere, doesn't it?

1 What are you basing that on? You are in court and
2 you're telling this jury, you are explaining that you think
3 there is an intent to the agreement that's different than
4 these words, right?

5 A Yes, I'm relying on conversations that were held
6 internally among SCO personnel as well as conversations with
7 Novell.

8 Q What specific conversations are you relying on with
9 Novell in which somebody said to you, Ms. Madsen, this
10 language is limited -- this language is limited to the
11 binary royalty stream?

12 A I remember conversations with Novell where Novell was
13 concerned about SCO's financial viability and therefore
14 needed to protect the binary royalty stream as a way to
15 protect its interests in the event that SCO became
16 insolvent.

17 Q That was a very important concern of Novell, correct?

18 A It was a concern of Novell's. I can't say how
19 important it was.

20 Q But in connection with this language, Ms. Madsen -- I
21 want to distinguish, you've been in a lot of negotiations,
22 right? You're an experienced negotiator, yes?

23 A I have been in a lot of negotiations.

24 Q Negotiators can talk to each other about what is
25 bothering them at a particular moment, what is of concern to

1 them in a particular moment as a way of explaining to the
2 other side what's going on in their head at that time,
3 right?

4 A Yes.

5 Q That may reflect at that moment an intent behind a
6 particular provision?

7 A Sure.

8 Q Of course, the language itself may be broader than that
9 specific intent reflected at that particular moment,
10 correct?

11 A Yes.

12 Q It's the language that the negotiators intend to
13 control, right, not what they say to each other across the
14 table at that moment? Based on your experience, isn't that
15 right, isn't that what you do with your contracts?

16 A I'm sorry. I've lost track of what the question was.

17 Q The question is this: Isn't there -- don't you
18 understand, as a negotiator of contracts, that what somebody
19 says as a concern that may be reflected in some language is
20 different from what the deal is, the deal is what is in the
21 language, isn't it, Ms. Madsen?

22 A The deal is is what is in the contract. But you have
23 to -- I think you have to look at the contract in the
24 context.

25 Q Ms. Madsen, just to review where we were on 4.16(b),

1 the language includes, if you truncate it a little bit, in
2 addition, at seller's sole discretion and direction, buyer
3 shall assign any rights to any SVRX license to the extent so
4 directed in any manner or respect by seller. Do you see
5 that?

6 A I see it.

7 Q That language, you understood, as your eyes passed over
8 that language in 1995, that that language meant that Novell
9 could direct Santa Cruz to assign rights under an SVRX
10 license to someone else?

11 A That is not how I understood it in 1995.

12 Q That's not how you understood the words, Ms. Madsen?
13 That's not how you understood the words of this contract?

14 A No, that isn't how I understood it.

15 Q You have a specific recollection of 1995, 15 years ago,
16 you have a specific recollection of your eyes passing over
17 this language and thinking something different from what I
18 just read and said to you?

19 A I have no specific recollection. I have a general
20 recollection of not understanding the intent to mean how you
21 have interpreted it.

22 Q So you have no specific recollection of understanding
23 these words differently than the way I just articulated it?

24 A That's correct.

25 Q Because the words say that Novell, for whatever reason

1 it wants, in its sole discretion, can tell the buyer, Santa
2 Cruz, assign the rights under the SVRX licenses to someone
3 else, that's what the words say?

4 A Is that a question?

5 Q Yes.

6 A That's what the words say.

7 Q Terrific.

8 That's like an agency, isn't it, Ms. Madsen? That's
9 like when you hire a real estate agent, you know what, you
10 are fired. I don't like the way you are selling my house.
11 I'm going to assign the right to sell my house on my behalf
12 to someone else. Isn't that right, Ms. Madsen?

13 A No. I really don't know very much about agency
14 relationships, so I couldn't make that statement one way or
15 the other.

16 Q You never had any relationship with a property manager?
17 Let's say, it's like a property manager, isn't it,
18 Ms. Madsen, where you say to the property manager, you're
19 not doing a good job with these apartments, I'm going to
20 assign your right to be my property manager to someone else?
21 Isn't it like that, Ms. Madsen?

22 A That's not what I understood this provision to mean.

23 Q Then if we go back to SCO Exhibit 163, Mr. Mohan's memo
24 to the troops, he says, in addition, Santa Cruz will manage
25 the licensing business for UNIX prior to UnixWare?

1 A Yes.

2 Q That's consistent with the language of section 4.16(b),
3 or 4.16(a), for that matter, if you want to take a look at
4 it, that buyer shall administer the collection -- let's look
5 at (a) for a minute, buyer shall administer the collection
6 of all royalties, fees and other amounts due under all SVRX
7 licenses. Do you see that?

8 A Yes.

9 Q Administer, that's pretty close to the word Mr. Mohan
10 used, isn't it, manage?

11 A Yes.

12 Q So, in fact, in this particular sentence, you haven't
13 seen anything that's inconsistent in the language of the
14 asset purchase agreement with Mr. Mohan's nice simple
15 sentence, we will manage the licensing business for UNIX
16 prior to UnixWare, correct?

17 A No, I haven't seen anything inconsistent.

18 Q Let's turn to the other half of the pie. Let's turn to
19 the UnixWare side of things. Here, Ms. Madsen, I think I'm
20 going to agree with you that this is a simplification from
21 UnixWare, we signed an agreement with Novell whereby we
22 become the owner of the UNIX product line and the UnixWare
23 license for the OEMs. Do you recall that sentence from
24 Mr. Mohan's e-mail?

25 A I'm sorry, where is that?

1 Yes, I see that.

2 Q So let's talk about -- let's walk through your
3 understanding of Santa Cruz's role with respect to UnixWare
4 at the time of the asset purchase agreement. Let's see if
5 we can work through this. There are some provisions in the
6 asset purchase agreement. With your knowledge of the APA, I
7 think we can help the jury understand how this works.

8 So let's turn first to 1.2(b) of the asset purchase
9 agreement, SCO Exhibit 1, section 1.2(b).

10 Section 1.2(b), the first half of it is about SVRX
11 royalties. Do you see, Ms. Madsen?

12 A 1.2(b), yes.

13 Q Then there's transition about -- I don't know, about
14 ten lines down, in addition, buyer agrees to make payment to
15 seller. Do you see that? It's on the screen.

16 A Yes. Thank you.

17 Q Mr. Lee knows the asset purchase agreement intimately
18 by now.

19 It says, on account of buyer's future sale of UnixWare
20 products. Do you see that?

21 A Yes.

22 Q So buyer is going to make payments to seller -- Santa
23 Cruz is going to make payments to Novell on account of Santa
24 Cruz's future sale of UnixWare products, that's consistent
25 with your understanding of the agreement, correct?

1 You said if they hit the royalty threshold or the sale
2 threshold, there will be royalty payments, right?

3 A Yes.

4 Q It says, that seller is going to sell -- I'm sorry,
5 buyer, Santa Cruz, is going to sell UnixWare products,
6 doesn't it?

7 A Yes.

8 Q So there is no doubt under the asset purchase agreement
9 that Santa Cruz was given the right to sell UnixWare, is
10 there?

11 A No.

12 Q Then in the next sentence it says, the amounts and
13 timing of additional royalties to be paid in connection with
14 buyer's sale of the UnixWare products are identified in
15 detail on schedule 1.2(b) hereto. Do you see that?

16 A Yes.

17 Q Let's go to schedule 1.2(b). In fact, here is the
18 royalty schedule, correct?

19 A Yes.

20 Q And down at the bottom below, I think (b) of this
21 schedule, is all the discussion of the various thresholds
22 that have to be met, the forecasts, before the royalties are
23 due. Do you see that?

24 A No. Where is the forecast?

25 Q Amount of royalties, including an annual forecast by

1 seller.

2 A Yes.

3 Q But if we go up into (a), we understand what the
4 royalty-bearing products that Santa Cruz is going to sell
5 are. Do you see that?

6 A Yes, I see that.

7 Q It says, royalties shall be paid on sales of the
8 following products by buyer, buyer's inventory?

9 A That's correct.

10 Q It refers to UnixWare, for example, right?

11 A Yes.

12 Q So Santa Cruz is going to make payments for its sales
13 of UnixWare, isn't it, in accordance with the schedule?

14 A Yes.

15 Q And then down in (v) it says, any derivative, upgrades,
16 updates or new releases of little (i) through Roman (iv)
17 above. Do you see that?

18 A Yes.

19 Q So the royalty-bearing products are UnixWare -- among
20 others, are UnixWare and any derivatives, upgrades, updates
21 or new releases of UnixWare, right?

22 A I see this, but I don't have any specific recollection
23 of what the understanding of this language was at the time.
24 So, I mean, I can read this and say, yes, I see this. But
25 if you're asking me about my knowledge about it, I just

1 don't recall much discussion about this particular
2 provision.

3 Q But in some cases you have an understanding of the
4 parties' intent that's different from the words as I'm
5 reading them to you. In this case, that is consistent with
6 your understanding of the parties' intent, or at least not
7 inconsistent, correct, Ms. Madsen?

8 A I just don't remember what the intent was, so I have no
9 reason to believe it's inconsistent.

10 Q The language, as you see it and as you recall your
11 understanding of the overall intent of the parties, is
12 pretty clear that Santa Cruz is going to be making
13 derivatives, upgrades, updates or new releases of UnixWare,
14 right?

15 A Yes, that was the intent.

16 Q Now let's go a little more deeply for just a few
17 minutes so that the jury gets a sense of the overall
18 structure of this agreement. Take a look at section 4.18.
19 Part of the intent of the parties to the asset purchase
20 agreement was that Santa Cruz was actually going to develop
21 a product that was jointly specified by Novell and Santa
22 Cruz, correct?

23 A Jointly specified by?

24 Q Yes. The merged product, the specifications for the
25 merged product Novell and Santa Cruz had agreed to, correct?

1 A I don't know.

2 Q Do you see that -- you see the merged product there,
3 right?

4 A Yes.

5 Q You had an understanding that there was going to be a
6 merged product developed by Santa Cruz, correct?

7 A Yes.

8 Q And it's pretty clear that in this provision, that's
9 what Santa Cruz is going to do, develop the merged product,
10 right?

11 A Yes.

12 Q It's given both the right and the obligation to take
13 the assets it's acquiring under the asset purchase agreement
14 and develop a merged product, right?

15 A Yes.

16 Q And then it says, in the second sentence, buyer shall
17 use its commercially reasonable efforts to complete the
18 merged product. Do you see that?

19 A Yes.

20 Q And the merged product is going to be defined into yet
21 another document that I don't think the jury has seen yet
22 called the operating agreement. Do you see that?

23 A Yes.

24 Q Then it says, buyer shall be entitled to modify the
25 specifications of the merged product. Do you see that?

1 A Yes.

2 Q It refers to this architecture board that is going to
3 review the specifications of the merged product?

4 A I do.

5 Q So although what is happening here, consistent with
6 your understanding of the asset purchase agreement,
7 Ms. Madsen, is that actually the road map, the product road
8 map for Santa Cruz as it relates to the assets its acquiring
9 relevant to UnixWare, that product road map is agreed to by
10 the parties, isn't it?

11 A I have no knowledge of the product road map.

12 Q And no knowledge of this part of the asset purchase
13 agreement?

14 A I remember reviewing this part of the asset purchase
15 agreement, but the details behind this would have been
16 supplied by other groups.

17 Q There was a road map?

18 A Okay.

19 Q You agree with that. It was supplied by others?

20 A The details to support this provision would have been
21 supplied by others. I have no knowledge of a road map. I
22 don't recall seeing a road map.

23 Q Fair enough.

24 THE COURT: Mr. Jacobs, how much more do you have?

25 MR. JACOBS: I have about 25 minutes, Your Honor.

1 THE COURT: Okay. Why don't we go ahead and take
2 a recess now.

3 Ms. Malley.

4 (Jury excused)

5 THE COURT: We'll take 15 minutes.

6 (Recess)

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