

1 THE COURT: Counsel, as to recalling
2 Ms. Madsen, as I understand it, you want to recall her to
3 have her comment on Mr. Sabbath's declaration, which he
4 has already disowned in his own testimony. The Court
5 sees nothing to be gained by having her come and disown
6 it as well. And, for that reason, I think we are just
7 going to release her and let her go.

8 MR. JACOBS: I understand, Your Honor, but can
9 we spend a little more time on the declaration --

10 THE COURT: Yes.

11 MR. JACOBS: -- before the next segment of
12 depositions? There are two ways one could look at
13 declarations. One could look at them as relatively
14 trivial, frivolous things that people sign casually, or
15 one could look at them as sworn statements under penalty
16 of perjury that are given in court and should have the
17 same weight as testimony given in court.

18 In this case, this is a declaration signed by a
19 lawyer, a member of the bar, who, although he says he was
20 lazy and says in some ways it doesn't completely comport
21 with his recollection, it is still his statement under
22 penalty of perjury.

23 And it is flatly inconsistent with the
24 portions -- with the evidence and with the testimony that
25 SCO introduced in their portion of his deposition.

1 THE COURT: Correct.

2 MR. JACOBS: We're a little surprised they
3 brought Mr. Sabbath in any capacity here because that
4 declaration so rebuts the testimony they have offered,
5 but they have done that. To use an expression we may
6 grow fond of in this lawsuit, they have opened the door.
7 And what they have opened the door to specifically is
8 for the jury to hear the paragraphs of Mr. Sabbath's
9 declaration that he offered, under penalty of perjury,
10 that directly contradict the testimony that they played
11 in their portion of his videotape deposition.

12 Had he been here live, there is no question
13 that we could have read those segments of his declaration
14 to him, and we could have asked for his live testimony on
15 them.

16 And so, when we get to that portion of the
17 declaration, particularly because we now can't ask
18 Ms. Madsen about those portions, what I would like to do
19 is to be able to read to the jury the portions of his
20 declaration, signed under penalty of perjury, that
21 directly contradict what he testified to in SCO's
22 presentation of his testimony.

23 THE COURT: And the way you do it is, when you
24 come to those questions, you would stop, and you would
25 personally read those portions of the declaration and

1 then proceed with the question regarding it?

2 MR. JACOBS: I think that I would flip it
3 slightly. I will have him testify that -- there is a
4 brief segment of our designations, Your Honor, where he
5 says that he provided this declaration to Ron Lauderdale
6 in 2003. And I would stand up, and I would say:

7 With Your Honor's permission, I would now like
8 to read portions of Mr. Sabbath's December, 2003,
9 declaration.

10 THE COURT: Okay.

11 MR. NORMAND: Your Honor, there are multiple
12 problems with this proposal, Your Honor. The first is
13 that the general rule is extraneous testimony, testimony
14 from outside court, whether it's read to a witness for
15 impeachment or not, does not come in as evidence. That's
16 the general rule.

17 Second. The fact that we called Mr. Sabbath as
18 a witness doesn't open the door to controverting that
19 rule. Every other witness that we've called, parties
20 could have addressed them by trying to get in prior
21 testimony. No one has tried to do that. It's improper.

22 Third, Your Honor, if we're going to get into a
23 little mini trial about what Mr. Sabbath was thinking or
24 doing when he signed this prior declaration, we would
25 need to explore his deposition testimony in the IBM case.

1 We did not designate that because we did not understand
2 there to be a prospective fight about the circumstances
3 under which that declaration was signed. That would be
4 incredibly collateral, confusing to the jury, and
5 prejudicial.

6 And, for all those reasons, Your Honor, we
7 don't see any reason to change the general rule that,
8 one, when you have a witness by deposition designation,
9 you don't make special rules for the witness just because
10 they haven't shown up in person; and, two, the general
11 rule, which Mr. Jacobs' proposal would controvert, that
12 impeachment evidence somehow comes in and should be given
13 special consideration by the jury.

14 THE COURT: Mr. Jacobs?

15 MR. JACOBS: I think we're mixing apples and
16 oranges a little bit. The witness has the declaration in
17 front of him when he is testifying in the deposition.

18 THE COURT: And I did not get all the way
19 through that which you gave me at the beginning of that
20 break, which are your designated portions, which it is
21 clear you did examine him on it, correct?

22 MR. JACOBS: That is true, Your Honor.

23 THE COURT: So, I'm not inclined to supplement
24 what has been designated by you, by an actual reading. I
25 wish I had been able to get through it all, but I simply

1 did not have the time, but I have to assume that you
2 effectively brought out the contradictions between the
3 testimony as heard by the plaintiff's designations and
4 that which you cross examined him on, showing the
5 inconsistencies. And I think that we better just leave
6 it at that.

7 MR. JACOBS: So the other alternative, Your
8 Honor, is, rather than reading it to the jury, we should
9 be able to put on the screen the portion of the
10 declaration, and they should be able to look at it as the
11 witness is looking at it. He had it in front of him at
12 the time. They need to know what he's talking about when
13 he's talking about that declaration. Otherwise --

14 THE COURT: Don't you ask him to read those
15 parts of it that you then cross examine him on?

16 MR. JACOBS: Candidly, Your Honor, not all of
17 them. There are some portions of his declaration that go
18 specifically to the logic and structure of the
19 transaction, that go to Amendment Number 2. We did not
20 want to waste valuable deposition time just reading
21 portions of a deposition -- of a declaration into the
22 record.

23 THE COURT: I'm sorry, Mr. Jacobs, but I don't
24 believe I ought to make up for your unwillingness to take
25 the time during the deposition to have him read it,

1 recognizing that you would be possibly using that
2 deposition testimony in this fashion, by now allowing you
3 to bring undue attention to that declaration. So, again,
4 the Court will not allow that to happen either.

5 MR. JACOBS: And the last point, Your Honor, to
6 make in this connection is that there is really not that
7 much difference between this declaration and the other
8 out-of-court statements that, for example, SCO has used
9 to question witnesses and say:

10 Is this consistent with your understanding or
11 not?

12 They are all out-of-court statements. This
13 happens to be under penalty of perjury.

14 THE COURT: But you have -- you're going to be
15 cross examining him on it in the designated portions of
16 the deposition, so you have in fact been allowed to use
17 it in that fashion in the deposition, but what you're
18 asking for is something well beyond that now, and the
19 Court believes that the appropriate way to deal with this
20 is just to rely on what you did at the deposition with
21 those designated portions that the jury will now hear

22 MR. JACOBBS: So, just so we don't have to do
23 this in front of the jury, Your Honor, we would move to
24 strike Mr. Sabbath's testimony that SCO has offered in
25 their portion of Mr. Sabbath's testimony on the grounds

1 that it's flatly contradicted by a sworn declaration he
2 gave under penalty of perjury that we now cannot
3 effectively impeach him on because he is not here live.

4 THE COURT: But you were able to cross examine
5 him in the deposition, and you will now show those
6 designated portions of that deposition; is that correct?

7 MR. JACOBS: We will be doing that, Your Honor,
8 absent a grant of the motion to strike.

9 THE COURT: The Court will deny the motion to
10 strike.

11 MR. JACOBS: Thank you, Your Honor.

12 THE COURT: Do you have anything also before we
13 bring the jury in?

14 MR. NORMAND: No, Your Honor.

15 THE COURT: All right.

16 MR. JACOBS: I'm sorry, Your Honor, one quick
17 question.

18 THE COURT: Yes.

19 MR. JACOBS: There are portions that we're
20 asking him about during the deposition testimony. Can we
21 put those portions on the screen as we're doing so?

22 MR. NORMAND: Your Honor, I thought that was
23 the third of Mr. Jacobs' four proposals.

24 THE COURT: That was my understanding as well.
25 You may not show anything that does not occur in the

1 actual deposition. If you have the running words below
2 it, as you have in the banner, then you may certainly
3 focus their attention -- or the jury will focus their
4 attention as they read that, but nothing supplemental to
5 that which will appear in the designated portions of the
6 deposition of Mr. Sabbath.

7 MR. JACOBS: Thank you, Your Honor.

8 MS. MALLEY: All rise for the jury, please.

9 (Jury brought into the courtroom.)

10 THE COURT: Mr. Norman, let me clarify. Have
11 you now shown everything of Mr. Sabbath that you
12 intended?

13 MR. NORMAND: We have, Your Honor. Thank
14 you.

15 THE COURT: Mr. Jacobs.

16 MR. JACOBS: We would offer testimony of
17 Mr. Sabbath as well, Your Honor.

18 THE COURT: Thank you.

19 Designated portions of the deposition
20 testimony of Mr. Sabbath were read as
21 follows:

22 Q. Did Santa Cruz have occasion to retain outside
23 counsel in connection with the potential transaction?

24 A. Yes. We retained the Brobeck law firm, Brobeck
25 Phleger and Harrison, I believe it was. It doesn't exist

1 anymore, but at the time they were one of the large
2 Silicon Valley San Francisco law firms.

3 Q. And who were the attorneys at Brobeck with whom
4 you dealt with respect to this potential transaction?

5 A. Sure. Ed Leonard was the lead attorney, the
6 most senior of the Brobeck attorneys. I believe he was
7 even the managing partner at that time; if not of the
8 entire firm, at least of the Palo Alto office, very
9 experienced in M&A work. Scott Lester was either a
10 senior associate or more junior partner on the team. And
11 then there were, I don't know, three or four others,
12 maybe a Jeff Higgins, I seem to kind of recall, but I may
13 be confusing law firms at this point.

14 But, anyway, it was Ed Leonard and Scott
15 Lester, the leads, and they had several attorneys, maybe
16 some paralegals as backup.

17 Q. Paragraph A of Amendment Number 2 --

18 A. Yeah, paragraph A I didn't recall being here in
19 this Amendment A, but it looks to me like a clarification
20 of some sort to the APA.

21 Q. Is paragraph A a part of Amendment Number 2
22 that you recall negotiating to any extent?

23 A. I don't recall that, but I don't know.

24 Q. And, to the best of your recollection, who, at
25 Santa Cruz, would have been involved in negotiating the

1 language of paragraph A of Amendment Number 2?

2 A. I don't know.

3 Q. Can you recall, prior to signing Amendment
4 Number 2, focusing on paragraph A to any extent?

5 A. I don't.

6 Q. You have the APA among the documents in front
7 of you?

8 A. Uh-huh.

9 Q. And I wanted to direct your attention to one
10 section in particular, Section 1.2(b), which begins on
11 the page with the Bates number ending 901. In the
12 language I read into the record, there's a reference to
13 equitable interest within the meaning of Section 541(d)
14 of the Bankruptcy Code. Do you see that language?

15 A. Yes. Yes.

16 Q. Do you recall having an understanding of that
17 provision at the time the APA was executed?

18 A. Well, when we were writing this paragraph, we
19 being the business guys, the Wilson Sonsini guys, the
20 Brobeck guys; Tor Braham, the Wilson lead outside counsel
21 felt that he wanted to run this issue by his bankruptcy
22 specialist, secure transaction specialist.

23 The fear of Novell was that Santa Cruz would go
24 bankrupt and then what would happen to this revenue
25 stream that could become the property of the bank or bank

1 or lenders, some sort of creditor? And they would lose
2 the right to collect that 95 percent.

3 So, his bankruptcy secure transaction
4 specialist came back with this kind of language, which
5 doesn't make a lot of sense to me and I suspect to
6 everybody else in the room that was handed the language,
7 but that's what we plugged in there to make those people
8 happy.

9 Q. I want to ask you, Mr. Sabbath, about the
10 declaration you've previously signed. And I'm handing
11 you that declaration marked Exhibit 1049. It's a
12 declaration dated December 22, 2003, in the SCO Group vs.
13 IBM case.

14 And if you want to take a minute to review the
15 document. Let me know if you recognize it.

16 A. Okay. Yes.

17 Q. Do you recall executing this declaration?

18 A. I do, yes.

19 Q. Would you say that you reviewed this
20 declaration very carefully before you signed it?

21 A. Well, I mean I read it through. I have to say
22 I didn't really read the documents it refers to.

23 Q. Why not?

24 A. It's just -- I mean, you know, this is just the
25 Asset Purchase Agreement, and there were other documents

1 I believe here that were referred to, and, you know, I
2 don't have any skin in the game. I wasn't that
3 interested. Okay? I was being lazy.

4 Q. You say in paragraph 11 of the declaration.

5 "Under the Asset Purchase Agreement novell
6 retained significant UNIX-related assets following the
7 sale. For example, Schedule 1.1(b) of the Asset Purchase
8 Agreement provided that much of the UNIX System V
9 intellectual property would not be transferred to Santa
10 Cruz by listing the following items as excluded assets."

11 And then the paragraph 11 quotes from the
12 Schedule 1.1(b) of the APA. Do you see that language?

13 A. I do.

14 Q. How does the content of that paragraph 11
15 comport with your understanding today regarding any UNIX
16 System V intellectual property that was not transferred
17 to Santa Cruz?

18 A. Well, you mean -- the easy answer is this
19 language would be correct if it said -- instead of UNIX
20 System V it said Netware, which is really what the
21 language below refers to.

22 Q. But, in your declaration, it doesn't refer to
23 Netware, does it?

24 A. No. No. I just -- I missed that. They missed
25 it or I missed it or both.

1 Q. If you look at paragraph 29 of your
2 declaration, you say:

3 "It is my understanding, based upon my review
4 of plaintiff's Amended Complaint that plaintiff claims to
5 have acquired all right, title and interest in and to
6 UNIX System V operating system source code, software and
7 sublicensing agreements together with copyrights,
8 additional licensing rights in and to UNIX System V and
9 claims against all parties breaching such agreements. I
10 understand that plaintiff also claims to control the
11 right of all UNIX vendors to use and distribute UNIX
12 System V. I believe that these claims are incorrect. As
13 described above in relation to the related agreements and
14 Amendment Number 2, Novell retained certain rights under
15 the UNIX System V licensing agreements as well as certain
16 UNIX System V intellectual property, as described above."

17 Do you see that language?

18 A. I do.

19 Q. As you sit here today, are you satisfied that
20 this declaration accurately reflects your views regarding
21 the issues we've discussed?

22 A. Well, I mean, this declaration was a quick and
23 dirty, you know, done before the holidays, over the
24 phone, with an associate in -- somewhere in the East
25 Coast and me. And, I mean, it's, you know, close enough

1 for government work, if you want to use that phrase, but
2 it's a hundred percent accurate? No. Not at all.

3 Q. The work you did on the Asset Purchase
4 Agreement occurred over -- between Novell and Santa Cruz
5 occurred about 11 -- about 11 and a half years ago, now,
6 didn't it?

7 A. Yes.

8 Q. And it's hard to remember the specifics of
9 negotiations that occurred that many years ago, isn't it?

10 A. It sure is.

11 Q. It's hard, in part, because it's a long time?

12 A. Yeah.

13 Q. It's hard, in part, because a lot of
14 negotiations occurred after that negotiation in which you
15 were closely involved?

16 A. Right.

17 Q. We know that you had considerable experience
18 dealing with transactions in the software industry?

19 A. That's true.

20 Q. We know that you retained highly skilled
21 outside counsel to assist you in the negotiation of the
22 Asset Purchase Agreement?

23 A. That's true.

24 Q. We know that you considered an agreement like
25 the Asset Purchase Agreement to be an agreement that

1 would have a major impact on SCO's business?

2 A. Yes.

3 Q. Specifically, that the Asset Purchase Agreement
4 would have a major impact on SCO's business?

5 A. Sure.

6 Q. And that it was, therefore, an important
7 document?

8 A. Yes.

9 Q. You knew, as a skilled attorney, that while you
10 might have an understanding going into the negotiations
11 of the parties' intent, ultimately, if a dispute arose,
12 the first thing people would do is pick up the contract
13 itself?

14 A. Sure.

15 Q. You do recall, you do acknowledge that there
16 was a three-month period or so during which the Asset
17 Purchase Agreement was subject to further review by the
18 parties and an amendment was prepared?

19 A. Sure.

20 Q. Now, we also know that, as of 1995, you
21 understood software licensing?

22 A. Yes.

23 Q. And that you held yourself out to your
24 colleagues as somebody who could handle the legal
25 intricacies of software licensing?

1 A. For the most part, yes.

2 Q. You understood that -- what role copyrights
3 played in computer software?

4 A. Sure.

5 Q. And you understood what role patents were
6 evolving to play in computer software?

7 A. Sure.

8 Q. Now take a look at Section 1.1(a) of the Asset
9 Purchase Agreement, please.

10 A. 1.1(a)? Purchase and Sale of Assets?

11 Q. Yes.

12 A. Uh-huh.

13 Q. You understood that the -- really the meat of
14 the agreement, in a way, in Schedule 1.1(a), the list of
15 included assets, and Schedule 1.1(b), the list of
16 excluded assets when you reviewed this agreement,
17 correct?

18 A. Yes.

19 Q. As a skilled attorney, you understood that an
20 an agreement like this, as a layperson might say, the
21 devil is in the details?

22 A. Yes.

23 Q. And, even though, in your answer to your
24 question to Mr. Normand, you said that the UNIX business
25 was being sold lock, stock and barrel. In fact, exactly

1 what was being sold by Novell was shown in Schedule
2 1.1(a) and what was not being sold was shown in shown in
3 Schedule 1.1(b), correct?

4 A. I can't really agree with you. It is what is
5 here and in the clean up amendments.

6 Q. Fair enough. So in here and in the clean up
7 amendments is -- documents what is included in the assets
8 that were transferred to SCO?

9 A. That's right.

10 Q. Now, let's turn to Section 1.6.

11 A. License Back?

12 Q. That's the provision that anticipated the
13 technology license agreement, correct?

14 A. Yes. That's right.

15 Q. And let me -- let's just break this down a
16 little bit. It states:

17 "License Back of Assets. Concurrent with the
18 closing, buyer shall execute a license agreement under
19 which it shall grant to seller a royalty-free, perpetual
20 worldwide license to, small little i, all of the
21 technology included in the, capital A, Assets and, two
22 little i, all derivatives of the technology included in
23 the Assets, including Eiger product release, such
24 licensed-back technology to be referred to collectively
25 as, capital L, license, capital T, Technology."

1 Do you see that, sir?

2 A. I do.

3 Q. And SCO, as the employer of the coders, under
4 your understanding of the way law worked with respect to
5 software, SCO would own the copyrights and the code that
6 it wrote?

7 A. That's true.

8 Q. And so the license back of derivatives of the
9 technology included in the assets would grant Novell a
10 right to license back SCO-developed code in which SCO
11 owned the copyrights, correct?

12 A. That's correct.

13 Q. So, did you tell Allison Lisbonne, later
14 Allison Amadia --

15 A. Uh-huh.

16 Q. -- that the copyrights were specifically
17 excluded from the Asset Purchase Agreement?

18 A. I don't recall that, no.

19 Q. Would you -- if she testified that you said
20 that to her, would you be able to contradict her?

21 A. No. I just don't recall that discussion.

22 Q. You understood one of the deal points of the
23 Asset Purchase Agreement was that SCO, generally, was not
24 going to be in the SVRX licensing, new licensing
25 business, correct?

1 A. That is absolutely correct.

2 Q. You described how you came to provide a
3 declaration at the request of the Ron Lauderdale?

4 A. Yes.

5 Q. And that declaration was provided in 2003?

6 A. I think so.

7 Q. It was -- at the time you looked at it, it was
8 your best recollection of the topics it covered?

9 A. In general, yes. Overall, yes. You know, keep
10 in mind, I thought what I was really doing is helping
11 them understand the history and the overall facts of the
12 transaction.

13 Q. You understood that you were providing it under
14 penalty of perjury?

15 A. Sure.

16 Q. And you could explain to the jury what penalty
17 of perjury means?

18 A. I think so, yeah.

19 Q. Could you do that, please?

20 A. Well, I think it means that under oath you're
21 bound to tell the truth and, if you don't, you're
22 committing a crime, either a serious misdemeanor or a
23 felony.

24 Q. Well, in your response to Mr. Normand earlier,
25 you said you were being lazy about it?

1 A. Yeah. I was being lazy.

2 Q. Do you really think that's what happened, that
3 you were lazy on an important legal document you were
4 signing under penalty of perjury?

5 A. At that point in time, I wasn't concerned with
6 min -- what I thought was minutia. You know, I didn't
7 realize that a case -- that your case could turn on one
8 word being different from what I think that -- you know,
9 a better word would be.

10 Q. When you prepared the declaration at the
11 request of Mr. Lauderdale, you did have the Asset
12 Purchase Agreement in front of you?

13 A. I'm sorry. I did not prepare it. I was sent a
14 bunch of documents from Lauderdale's outside law firm
15 that must have been several inches thick. I looked at
16 them, scanned them just to see what they were. I did not
17 read all the documents.

18 Q. IBM didn't compensate you for your work on that
19 declaration, did they?

20 A. Absolutely not.

21 Q. The Asset Purchase Agreement limits SCO's
22 rights to license SVRX code, doesn't it?

23 A. Yes, it does.

24 Q. And SVRX is part of UNIX, isn't it?

25 A. Yes.

1 Q. The Asset Purchase Agreement, even under your
2 interpretation, allows Novell to direct SCO to take
3 certain actions with respect to SVRX licenses, correct?
4 A. Yes.
5 Q. By the way, that section, that Section 4.16(b),
6 it doesn't say anything about limiting Novell's right to
7 direct SCO to take action to the CPU's or the number of
8 CPU's on which the source code is residing, does it?
9 A. It is not that specific.
10 Q. In fact, it says "any," in several places,
11 doesn't it?
12 A. I think.
13 Q. And it says "in Novell's sole discretion,"
14 doesn't it?
15 A. I don't know.
16 Q. Take a look.
17 A. Where is it? 416?
18 Q. Right?
19 A. 416 where?
20 Q. B.
21 A. B? Yes. At seller's sole discretion and
22 direct.
23 Q. And by sole discretion, you understand that to
24 mean that Novell can really do it for any reason it
25 wants, correct?

1 A. That's correct.

2 Q. And it is correct, is it not, that Novell had
3 the right to veto new source code SVRX licenses that SCO
4 wished to enter into pursuant to the terms of Amendment
5 Number 1?

6 A. That's correct.

7 Q. And so Novell did have a right with respect to
8 Santa Cruz's future source code interests in UNIX, as
9 particularly with respect to SVRX, didn't it?

10 A. Novell had that limited right, yes.

11 Q. So the parties intended to give Novell at least
12 a limited right with respect to Santa Cruz's future
13 source code interests in UNIX as it pertained to SVRX?

14 A. Yes.

15 Q. And when you have said -- so when you were
16 using the expression "the UNIX copyrights," you meant all
17 UNIX copyrights?

18 A. Yes.

19 Q. And the UNIX copyrights or all UNIX copyrights
20 is a simple way of saying all the copyrights relating to
21 UNIX that Novell had at the time, correct?

22 A. That's correct.

23 Q. It's not hard to say "all" or "the" to mean
24 that -- to get -- to convey that intent, right?

25 A. I suppose so.

1 Q. And if you look at Amendment Number 2, it
2 doesn't say that, does it?

3 A. If you are saying the word "all" isn't there,
4 you're absolutely right.

5 Q. And a simple expression like "the UNIX
6 copyrights" isn't there either?

7 A. The UNIX copyrights?

8 Q. I'm sorry. I'm looking at Amendment Number 2,
9 sir.

10 A. Oh, with respect -- well, it says, "all
11 copyrights and trademarks."

12 Q. That's the exclusionary part.

13 A. Oh. Let me read it. Oh. Except for the
14 copyrights and trademarks covered by Novell. Yeah. It
15 doesn't say, "except for all the copyrights and
16 trademarks," true.

17 Q. And when it says, "the copyrights necessary to
18 carry on the business," you want to read that expression
19 again?

20 A. Okay. "Except for the copyrights and
21 trademarks owned by Novell as of the date of the
22 agreement required for SCO to exercise its rights with
23 respect to the acquisition of UNIX and UnixWare
24 technologies," period.

25 Q. So it refers to the exercise of rights,

1 correct?

2 A. Yes.

3 Q. And with respect to the code that you developed
4 at UnixWare, we established that the UnixWare code that
5 Santa Cruz developed, we established earlier that you
6 would own that by virtue of the operation of copyright
7 law, correct?

8 A. Yeah. It may not be that simple, but if what
9 You're getting at is anything we developed we would hold
10 the copyright in, true, but there might be some other
11 UNIX, older UNIX code in it, okay, which could be a
12 problem if you don't own the copyright to it.

13 Q. But the specific right you need in order to
14 effectuate that, based upon your knowledge and experience
15 in the software industry, is the right to create a
16 derivative work, correct?

17 A. You definitely need that, but you could do that
18 as a licensee.

19 Q. After Amendment Number 2 was executed, did you
20 write any memos or create any communications internally
21 in which you said something to the effect that now that
22 we have the rights we need, we can go for it, guys.

23 A. I have no idea.

24 (Whereupon the reading of the designated
25 portions of the deposition were concluded.)

1 MR. JACOBS: That concludes the portions of the
2 testimony we wished to present to the Court, Your Honor.

3 THE COURT: Thank you, Mr. Jacobs.

4 Mr. Singer, your next witness.

5 MR. SINGER: Our next witness is Darl McBride.

6 DARL MC BRIDE,
7 the witness hereinbefore named, being first duly
8 cautioned and sworn or affirmed to tell the truth, the
9 whole truth, and nothing but the truth, was examined and
10 testified as follows:

11 THE CLERK: Would you please state and spell
12 your name for the Court.

13 THE WITNESS: My name is Darl McBride. That's
14 D-a-r-l. M-c, capital B-r-i-d-e,

15 THE CLERK: Thank you.

16 THE WITNESS: There's a Charles in the middle,
17 if you want that.

18 THE CLERK: Thank you.

19 DIRECT EXAMINATION

20 BY MR. SINGER:

21 Q. Good afternoon, Mr. McBride. Can you begin by
22 telling us a little bit about your background.

23 A. Okay. I grew up in Ephraim, Utah, a couple
24 hours south of here, graduated from Manti High School,
25 went to Snow College, eventually graduated from Brigham

1 Young University and then, after that, went to graduate
2 school at University of Illinois, back in
3 Urbana-Champaign.

4 Q. Can you tell the jury a little bit about your
5 employment before you joined SCO Group?

6 A. Sure. After graduating from University of
7 Illinois, I was recruited to go work at Texas Instruments
8 down in Dallas. I went down there for a couple of years,
9 later moved back to Utah, worked at Novell from 1988 to
10 1996 and kind of grew up the ranks from manager level.
11 Eventually, in '96, I was vice-president of one of their
12 operating divisions.

13 From there I was recruited out of Novell, went
14 and worked for a company back east, helped them build a
15 network systems integration business, about a
16 half-billion-dollar business over a couple-year period
17 and then, from there, did a couple of startups where I
18 was chief executive and president of a couple of startup
19 operations during the internet boom years.

20 And, eventually, from there, went and worked
21 for Franklin Covey as the president of one of their
22 online planner operations, worked there a couple years
23 and was there when I was recruited to go work at SCO as
24 their president and CEO. That was in, I believe, June of
25 2002 when I went to SCO.

1 Q. June of 2002 is when you joined SCO?

2 A. Correct.

3 Q. And did you join as chief executive officer?

4 A. Yes, I did.

5 Q. Were you the chief executive officer of SCO in
6 May of 2003?

7 A. Yes, I was.

8 Q. Do you recall, Mr. McBride, how SCO's business
9 did in the quarter ending April of 2003?

10 A. It was a good quarter. It was a record quarter
11 for the company in terms of both revenues and in terms of
12 profits.

13 Q. I'd like to hand you a book of exhibits that
14 we're going to be using in connection with your
15 examination.

16 A. Okay. Are we going to use these two?

17 Q. You can put those on the side. We won't be
18 using those.

19 A. Okay.

20 Q. I'd like to ask you to take a look at what is
21 SCO Exhibit 94, which is in evidence.

22 A. Right.

23 Q. Did you receive this letter from Jack Messman,
24 the CEO of Novell, on May 28, 2003?

25 A. Yes, I did.

1 Q. This was sent in the case by fax and certified
2 mail?

3 A. Yes. That's correct.

4 Q. And if you turn to page 2 --

5 A. Right.

6 Q. -- did you see his statement in the last
7 paragraph, that SCO is not the owner of the UNIX
8 copyrights?

9 A. Yes. I see that.

10 Q. What was your reaction to that?

11 A. I was shocked, quite frankly.

12 Q. Why were you shocked?

13 A. I had been trying to get clarification around a
14 problem in an Asset Purchase Agreement from an early
15 agreement with Novell over the previous six months, and,
16 ultimately, what the word had come down to me from Novell
17 management was that upper management at Novell didn't
18 want to get involved with that old UNIX stuff, and they
19 were not involved. Then, to have them come out in this
20 letter and say not only were they not going to be
21 involved, but to step up and say that they were the owner
22 of the UNIX copyrights was really surprising.

23 Q. Did you learn that Novell issued this letter as
24 a press release to the general public?

25 A. Yes, I did. I think they had a press release,

1 and this was attached to the release as -- the letter was
2 part of the content of the release as I recall.

3 Q. Could you turn to SCO Exhibit 525, which is in
4 evidence, and it's the next document in your binder.

5 A. Okay.

6 Q. And was this the press release that you're
7 referring to?

8 A. That's the one.

9 Q. Before they reproduced your letter, do you see
10 in the second paragraph of the press release, it says
11 first, Novell challenged SCO's assertion that it owns the
12 copyrights and the patents in the UNIX System V, pointing
13 out that the Asset Purchase Agreement entered into
14 between Novell and SCO in 1995 did not transfer these
15 rights to SCO? Do you see that?

16 A. Yes. I see that.

17 Q. Do you see, in the second paragraph -- not the
18 second, it's the third paragraph.

19 A. Okay.

20 Q. Where it says:

21 "To Novell's knowledge, the 1995 agreement
22 concerning SCO's purchase of UNIX from Novell does not
23 convey to SCO the associated copyrights," as has been
24 said in the letter.

25 Do you see that?

1 A. Yes. I see that.

2 Q. And then, if we turn to the next page of the
3 press release, is this now a copy of the letter that
4 Mr. Messman sent to you?

5 A. Yes, it is.

6 Q. And do you see that in the third paragraph from
7 the bottom, it says:

8 "Importantly, and contrary to SCO's assertions,
9 SCO is not the owner of the UNIX copyrights."

10 A. Yes. I see that.

11 Q. So, in this press release, Novell said three
12 times that SCO didn't own the UNIX copyrights?

13 A. Yes.

14 Q. And Novell did?

15 A. Yes.

16 Q. What was the effect of Novell having sent this
17 out as a press release, claiming that SCO did not own the
18 copyrights?

19 A. It had a very damaging effect on SCO that very
20 day.

21 Q. Did it get a lot of play in the press?

22 A. Yes. It got a lot of play.

23 Q. Did it have an effect on SCO's stock?

24 A. Yes. SCO's stock dropped, I want to say
25 somewhere on the order of 25 to 30 percent in that single

1 day.

2 Q. Was it particularly important to you that it
3 was Novell, as opposed to some other company, that was
4 making this claim?

5 A. Yeah. It was a big deal that it was Novell.

6 Q. Why is that?

7 A. Well, we had bought the property from Novell.
8 It would be like somebody -- you buy a house from
9 somebody and then that owner of the house comes out later
10 and tries to say, "I never sold you the house."

11 It was stunning.

12 Q. Now, after Mr. Messman's letter was received,
13 what did you do?

14 A. Well, after we picked ourselves up and tried to
15 figure out what was going on here, the first thing I had
16 to do, as the CEO of a publicly traded company, is I had
17 to go meet with our large shareholders, many of whom were
18 in New York, on Wall Street, and I had to go settle them
19 down and try and explain to them that, in fact, SCO did
20 own UNIX and we did own the copyrights.

21 So, I got on a plane soon after this, went back
22 to New York and spent a few days back there with them.
23 That was the first thing that I did.

24 Q. Did there come a time when you called Jack
25 Messman directly about this?

1 A. Yes, I did.

2 Q. When was that?

3 A. That happened on -- so, May 28 was the date of
4 this. It would have been June 5, the following week.

5 Q. Would you please tell the jury about that
6 conversation?

7 A. Sure. So, after I had gone to Wall Street and
8 I tried to settle these guys down, explaining to them
9 that we actually did own the copyrights, I received a
10 call from my secretary indicating she had something that
11 I probably wanted to see.

12 Q. And what was that?

13 A. It was something called Amendment Number 2.

14 Q. And was this before your conversation with
15 Mr. Messman?

16 A. Yes, it was.

17 Q. Did you then call Mr. Messman?

18 A. Yes. So, I -- come to find out what Amendment
19 Number 2 was, I read it. It cleared up the problems that
20 I had been struggling with before around some odd
21 language in the Asset Purchase Agreement. This made it
22 clear that we did own the UNIX copyrights and so, at that
23 point in time, I picked up the phone and called Jack.

24 Q. Tell us about that conversation, please.

25 A. So, on the afternoon of June 5, then, I called

1 Jack. He got on the phone, and we talked for a few
2 moments. And then he said:

3 "What's up?"

4 And I said: "Well, Jack, I've got a real
5 problem with this letter that you sent not only me but
6 broadcast around the world saying that you still owned
7 UNIX and the copyrights."

8 And he said: "Well, Darl, we do."

9 And I said: "Well, Jack, that's a point of
10 contention. I totally disagree with that, but if there
11 was ever any doubt before, it's certainly cleared up when
12 you read Amendment Number 2 to the purchase agreement."

13 Q. What did he say to that?

14 A. He got pretty excited and said: "Amendment
15 Number 2? What are you talking about? What's Amendment
16 Number 2?"

17 Q. And what did you tell him?

18 A. I explained to him that this clarifies that SCO
19 in fact does own the UNIX copyrights.

20 Q. What happened next?

21 A. He said: "Darl, is this a trick? Are you
22 trying to trick me?"

23 Q. And I said: "Trick you into what? What are
24 you talking about?"

25 "Did you trick me into sending out the letter

1 and now you're coming out afterwards? You had this all
2 the time, didn't you? You knew?"

3 I said: "Jack, I didn't even know you were
4 sending a letter. That was a shock to me. There's no
5 trick here. My secretary just found this letter. A few
6 hours after finding it, I came back. I came and looked
7 at it. I verified it, and the first thing I did is I
8 called you."

9 Q. What did he say then?

10 A. "Well, I don't know what you're talking about,
11 but send it over to me."

12 Q. Did you do that?

13 A. I said: "Okay. I'll get it over to you. And
14 then maybe we can talk tomorrow."

15 He said: "I want you to send it right now.
16 Fax it to me."

17 So I faxed it to him.

18 Q. What happened next?

19 A. About ten minutes later, Jack called me back.

20 Q. What did he say?

21 A. He said: "Okay, Darl, you got the copyrights.
22 What do you want?"

23 Q. Did you -- what did you say in response to
24 that?

25 A. I said: "Jack, there are three things that we

1 want."

2 Q. What were the three things?

3 A. "The first thing is we want you to send out a
4 retraction letter with respect to the letter you just
5 sent out saying you own UNIX. You need to retract that."

6 Q. What did he say to that?

7 A. He said: "Okay. What else?"

8 I said: "The second thing is, I want you to
9 disclose to me, right now, whether IBM was involved in
10 your communications in sending this letter out."

11 Q. How did he respond to that?

12 A. He was evasive. He didn't say yes. He didn't
13 say no. So I pressed him on it further. I pressed him
14 two or three times on the issue about whether he had
15 coordinated with IBM, and then finally he said: "I don't
16 want to talk about this topic anymore until I have an
17 attorney with me."

18 Q. What else occurred in the conversation?

19 A. So then we went to number three. And I said:
20 "Jack, we need to talk about damages."

21 Q. What was his reaction to you raising that
22 subject?

23 A. "Damages? What damages? What are you talking
24 about? There hasn't been any damages."

25 And I explained to him that the day that their

1 letter went out, on a day that our stock should have been
2 going up because we had record revenue and record
3 profits, in fact, instead of our stock going up that day,
4 our stock sank significantly and that we had been damaged
5 as a result of their letters that had gone out, his press
6 release that had gone out.

7 Q. Was there any further conversation?

8 A. Jack was upset about the discussion of damages,
9 and, effectively, that was the end of the call.

10 Q. I'd like you to take a look at Exhibit 95. Is
11 this a letter which you sent Mr. Messman on June 6, 2003?

12 A. Yes, it is.

13 MR. SINGER: I move the admission of Exhibit
14 95.

15 MR. ACKER: No objection.

16 MR. SINGER: I'm sorry?

17 MR. ACKER: No objection.

18 THE COURT: It will be admitted.

19 (SCO Exhibit 95 received in evidence.)

20 Q. BY MR. SINGER: Mr. McBride, is this a letter
21 which you caused to be sent to Mr. Messman by fax and
22 certified mail on June 6, 2003?

23 A. Yes, it is.

24 Q. This was -- was this the day following the
25 conversation on the phone that you have just been telling

1 the jury about?

2 A. That's correct.

3 Q. Can we walk through the letter?

4 A. Sure.

5 Q. In the first paragraph, you state: "In a well
6 orchestrated press release on May 28, 2003, entitled
7 Novell Challenges SCO's Position, Reiterates Support For
8 Linux, you stated: 'Importantly and contrary to SCO's
9 assertions, SCO is not the owner of the UNIX
10 copyrights.'"

11 Did you then say: "As you know, your
12 accusation that SCO does not own the UNIX copyrights was
13 false and without a good faith basis for belief."

14 A. Yes. That's correct.

15 Q. Did you then proceed to say: "The documents
16 clarifying this issue have been in your possession for
17 nearly seven years."

18 A. Yes.

19 Q. Was that referring to Amendment Number 2 as
20 well as the APA?

21 A. Yes. All of the documents, including Amendment
22 Number 2.

23 Q. "Any question of whether the UNIX copyrights
24 transferred to SCO under the September, 1995 -- 19, 1995,
25 Asset Purchase Agreement was clarified in Amendment

1 Number 2 to the Asset Purchase Agreement dated October
2 16, 1996, you either knew or should have known of
3 Amendment Number 2 prior to issuing your press release
4 attack against SCO's ownership rights of the UNIX
5 copyrights on May 28, 2003."

6 "Therefore your conduct in this matter was
7 either maliciously or recklessly intended to harm SCO's
8 share value and customer relations."

9 Did you believe that when you wrote it on June
10 6, 2003?

11 A. Yes. Absolutely.

12 Q. It then says: "As to the question of whether
13 your conduct was malicious or reckless, we have a direct
14 statement that Chris Stone, an executive employee working
15 closely with you on this matter, stated that the timing
16 of your May 28, 2003, press release was intended to
17 coincide with our earnings announcement that occurred
18 later that day."

19 Did you have information that led you to say
20 that Mr. Stone had timed the press release to coincide
21 with the release of your earnings?

22 A. Yes, we did.

23 MR. ACKER: Objection, Your Honor. Calls for
24 hearsay.

25 THE COURT: I'll sustain the objection.

1 Q. BY MR. SINGER: Did this part of the letter
2 reflect your belief at the time?

3 MR. ACKER: Same objection, Your Honor.

4 THE WITNESS: Yes, sir.

5 MR. ACKER: Just a back door to the last
6 question.

7 THE COURT: I'll overrule the objection. You
8 may answer.

9 THE WITNESS: Yes. This was my belief at that
10 point in time.

11 Q. Did the next sentence also reflect your belief
12 when you stated: "I am also concerned that IBM may have
13 possibly been involved in your decision to issue this
14 groundless press release based upon statements that you
15 made in our telephone conversation on June 5."

16 A. Yes, based on the previous statement he had
17 made to me when we were on the phone.

18 Q. And are those the statements that you relayed
19 earlier in your testimony today?

20 A. Yes. Point number 2, the phone call I had with
21 Jack.

22 Q. If you go back -- if you go down the letter a
23 little bit further to the next paragraph where it says:
24 "SCO will hold a press call at 11 a.m., eastern standard
25 time, to clear up this matter so that our shareholders

1 and customers are fully aware of SCO's rights with
2 respect to the UNIX copyrights. You have time before
3 that call to take the following corrective action in
4 order to possibly mitigate any liability on the part of
5 you, Jack Messman, and Novell, to SCO and to your own
6 shareholders for your false and groundless accusations."

7 And did you then set forth in the letter what
8 you had asked Mr. Messman to do on the phone call?

9 A. Yes, I did.

10 Q. And, following this letter, did you learn that
11 Mr. Messman authorized a press release to be issued by
12 Novell with respect to these claims?

13 A. Yes, I did.

14 Q. I'd like to turn to SCO Exhibit 96, which I
15 believe is already in evidence. This was a letter to you
16 on the same day, June 6, by fax; is that right?

17 A. That's correct.

18 Q. Was Mr. LaSala an executive of Novell?

19 A. Yes. He was their general counsel.

20 Q. Did you understand that this was a response to
21 the letter we have just been looking at?

22 A. Yes. That was my understanding.

23 Q. And you see where, in the second paragraph of
24 the letter, it says: "For your information, Novell has
25 to date issued a press release with respect to Amendment

1 Number 2, and a copy is attached."

2 A. Yes. Correct.

3 Q. And was there a copy attached to this?

4 A. Yes.

5 Q. And if we turn to SCO Exhibit 97, which I
6 believe is also in evidence, is this, in fact, a press
7 release that Novell issued on June 6, 2003?

8 A. Yes. That's right.

9 Q. Did you read it when it was issued?

10 A. Yes, I did.

11 Q. Did you see that it stated that in a May 28
12 letter to SCO, Novell challenged SCO's claims to UNIX
13 patent and copyright ownership and demanded that SCO
14 substantiate its allegations that Linux infringes SCO's
15 intellectual property rights. "Amendment Number 2 to the
16 1995 SCO/Novell Asset Purchase Agreement was sent to
17 Novell last night by SCO."

18 Did you understand that to refer to what you
19 had sent to Mr. Messman?

20 A. Yes. That's right.

21 Q. "To Novell's knowledge, this Amendment is not
22 present in Novell's files."

23 Did you have any way of knowing, at that time,
24 whether that was true or not?

25 A. I didn't know what was in their files.

1 Q. "The Amendment appears to support SCO's claim
2 that ownership of certain copyrights for UNIX did
3 transfer to SCO in 1996."

4 A. Right.

5 Q. Then it says: "The Amendment does not address
6 ownership of patents, however, which clearly remain with
7 Novell."

8 What was your reaction, Mr. McBride, to
9 Novell's press release of June 6?

10 A. I was very pleased that Jack not only gave us a
11 retraction letter as I had requested of him, but he did
12 it inside of the 24-hour window.

13 Q. Now, is it -- had SCO brought a lawsuit against
14 IBM for breach of contract in March of 2003?

15 A. Yes, we had.

16 Q. And during this time, in June, were you in
17 discussions with IBM regarding whether their license
18 rights should be terminated?

19 A. Yes, we were.

20 Q. Can you tell us whether those had started in
21 March?

22 A. We had started discussions with them in March.
23 Per our contract with IBM, we had a hundred-day cure
24 period where we needed to work through and try and
25 resolve the issues. In June, we were getting towards the

1 latter end of that hundred-day period. I believe the
2 period expired the middle of June in order for them to
3 get square with us so we wouldn't be terminating their
4 AIX license

5 Q. Three days after the June 6 letter and press
6 release from Novell, did you receive SCO Exhibit 672,
7 which is another letter from Jack Messman, this one dated
8 June 9, 2003?

9 A. Yes, I did.

10 MR. SINGER: I move the admission of Exhibit
11 672.

12 MR. ACKER: No objection.

13 THE COURT: It will be admitted.

14 (SCO Exhibit 672 received in evidence.)

15 Q. BY MR. SINGER: Did you understand that this
16 letter had to do with the discussions that you were
17 having with IBM and the issue of terminating IBM's
18 license rights?

19 A. Yes. I did understand that.

20 Q. Why were you engaged in a discussion about
21 terminating IBM's license rights?

22 A. Well, that was part of the contract
23 requirement, that we would sit down and try and work
24 through that and try and come to a resolution to the
25 problem.

1 Q. Was there a particular concern that you had had
2 with what IBM had done that would give you reason to
3 terminate those license rights?

4 A. Yes. There was a big concern we had.

5 Q. Can you briefly summarize what that concern
6 was?

7 A. The concern was, IBM had taken their version of
8 UNIX, called AIX. They had taken significant portions of
9 that, and they had moved that technology over to this
10 upstart operating system called Linux to help Linux grow
11 up to be a business-worthy, business-qualified operating
12 system, and that was against the rights that they had
13 with respect to their AIX contract and license

14 Q. Had you provided, in March, 2003, a notice of
15 intent to terminate your license because of that?

16 A. Yes, we did.

17 Q. And did that begin a period of discussion
18 between SCO Group and IBM?

19 A. Yes, it did.

20 Q. Can you look at the last paragraph of
21 Mr. Messman's letter of June 9, 2003.

22 A. Okay.

23 Q. Where it says: "Accordingly, pursuant to
24 Section 4.16(b) of the Asset Purchase Agreement, Novell
25 hereby directs SCO to waive any purported right SCO may

1 claim to terminate IBM's SVRX licenses enumerated in
2 Amendment X or to revoke any rights thereunder, including
3 any purported rights to terminate asserted in SCO's
4 letter of March 6, 2003, to IBM. Novell directs SCO to
5 take this action by noon, mountain daylight time, June
6 12, 2003, and to notify Novell it has done so by that
7 time."

8 Did you understand this to be basically a
9 three-month -- three-day ultimatum to waive your rights?

10 A. Yes. That's right.

11 Q. Did you do so?

12 A. No, we did not.

13 Q. I'd like to turn to Exhibit 675. Is this
14 another letter from Mr. Messman, dated June 12, 2003 that
15 was sent to you?

16 A. Okay.

17 MR. SINGER: I move the admission of Exhibit
18 675.

19 MR. ACKER: No objection, Your Honor.

20 THE COURT: It will be admitted.

21 (SCO Exhibit 675 received in evidence.)

22 Q. BY MR. SINGER: Mr. McBride, can you read
23 for the jury, after it refers to the various agreements,
24 what Mr. Messman told you in his letter of June 12, 2003?

25 A. Do you want me to read that?

1 Q. Please.

2 A. "In its June 9 letter to the SCO Group, Novell
3 directed SCO to waive any purported right SCO may claim
4 to terminate IBM's SVRX licenses enumerated in Amendment
5 X or to revoke any rights thereunder, including any
6 purported rights to terminate asserted in SCO's letter of
7 March 6, 2003, to IBM. Novell directed SCO to take this
8 action by noon, mountain daylight time, June 12, 2003."

9 Q. Can you read the next paragraph. I think
10 there's a paragraph at the bottom of the page, Mr. Calvin
11 (sic). Please continue, Mr. Messman -- or, Mr. McBride,
12 with Mr. Messman's letter.

13 A. Okay.

14 Q. The last --

15 A. Oh, okay: "SCO has failed to take the action
16 directed by Novell."

17 Q. And then, can you read the paragraph on page 2?

18 A. Okay: "Accordingly, pursuant to Section
19 4.16(b) of the Asset Purchase Agreement, Novell, on
20 behalf of the SCO Group, hereby waives any purported
21 right SCO may claim to terminate IBM's SVRX licenses
22 enumerated in Amendment X or to revoke any rights
23 thereunder, including any purported rights to terminate
24 asserted in SCO's letter of March 6, 2003, to IBM."

25 Q. Did you understand this to be Novell seeking to

1 act to force SCO to waive its rights?

2 A. Yes. That's exactly the way I viewed it.

3 THE COURT: Mr. Singer, Mr. Acker has not
4 objected, but I've got to instruct you to not ask leading
5 questions.

6 MR. SINGER: Yes, Your Honor.

7 Q. BY MR. SINGER: Did Novell change its position
8 with respect to the UNIX copyright ownership after June
9 6?

10 A. Yes, it did.

11 Q. And I'd like you to look at Mr. LaSala's letter
12 of June 26, SCO Exhibit 678. I move the admission -- is
13 this a letter from Mr. LaSala to you dated June 26, 2003?

14 A. Yes, it is.

15 MR. SINGER: I move the admission of Exhibit
16 678.

17 MR. ACKER: No objection, Your Honor.

18 THE COURT: It will be admitted.

19 (SCO Exhibit 678 received in evidence.)

20 Q. BY MR. SINGER: Do you -- would you go down to
21 the second paragraph of this letter?

22 A. Okay.

23 Q. Do you see where it says: "SCO's statements
24 are simply wrong."

25 A. Yes.

1 Q. And can you read the balance of that paragraph
2 for the jury, please.

3 A. "SCO's statements are simply wrong. We
4 acknowledge, as noted in our June 6 public statement,
5 that Amendment Number 2 to the Asset Purchase Agreement
6 appears to support a claim that the Santa Cruz Operation
7 had the right to acquire some copyrights from Novell."

8 Q. Can you stop there, Mr. McBride?

9 A. Yes.

10 Q. Is that what your view of the June 6 public
11 statement by Novell said?

12 A. No. That's not what it said at all.

13 Q. Can you explain the difference?

14 A. Well, if you look at the word "acquire" in
15 here, that's not what Jack said in the statement that
16 went out. He said "transfer." He didn't use the word
17 "acquire." He said "transfer."

18 Q. What was the significance of that, to you?

19 A. He admitted, when he saw the thing come
20 through, and the first statement he came out with was
21 that, in fact, copyrights had transferred to SCO.

22 Q. Can we look back at the June 6 press release
23 for a moment. That would be Exhibit Number 97.

24 A. Okay.

25 Q. Are you referring to the statement that appears

1 in the first paragraph -- can you show what you're
2 referring to in this paragraph?

3 A. Let me find it here. Let's see. Yes. So if
4 you go down to the second-to-the-last sentence, it says
5 very clearly: "The Amendment appears to support SCO's
6 claim that ownership of certain copyrights for UNIX did
7 transfer to SCO in 1996".

8 Q. Can we turn back, now, to SCO Exhibit 678. And
9 can you pick up with your reading of the second paragraph
10 of Mr. LaSala's letter of June 26?

11 A. Yes. So we got down to the part where they did
12 some wordsmithing to change what was actually in the
13 letter. Then we go to the next part. Then he says:
14 "Upon closer scrutiny, however, Amendment Number 2 raises
15 as many questions about copyright transfers as it
16 answers. Indeed, what is most certainly not the case is
17 that any question whether UNIX copyrights were
18 transferred to SCO as part of the Asset Purchase
19 Agreement was clarified in Amendment Number 2 as SCO
20 stated in its June 6 press release, and there is no
21 indication whatsoever that SCO owns all the patents
22 associated with UNIX or UnixWare."

23 Q. How did you regard Mr. LaSala's letter of June
24 26?

25 A. Well, it was flipflopping, to use the term from

1 the political world. They had gone out publicly and said
2 we own UNIX. We had come back and produced Amendment
3 Number 2, and right on the phone, Jack said to me:

4 "Okay. You got the copyrights. What do you want?"

5 And the first thing I said is: "We want a
6 retraction letter."

7 And within 24 hours they sent a retraction
8 letter. Now, several weeks later, they were reversing
9 their position again. It was getting dizzying to figure
10 out which direction they were. Did they own them or did
11 they not own them?

12 Q. Can you turn to Exhibit 105, which I believe
13 has already been admitted into evidence. This is a
14 letter from Mr. LaSala, now, August 4, 2003. Did you
15 receive this letter?

16 A. Yes, I did.

17 Q. And did you regard this -- in your judgment,
18 was this a change in Novell's position?

19 MR. ACKER: Objection. Leading, Your Honor.

20 THE COURT: Sustained.

21 Q. BY MR. SINGER: Can you explain how you viewed
22 this letter of August 14, 2003?

23 A. Yeah. And it's not coming up on my screen.
24 Which Exhibit Number is it?

25 Q. It's Exhibit 105.

1 A. 105?

2 THE COURT: It has been admitted, so it should
3 be on the screen.

4 THE WITNESS: It stops at "Dear Mr. McBride."

5 There. Thank you. If you blow it up so I can read it.

6 There. Thank you.

7 Q. BY MR. SINGER: Can you turn to the second
8 paragraph.

9 A. Okay.

10 Q. Do you see where it says: "We dispute SCO's
11 claim to ownership of these copyrights."

12 A. Yes, I do.

13 Q. And can you turn to the third paragraph.

14 A. Okay.

15 Q. What was your reaction to the letter of August
16 4, 2003?

17 A. Well, it was -- again, this -- the flipflopping
18 mentality comes to mind, that Jack had clearly told me:
19 "You got the copyrights." They had sent out the
20 retraction letter. Then, the end of June, they send a
21 letter trying to modify what we had said. Now, in
22 August, they are coming out with another story. It just
23 appeared they were trying to make up stories to create a
24 claim for ownership, when in fact they had told me -- he
25 had told me over the phone: "You've got the copyrights."

1 What do you want?"

2 Q. Could you turn to the last paragraph of the
3 letter and read that to the jury, please.

4 A. Okay: "Unless and until SCO is able to
5 establish that some particular copyright right is
6 required for SCO to exercise its rights under the APA,
7 SCO's claim to ownership of any copyrights in its UNIX
8 technologies must be rejected and ownership of such
9 rights, instead, remains with Novell."

10 Q. We will talk about this in more detail later,
11 but, in general, what effect did Novell's statements
12 claiming that it owned the copyrights, that SCO did not
13 own the UNIX copyrights have on SCO's business?

14 MR. ACKER: Objection. Compound. Which
15 statement?

16 THE COURT: Sustained.

17 Q. BY MR. SINGER: Let's start with, what effect
18 did the statement that SCO did not own the UNIX and
19 UnixWare copyrights have on SCO's business?

20 MR. ACKER: Same objection. Statements. He's
21 got to identify which statements, Your Honor.

22 MR. SINGER: I think that this is --

23 MR. ACKER: Some are public and some are
24 private, and he's talking -- he's glumping them all
25 together. He needs to break it out. It's a compound

1 question.

2 THE COURT: Why don't you reask the question,
3 Mr. Singer.

4 Q. BY MR. SINGER: At this point in time, you were
5 aware of -- were you aware of statements that we had
6 looked at in June of 2003 --

7 A. Yes.

8 Q. -- including a press release which had
9 retracted the May 28 press release?

10 A. Yes.

11 Q. This letter of August 4, 2003, do you know if
12 this was published at this time?

13 A. At this time, to my knowledge, it was not
14 published publicly.

15 Q. Do you know whether it was published at a later
16 time?

17 A. Yes, it was, eventually.

18 Q. Do you know approximately when that was?

19 A. Yes. It was later published on our earnings
20 call, two quarters later, on December 22, 2003.

21 Q. And can you tell me, Mr. McBride, whether this
22 assertion by Novell in December, 2003, had an effect on
23 your business?

24 A. It had a devastating effect on our business.

25 Q. Can you elaborate a bit?

1 A. On December 22, 2003, we had just finished up
2 our fiscal year, so we had a full year, now, of
3 reporting, and it was the first full year of having
4 SCOSource licensing within one year. And the results
5 that we announced were record breaking revenues of nearly
6 80 million dollars for the year and record breaking
7 profits. I believe they were over 5 million dollars. On
8 the day that we announced, once again, SCO was facing
9 another attack from Novell about the question of UNIX
10 copyright ownership.

11 Novell came out and announced that it had filed
12 copyright registrations with the copyright office, it
13 reasserted its ownership claims of UNIX, and, once again,
14 on a day that our stock would be expected to go up -- I
15 mean, when you have record breaking revenues, usually, as
16 a publicly traded company, your stock goes up. Instead
17 of our stock going up on what should have been the best
18 day of our company's life with our record breaking
19 earnings and revenue, our stock went down on the
20 heaviness of yet another Novell statement that they owned
21 UNIX.

22 Q. Would you look at Exhibit 134, which I believe
23 is later in your book. I'm sorry. It's A-24.

24 A. A-24?

25 Q. Yes. It should be near the end of the book.

1 A. Got it.

2 Q. Was this SCO's announcement at the end of 2003,
3 specifically on December 22, 2003, regarding financial
4 results?

5 A. Yes. That's right. This is the one we were
6 just talking about.

7 MR. SINGER: I move the admission of A-24.

8 MR. ACKER: No objection.

9 THE COURT: It will be admitted.

10 (Defendant's Exhibit A-24 received in evidence.)

11 Q. BY MR. SINGER: And can you read out loud the
12 first paragraph of the report.

13 A. Sure: "The SCO Group, owner of the UNIX
14 operating system and the leading provider of UNIX based
15 solutions today reported revenue of 24.3 million for the
16 fourth quarter of its fiscal year ended October 31, 2003,
17 a 57 percent increase of revenue over 15.5 million
18 for the comparable quarter a year ago."

19 Q. And this press release was issued, you said, on
20 December 22?

21 A. Correct.

22 Q. Could you turn to the exhibit that's right
23 before this in your book, Exhibit 517. Is this a press
24 release by Novell dated December 22, 2003?

25 A. Yes. Correct.

1 Q. I believe this is already in evidence. Can you
2 read out loud the one paragraph of this press release.

3 A. Sure: "Novell believes it owns the copyrights
4 in UNIX and has applied for and received copyright
5 registrations pertaining to UNIX consistent with that
6 position. Novell detailed the basis for its ownership
7 position in correspondence with SCO. Copies of our
8 correspondence and SCO's reply are available here.
9 Contrary to SCO's public statements, as demonstrated by
10 this correspondence, SCO has been well aware that Novell
11 continues to assert ownership of the UNIX copyrights."

12 Q. Do you know what correspondence -- whether the
13 correspondence being referred to in its press release
14 included the letters we've been looking at in August and
15 June?

16 A. That was my assumption.

17 Q. The letter of June 26 from Mr. LaSala, was that
18 published, at the time, as a press release?

19 A. No, it was --

20 MR. ACKER: Objection. Vague as to which time.
21 September 22 or in December?

22 Q. BY MR. SINGER: At the time it was written, in
23 June, 2003, was that published as a press release?

24 A. It was not published in June, no.

25 Q. Was the -- did you come to learn that Novell

1 had registered copyrights in its name in 2003 for UNIX
2 and UnixWare?

3 A. Yes.

4 Q. Was that publicly made known at that time by
5 Novell?

6 A. No.

7 MR. ACKER: The question misstates facts.
8 There is no copyright registrations for UnixWare.

9 Q. BY MR. SINGER: We're talking about UNIX and
10 UnixWare. Are you aware of whether or not any of the
11 copyrights registered by Novell were for UNIX
12 technology?

13 MR. ACKER: Calls for speculation -- oh, for
14 UNIX technology? I have no objection to that.

15 THE WITNESS: Yes. I was aware that they had
16 registered copyright notices on UNIX back in the October
17 time frame.

18 Q. BY MR. SINGER: Are you aware of whether or not
19 those copyrights covered the same technology which you
20 had obtained copyrights on from AT&T through Novell?

21 A. Yes, they did.

22 Q. Did -- was that publicly announced by Novell
23 prior to December 22, 2003?

24 A. No, it was not.

25 Q. Can you summarize what the effect of the press

1 release on December 22, 2003 had on your SCOsource
2 business?

3 MR. ACKER: Objection. Asked and answered,
4 Your Honor.

5 THE COURT: Overruled.

6 THE WITNESS: It had the effect of killing off
7 our SCOsource business over the period of time from when
8 that was announced, going forward. Eventually, because
9 of the statements that Novell had made, we were unable to
10 complete anymore SCOsource licensing deals. "Anymore" is
11 not the right word. Eventually it got to the point we
12 could not complete SCOsource transactions because people
13 kept pointing to the Novell public statements that were
14 out there that they still owned UNIX.

15 MR. SINGER: Your Honor, I am at a breaking
16 point before going on to a different topic. I can start
17 that or --

18 THE COURT: No. I think it's best that we just
19 go ahead and recess for the afternoon. That is what
20 you're asking me, correct?

21 MR. SINGER: Yes, Your Honor.

22 THE COURT: Ladies and gentlemen, I will not
23 repeat what you have been told to do. Because I don't
24 repeat it doesn't mean it doesn't still apply to you.
25 All right. We will be in recess until 8:30 in the

1 morning.

2 Ms. Malley.

3 MS. MALLEY: All rise for the jury.

4 (Jury leaves the courtroom.)

5 THE COURT: Mr. McBride, I do need to caution
6 you not to discuss your testimony with any other
7 witnesses in this case.

8 THE WITNESS: Understood.

9 THE COURT: Or in the presence of any other
10 witnesses.

11 THE WITNESS: Okay.

12 THE COURT: And we will have you back on at
13 8:30 in the morning.

14 Do you have anything, counsel, before we
15 recess?

16 MR. SINGER: Your Honor, is Mr. McBride able
17 to discuss the case with counsel, since he is still under
18 direct examination?

19 THE COURT: Mr. Acker?

20 MR. ACKER: That's fine.

21 THE COURT: I know of no reason why he
22 couldn't.

23 MR. ACKER: No objection. He can continue to
24 get down.

25 THE COURT: Counsel, we do have hearings this

1 afternoon, so if you would not mind clearing off the
2 desks.

3 MR. JACOBS: Your Honor, because the colloquy
4 among us about Ms. Madsen and her recall and what's in
5 the declaration refers to documents such as some
6 deposition testimony and the declaration itself, and
7 because I think we need to make a record on this, we
8 would propose to submit a proffer or offer of proof,
9 maybe tomorrow, that contains the declaration, the
10 deposition testimony, etc., so that there's a clear
11 record.

12 THE COURT: So that you have a record. I see.
13 That will be appropriate, certainly.

14 MR. JACOBS: Thank you.

15 THE COURT: If there's nothing else --

16 MR. NORMAND: Your Honor, there is one other
17 issue.

18 THE COURT: Mr. Normand.

19 MR. NORMAND: There are, respectively, three
20 sets of deposition designations that relate to
21 depositions that were taken in the IBM case, and SCO is
22 still contemplating using them. My understanding is that
23 Novell objects to them, among other reasons, on the
24 grounds that they were taken in the IBM case and not this
25 case. If that objection stands, we would propose to put

1 in a resubmission to the Court on that issue.

2 THE COURT: All right.

3 MR. JACOBS: The objection stands, Your Honor.

4 THE COURT: All right. You better put in a
5 submission, then.

6 MR. NORMAND: Thank you, Your Honor.

7 MR. SINGER: Thank you, Your Honor.

8 THE COURT: We will be in recess until 8:30.

9 (Whereupon the proceedings were concluded
10 for the day.)

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