

1           MR. ACKER: Your Honor, I think maybe I can cut  
2 this off. I've learned something here today.

3 Mr. Stewart is right. As long as it goes both ways --

4           THE COURT: I'm Mr. Stewart.

5           MR. ACKER: I'm sorry. You're always right.

6           MR. SINGER: I think that's Judge Stewart.

7           MR. ACKER: Yeah, it is Judge Stewart. He's  
8 always right. Mr. Singer is right, and I have no  
9 objection as long as the hearsay comes in both ways.  
10 That is, if he wants to put in statements of customers as  
11 to why they did or did not take SCOSource licenses, then  
12 we will do the same.

13           THE COURT: The analysis we've been able to do,  
14 based on a couple of Tenth Circuit cases, would indicate  
15 that he may he testify as to statements made that they  
16 were interested and, if he can prove that they would have  
17 engaged in business and he can demonstrate that they  
18 decided not to, but he would not be permitted to testify  
19 as to why they decided not to.

20           There are a couple of cases that my law clerks  
21 were able to find that would indicate that there is that  
22 limitation. He can not speculate as to what was the  
23 reason for ultimately not consummating the deal.

24           Now, if you two somehow or another want to  
25 agree to violate the rule jointly, I'm not sure that

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1 that's very wise.

2           MR. SINGER: Your Honor, we're also learning  
3 something because when he looked into this, we found  
4 Second and Third Circuit authority which said that  
5 customer motives were admissible under 8033 to the  
6 Hearsay Rule but we didn't discover Tenth Circuit  
7 authority. Would the Court be able to share with us  
8 that?

9           THE COURT: This is from the case of United  
10 States of America vs. Ledford. It's 443 Fed 3d 702.  
11 It's a Tenth Circuit decision from 2006. Let me just  
12 read the relevant part:

13           Under the state-of-mind exception -- which I  
14 presume we're all operating under -- itself, a statement  
15 is not excluded by the Hearsay Rule if it is, A, a  
16 statement of the declarant's then existing state of mind,  
17 etc. It then cites the rule.

18           Then, going on, it says: Thus the Federal  
19 Rules of Evidence contemplate an exception to the  
20 exception. A statement that would otherwise be  
21 admissible under the state-of-mind exception is  
22 inadmissible if it is a statement of memory or belief  
23 offered to prove the fact remembered or believed. Case  
24 law makes it clear that a witness may testify to a  
25 declarant saying "I am scared," but not "I am scared

1 because the defendant threatened me." The first  
2 statement indicates a natural state of mind or admission,  
3 while the second statement expresses belief about why the  
4 declarant is frightened.

5           The phrase "because the defendant threatened  
6 me" is expressly outside the state-of-mind exception  
7 because the explanation for the fear expresses a belief  
8 different from the state of mind of being afraid.

9           Now, admittedly, it's a criminal case, but I  
10 don't know of any reason why it should be distinguished.

11           MR. SINGER: The authority that we are relying  
12 on, Your Honor, and I'm happy to provide copies if I  
13 may.

14           THE COURT: If you would, please.

15           MR. SINGER: This is Hydrolevel Corporation vs.  
16 American Society of Mechanical Engineers, 635 F.2d 118.  
17 Second Circuit.

18           THE COURT: Do you have the relevant portion  
19 marked or something?

20           MR. SINGER: Yes. It is highlighted. It is at  
21 page 11 as the opinion is printed.

22           THE COURT: Have you given copies of these to  
23 Mr. Acker?

24           MR. SINGER: Yes, we have. But, you know, we  
25 recognize these are out of different Circuits. This is

1 the Third Circuit in *Freaser vs. Serv-a-Portion*, 909 F.2d  
2 1524. I think, in light of the Court's Tenth Circuit  
3 authority, we would be happy to be governed by the Tenth  
4 Circuit authority if the Court is inclined to follow on  
5 this and to proceed just within what I understand to be  
6 the scope of this, that we can talk with Mr. McBride  
7 about the fact that there was a business opportunity that  
8 they were interested in, the opportunity was lost, but  
9 not to elicit either through correspondence or through  
10 testimony as to the reasons that he was given why that  
11 customer was lost.

12 THE COURT: I believe that's what the Tenth  
13 Circuit tells us we are allowed to do.

14 MR. ACKER: Well, if that's the rule we are  
15 going to operate under, then I think we have to strike  
16 Mr. McBride's testimony regarding why HP obtained a  
17 license and what Mr. Buyers allegedly said to him in a  
18 telephone call.

19 THE COURT: Mr. Acker, I was expecting you to  
20 object, and you didn't. And I don't believe that, in  
21 light of your failure to object timely, that I can now go  
22 back and expect a jury to remember what it was that I'm  
23 striking from.

24 MR. ACKER: And then I'm just alerting the  
25 Court and counsel that I'm going into the reasons why it

1 is that HP did or did not take a license.

2 THE COURT: And I think I've got to allow you  
3 to do that certainly, but this point forward.

4 MR. ACKER: I understand.

5 THE COURT: All right. Do we understand each  
6 other then, counsel?

7 MR. SINGER: I believe so, Your Honor.

8 THE COURT: All right.

9 (Jury brought into the courtroom.)

10 THE COURT: Okay, Mr. Singer.

11 Q. Mr. McBride, I think we were in the course of  
12 discussing Google.

13 A. Yes.

14 Q. Was there an offer made by SCO to Google for  
15 selling SCOSource licenses?

16 A. Yes.

17 Q. Do you recall what SCO's offering price was for  
18 a SCOSource license?

19 A. Yes. There was a discount off from our  
20 at-the-time list price, which was 699. It was a discount  
21 off from that price because of their volume amount they  
22 had, down to a hundred dollars per server.

23 Q. Did that deal get done?

24 A. No, it did not.

25 Q. And did you have a business opportunity with

1 Dell?

2 A. Yes.

3 Q. Were you personally involved in those  
4 discussions?

5 A. Yes, I was.

6 Q. What type of license was the business  
7 opportunity that you presented to Dell consist of?

8 A. Dell was basically going to be a reseller of  
9 our SCOSource product line.

10 Q. And what was the time frame of those  
11 discussions?

12 A. That was in the early 2004, January, February,  
13 2004 time frame.

14 Q. And were you able to bring that discussion to a  
15 satisfactory conclusion?

16 A. No.

17 Q. In January, 2004, did Novell announce its own  
18 program with respect to selling indemnification for Linux  
19 users?

20 A. Yes, they did.

21 Q. And can you explain what -- well, actually,  
22 let's take a look at the exhibit, Exhibit 394. Was this  
23 an announcement by Novell of a Linux indemnification  
24 program?

25 A. Yes, that's right.

1 MR. SINGER: I move 394 into evidence.  
2 MR. ACKER: No objection, Your Honor.  
3 THE COURT: It will be admitted.  
4 (SCO Exhibit 394 received in evidence.)  
5 Q. BY MR. SINGER: And what is indemnification?  
6 Can you explain your understanding of that?  
7 A. Basically, they were looking to give legal  
8 protection to people who were using Linux.  
9 Q. Was this a program that would compete with the  
10 SCOsource licenses that SCO was offering?  
11 A. Yes. Absolutely.  
12 Q. And is it your under -- what is the time frame  
13 in which this was announced by Novell?  
14 A. My understanding is, if I recall correctly, it  
15 was announced and launched in January of 2004.  
16 Q. Were there requirements, as part of the  
17 program, that the customers buy a certain minimum amount  
18 of Novell goods in order to be eligible for this  
19 protection?  
20 A. That was my understanding.  
21 Q. Can we turn to -- and perhaps Mr. Calvin can  
22 enlarge it -- the terms and conditions of the program  
23 which appear on the right-hand column of this exhibit.  
24 A. Okay.  
25 Q. Are you referring to the statement that the

1 Novell indemnification program is available to all  
2 qualified Novell customers? Requirements include meeting  
3 the \$50 thousand annual minimum purchase requirement for  
4 licenses, upgrades and updates within the year preceding  
5 a claim against your indemnified Linux product?

6 A. Yes. That's right.

7 Q. Going forward into 2004, how did the SCOSource  
8 program fair?

9 A. Very poorly.

10 Q. Can you elaborate?

11 A. So, after having a record -- a banner year  
12 record, it was our first year, but we launched SCOSource  
13 in 2003, had a great year. The revenues were rolling  
14 nicely as we moved into 2004, and on the heels of  
15 Novell's second announcement on our earnings date, that  
16 they in fact did own UNIX, it put a severe damper --  
17 "damper" is probably too light of a word -- on our  
18 ability to sell SCOSource licenses.

19 Q. What happened to the SCOSource division? Had  
20 you built up a sales force for SCOSource?

21 A. Yes. We had, I believe, four or five people  
22 working in the sales force, in addition to some other  
23 people on the international side.

24 Q. What happened to that sales force?

25 A. We had -- ultimately, it became too high of a



1 hurdle for us to get over, and time after time it became  
2 problematic to sell in light of the Novell ownership  
3 claims and also their indemnification program, and before  
4 2004 was over, we had to shutter the SCOSource division  
5 and shut it down. I think the specific question was the  
6 employees related to that were laid off.

7 MR. SINGER: I have nothing further at this  
8 time. Thank you.

9 THE COURT: Mr. Acker.

10 MR. ACKER: Thank you, Your Honor.

11 CROSS EXAMINATION

12 BY MR. ACKER:

13 Q. Let me give you copies of your previous  
14 testimony, Mr. McBride.

15 A. Thank you.

16 Q. You may need that, too.

17 A. Oh.

18 Q. Good morning, Mr. McBride.

19 A. Good morning, Mr. Acker.

20 Q. It's good to see you again.

21 A. Likewise.

22 Q. I want to take a step back a little bit, and  
23 during your answers to the questions that Mr. Singer  
24 posed, you talked about the time that you worked at  
25 Novell. Do you recall that?

1 A. Yes, I do.

2 Q. But you left Novell in February of 1996,  
3 correct?

4 A. That's correct.

5 Q. And you were not involved in the negotiation of  
6 the asset purchase agreement between Novell and Santa  
7 Cruz while at Novell; is that right?

8 A. That's correct.

9 Q. Also true and you agree that you were not  
10 involved in the details of the structure of the asset  
11 purchase agreement in 1995, fair?

12 A. That's fair.

13 Q. And, also, it's certainly the case that you  
14 were not present at the Novell board of directors'  
15 meeting in September of 1995, when the directors approved  
16 the asset purchase agreement, correct?

17 A. Correct.

18 Q. And, obviously, if you weren't in the room, you  
19 don't know what was said, correct?

20 A. Correct.

21 Q. And you don't know what it is that the Novell  
22 board of directors approved, correct?

23 A. (Witness nods.)

24 Q. Is that right, sir?

25 A. I know what was approved by the board of

1 directors as a result of what came out of their meetings  
2 that were later published, but, beyond that, I don't  
3 know.

4 Q. Well, you weren't in the room, correct?

5 A. No. I was not in the room.

6 Q. Have you ever read the minutes of the board of  
7 directors' meeting?

8 A. Yes, I have.

9 Q. You have read those?

10 A. Yes, I have.

11 Q. And you understand that those minutes say that  
12 what the board of directors did is approved an asset  
13 purchase agreement that excluded the transfer of the UNIX  
14 copyrights, correct?

15 A. No.

16 Q. That's not correct? Is that right? Is that  
17 your testimony?

18 A. Pardon?

19 Q. That is your testimony, that the board of  
20 directors meetings don't say that?

21 A. Not the way you asked it.

22 Q. Isn't it true -- let me try again. Isn't it  
23 true that the board of directors' meetings in September  
24 of 1995, where the Novell board approved the APA, it says  
25 the copyrights will be excluded?

1       A.    The way you asked it that time, I would agree.

2 I would say yes.

3       Q.    And so the only information that you have about  
4 what occurred at the board of directors' meeting is  
5 reading the minutes, right?

6       A.    No.

7       Q.    The only documentation you've ever seen about  
8 the board of directors' meeting is reading the minutes,  
9 correct?

10      A.    I don't recall if I have other documentation  
11 that I have read.

12      Q.    And the documents that you have said, say that  
13 what the board did at Novell in 1995 is approved a deal  
14 where copyrights were excluded, right?

15      A.    I agree with you that there are board minutes  
16 that say the copyrights were excluded. I guess we don't  
17 agree on which copyrights.

18      Q.    And you didn't review the APA again until 2002,  
19 or that's actually the first time you ever laid eyes on  
20 it, right?

21      A.    Yes. That's correct.

22      Q.    So, a deal is done at Novell in 1995 that  
23 you're not part of, correct?

24      A.    That's correct.

25      Q.    And the board of directors at Novell approves

1 that deal, and you're not at that meeting. Right?

2 A. That's correct.

3 Q. And you're not involved in the negotiations of  
4 that deal, correct?

5 A. That's correct.

6 Q. And the first time that you ever actually lay  
7 eyes on the piece of paper that embodies that deal is  
8 seven years later, right?

9 A. That's correct.

10 Q. Now, you also testified, just a bit ago, that  
11 to run your business at SCO before you were terminated as  
12 CEO, you had to own the copyrights to UNIX. Did I hear  
13 that right?

14 A. Yes. That's right.

15 Q. Well, when Santa Cruz -- before you were  
16 involved with the company, when Santa Cruz was selling  
17 OpenServer in 1996, 1997, and even before the APA in 1994  
18 and 1995, they didn't own the UNIX copyrights, did  
19 they?

20 A. No, they did not.

21 Q. And they were out in the marketplace with their  
22 flavor of UNIX, OpenServer, selling OpenServer without  
23 the copyrights, right?

24 A. Without which copyrights?

25 Q. Before the APA, Santa Cruz did not own the UNIX

1 copyrights, correct?

2 A. They had their own copyrights for OpenServer.

3 Q. But what they had for OpenServer for the UNIX  
4 portion of OpenServer was a license, right?

5 A. For the portion that related to that, yes, but  
6 they did have their copyrights.

7 Q. And with that license, they were able to run  
8 their business selling OpenServer, correct?

9 A. The license plus the copyrights to  
10 OpenServer.

11 Q. Right. But they didn't have the copyrights, at  
12 least according to you, before 1995, right?

13 A. No. No. No. No, I don't agree with that  
14 statement.

15 Q. You also stated in your press release, when you  
16 announced SCOSource in January of 2002, that Santa  
17 Cruz -- SCO, the plaintiff in this case, also owned the  
18 UNIX patents. You said that in the press release, didn't  
19 you?

20 A. There was a press release that went out that  
21 mentioned UNIX patents.

22 Q. And you also know that in the APA, in the  
23 language that you looked at and the exclusion language of  
24 the APA, excluded patents as being transferred as part of  
25 the APA, right?

1 A. Yes.

2 Q. And there is nothing in Amendment Number 2 that  
3 says anything about patents, is there?

4 A. No, there is not.

5 Q. And so, the information that you have is that  
6 patents were excluded in the original deal by the plain  
7 language of the agreement, correct?

8 A. Yes.

9 Q. And there's nothing in Amendment Number 2 that  
10 says anything about patents, correct?

11 A. Correct.

12 Q. But you, as CEO of SCO, put out a press release  
13 to the world in January, 2002, or 2003, saying that you  
14 owned those patents, didn't you?

15 A. I wouldn't quite characterize it that way.

16 Q. So let's go back to when you first joined the  
17 company in 2002. This was your first job as a CEO at SCO  
18 when you joined in June of 2002, correct?

19 A. Did you say it was my first job as a CEO or CEO  
20 of SCO?

21 Q. First job as a CEO of a publicly traded  
22 company?

23 A. That's correct.

24 Q. And that was a big deal, wasn't it?

25 A. Yes.

1 Q. And when you joined SCO in 2002, it was not in  
2 great financial shape, right?

3 A. That's what I said earlier, that's right.

4 Q. The company was in a turnaround, right?

5 A. Correct.

6 Q. Hadn't been profitable in the last fiscal year  
7 that ended at the end of October of 2002, correct?

8 A. That's correct.

9 Q. It suffered a net loss of more than \$24  
10 million; isn't that right?

11 A. I don't have those numbers in front of me, but  
12 they clearly were not profitable.

13 Q. And the shoulder equity had decreased to such  
14 an extent that there was a possibility of you being  
15 delisted from the NASDAQ stock exchange, correct?

16 A. What time frame are you talking about?

17 Q. December of 2002.

18 A. I don't think the delisting issue was in  
19 December, if I recall correctly.

20 Q. And it was under these circumstances that you  
21 went to the board with this new SCOSource program, right?

22 A. Yes.

23 Q. And you believed that that was the course of  
24 action you had to take in order to save the company; is  
25 that right?



1 A. I wouldn't say it quite like that.

2 Q. Well, the reason you undertook SCOSource was in  
3 order to turn around this dire financial situation at  
4 SCO, wasn't it?

5 A. It was a key component of it, of turning around  
6 the company, yes.

7 Q. And, in order to implement this new strategy of  
8 SCOSource, you had to hire lawyers, right?

9 A. Lawyers were part of the team that we brought  
10 together. There were others.

11 Q. And you hired those lawyers. You had them on  
12 board, the Boies, Schiller firm, as of December of 2002,  
13 right?

14 A. Yes.

15 Q. And it was your belief, in late 2002, that the  
16 SCOSource licensing strategy would only result in  
17 significant revenue for SCO if the company was willing to  
18 engage in litigation or the legitimate threat of  
19 litigation, true?

20 A. I believed that we needed to be able to stand  
21 firm and enforce our property if people were not willing  
22 to license.

23 Q. And so you were changing the business plan of  
24 SCO from one of being a software company to being a  
25 litigation company, correct?

1 A. Incorrect.

2 Q. But, in order for SCOsource to work, you  
3 believed in 2002 you had to have a law firm and you had  
4 to either sue or be willing to sue; isn't that true?

5 A. We believed that we needed to be willing to sue  
6 people who would not -- if people would misuse our  
7 materials, we believed, yes, we would need to file  
8 lawsuits.

9 Q. And then, in January of 2002, you announced the  
10 SCOsource program at the Linux World Conference in New  
11 York?

12 A. Yes.

13 Q. In January of 2003, you announced the SCOsource  
14 in Linux World at New York, correct?

15 A. Yes. That's correct.

16 Q. If we could bring up Exhibit N-12, please. And  
17 if we could highlight the first line under SCOsource.

18 And what you told the community, the software  
19 community, was that you believed that you owned the UNIX  
20 copyrights, correct?

21 A. Yes.

22 Q. And you also believed that you owned the UNIX  
23 patents, right?

24 A. Yes.

25 Q. And we know that's not true, that you don't own

1 the UNIX patents or SCO never did, correct?

2 A. Over time, we came to that understanding. We  
3 had been trying to clarify the situation with Novell, but  
4 at that time, that was our understanding.

5 Q. You came to the understanding that you didn't  
6 own the patents, right?

7 A. That's correct.

8 Q. And you came to that understanding you didn't  
9 own the patents because the plain language of the  
10 exclusion in 1.(b) of the asset purchase agreement says  
11 that, right?

12 A. No.

13 Q. And this was a big deal, wasn't it?

14 A. What was a big deal?

15 Q. Your announcement?

16 A. This was an important announcement for us.

17 Q. And it caused quite a stir in the software  
18 community, didn't it?

19 A. In some parts. That would be accurate.

20 Q. And there was a great deal of press coverage,  
21 correct?

22 A. Yes. It was reported widely.

23 THE COURT: Mr. Acker, are you going to ask for  
24 admission of N-12?

25 MR. ACKER: Yes, Your Honor we'd move for

1 admission of N-12.

2 MR. SINGER: No objection.

3 THE COURT: It will be admitted.

4 (Novell Exhibit N-12 received in evidence.)

5 Q. BY MR. ACKER: Let me show you some of that  
6 press coverage. Let me hand you a couple documents,  
7 Mr. McBride, we have marked as Exhibit I-12 and Exhibit  
8 P-12.

9 MR. SINGER: I am assuming these are not coming  
10 in for the truth of the matter but simply press releases.  
11 We have no objection.

12 MR. ACKER: I'd move for admission of both I-12  
13 and P-12, Your Honor.

14 THE COURT: They will be admitted.  
15 (Novell Exhibits I-12 and P-12 received in evidence.)

16 Q. Have you had a chance to look at I-12,  
17 Mr. McBride?

18 A. Yes.

19 Q. And that's an article that was written by  
20 somebody you know, Maureen O'Gara, right?

21 A. Yes. That's correct.

22 Q. And she's a reporter in the software industry;  
23 is that correct?

24 A. That's right.

25 MR. ACKER: And if we could highlight the first

1 paragraph, please, Mr. Lee.

2 Q. BY MR. ACKER: And this article came out just  
3 before the announcement. There was actually a release of  
4 the announcement on the 22nd before it actually came out;  
5 isn't that true?

6 A. Say that again.

7 Q. There was a leak of the announcement of the  
8 SCOSource program before it was actually announced; isn't  
9 that true, Mr. McBride?

10 A. I'm not aware of that.

11 Q. In the first paragraph Ms. O'Gara writes:  
12 The financially challenged SCO group, the  
13 current avatar of pioneer Linux distributor Caldera  
14 International has been threatening behind the scenes to  
15 demand that the Linux users, regardless of whatever  
16 distribution they are using, pay SCO money to ensure that  
17 their Linux systems do not infringe on its UNIX System V  
18 IP.

19 That was what the press reported around the  
20 time of SCOSource in January of 2002; isn't that true,  
21 Mr. McBride?

22 A. No.

23 MR. ACKER: Let's go down to the next paragraph,  
24 below, sources, under the word "sources," Mr. Lee.

25 Q. BY MR. ACKER: Sources say the scheme, which

1 pretty much sounds like a protection racket, we won't sue  
2 if you pay, isn't engraved in stone, but an undated  
3 weeks' old SCO press release that details the plan and  
4 was read to us has been quietly making the rounds. At  
5 press time, we got word that a major player, believed to  
6 be IBM, thought it had dissuaded SCO from going through  
7 with the idea.

8           Wasn't it the case, Mr. McBride, that many in  
9 the Linux community and the software community thought  
10 that your SCOSource program was in fact a protection  
11 racket?

12       A.    That wasn't my understanding.

13       MR. ACKER: Let's go to the next paragraph, Mr. Lee,  
14 on the right column.

15       Q.    BY MR. ACKER: We begin:

16           It is unclear whether the alleged IP is  
17 unassailable and that valid patents or copyrights  
18 actually exist or that UNIX libraries are actually in  
19 Linux. Reportedly there has been a lot of patent  
20 research going on in the Linux community lately, and  
21 there are supposedly serious doubts SCO has much of  
22 anything.

23           Wasn't it also the case, Mr. McBride, that when  
24 you announced this SCOSource scheme in January of 2003,  
25 that many in the software community thought, one, that it

1 was a protection racket, and, two, you could not prove  
2 copyright infringement?

3 MR. SINGER: Object to the form of the  
4 question, using the term "scheme."

5 THE COURT: I'll overrule the objection.

6 Q. BY MR. ACKER: Isn't that true?

7 A. What was the question again, now?

8 Q. Isn't it true that many in the software  
9 community and the Linux community, after you announced  
10 SCOSource, thought that it was a protection racket and  
11 that you were never going to be able to prove copyright  
12 infringement. Isn't that true?

13 A. I don't know how many people had that  
14 opinion.

15 Q. But you heard that, didn't you?

16 A. I didn't hear that at this point in time.

17 Q. Well, you heard it after you announced it,  
18 didn't you?

19 A. No.

20 Q. It's your testimony that you never heard, after  
21 announcing SCOSource at Linux World in 2003, that no one  
22 ever said to you either in press reports or directly that  
23 there's no way you can prove that there is any UNIX in  
24 Linux. Is that your testimony, Mr. McBride?

25 A. That is a different question than the one you

1 asked me before, Mr. Acker. The way you asked it there,  
2 I would agree with you.

3 Q. So people were saying: This is crazy, you are  
4 never going to prove there is any UNIX in Linux because  
5 there isn't any UNIX in Linux; isn't that true?

6 A. There were definitely some that had that  
7 opinion.

8 Q. And wasn't it a great many that had that  
9 opinion, Mr. McBride?

10 A. I don't know how to count how many people had  
11 that opinion.

12 Q. And isn't it fair to say that after you came  
13 out with the SCOSource program in January of 2002, and  
14 after you had told your board of directors this is the  
15 way we are going to turn the company around, that you had  
16 staked your own personal representation on being right,  
17 that, one, you owned the UNIX copyrights, and, two, you  
18 could prove infringement?

19 A. I don't know if I would answer the question --  
20 say that exactly the way you did. There is no doubt that  
21 my reputation was on the line here, but this, at the end  
22 of the day, was not about my reputation. It was about a  
23 number of people at SCO that were advising me that all of  
24 us were coming to the conclusion that this was the path  
25 that we were going to go down.



1 Q. Once you launched this and went down that path,  
2 you were committed, correct?

3 A. Yes. That's correct.

4 Q. Now, yesterday, in your testimony to the jury,  
5 you described the Linux operating system in 2003 as an  
6 upstart operating system, right?

7 A. No.

8 Q. Well, you did use that word. Do you want to  
9 change that testimony?

10 A. When I was talking about the upstart operating  
11 system, I was referring to the state of the operating  
12 system in the '90's time frame. In the 2003 time frame,  
13 it was becoming more and more robust.

14 Q. And you would agree with me that in 2002,  
15 actually, you, yourself, SCO, had your own Linux product?

16 A. We did.

17 Q. And you were offering that Linux product  
18 until -- up until April of 2003, you were out selling it  
19 and issuing press releases regarding your Linux  
20 product?

21 A. Yes. That's correct.

22 Q. And then, the next month, you did a flipflop,  
23 didn't you, in May of 2003?

24 A. No.

25 Q. Wasn't it May of 2003, on May 14, you decided

1 that, despite the fact that we were in the Linux business  
2 and we were selling software and despite the fact that we  
3 had been touting it in late 2002, into April of 2003, now  
4 we're committed to SCOSource, so we're going to stop  
5 selling Linux; isn't that right?

6       A.    In 2002, 2003, the time frame you are talking  
7 about, when we found there was absolutely UNIX in Linux,  
8 we felt it disingenuous for us to be out there promoting  
9 Linux at the same time we were trying to get our  
10 intellectual property defended with respect to that  
11 infringement.

12       Q.    So you gave up selling software and were going  
13 to focus on the licensing scheme, right?

14       A.    That's totally wrong.

15       Q.    You gave up selling Linux, and you were going  
16 to focus on SCOSource; isn't that true, Mr. McBride?

17       A.    We announced that we were going to discontinue,  
18 as I recall, our Linux sales, and we would continue to  
19 sell our software, UNIX, UnixWare, OpenServer, which  
20 represented about 98 some-odd percent of our revenues,  
21 and that we were introducing a new product line,  
22 SCOSource, which is a licensing version that  
23 under-stitched the product business. So we basically had  
24 two product lines we were announcing. We've got, you  
25 know, our product lines, and then over here we have our

1 license materials, so that's quite a bit difference than  
2 the way I think you characterized it.

3 Q. But SCOsource, when you say a product line, it  
4 wasn't an actual software product you were selling,  
5 right? You were selling licenses?

6 A. It was a license. It was a license as much as  
7 somebody who has a music collection that decides not to  
8 sell directly, to come back and offer a royalty if  
9 somebody wants to come and use that music for something  
10 that they use on a commercial. It gets commercialized.  
11 It was a licensing business, which is very much a valid  
12 way of selling your intellectual property.

13 Q. Let's go back to your review of the APA. After  
14 1996, when you left Novell, you hadn't seen the APA until  
15 2002 and then you picked up the document in 2002 while at  
16 SCO, correct?

17 A. Yes. That's right.

18 Q. And you did not have Amendment Number 2, and  
19 you hadn't seen that document until June 4 or 5 of 2003,  
20 right?

21 A. Yeah. I think it was -- was it -- it was June  
22 5. That's right.

23 Q. And so, when you were reading the APA before  
24 that time and making your decisions about how to proceed,  
25 all you had was the original document, right?

1           A.    Well, I had the original document, and then I  
2 had a lot of advisors that had weighed in and given me  
3 advice with respect to the strength of that document.

4           Q.    In fact, you had been reading the APA for  
5 months by January of 2003; isn't that right?

6           A.    Yes.  That's correct.

7           Q.    And why don't we bring up the APA if we could  
8 and exclusion 1.1(b), Schedule 1.1(b).

9                    And when you read the APA, Mr. McBride, while  
10 you were at SCO in 2002 and 2003, you saw this language  
11 in the Excluded Assets Schedule of the APA, and  
12 particularly the Excluded Assets Schedule Roman Numeral  
13 V, correct?

14          A.    Yes.

15          Q.    And you saw what it said was that excluded from  
16 the deal or excluded from the transfer was intellectual  
17 property and, specifically, all copyrights and trademarks  
18 except for the trademarks UNIX and UnixWare, right?

19          A.    That's what it says.

20          Q.    And those were the words you read in 2002 and  
21 2003, correct?

22          A.    Those were a few of the words I read.  I think  
23 it was -- the asset purchase agreement, I think, is over  
24 60 pages, but certainly within the 60 pages I read, this  
25 is one of the lines that was in there.

1 Q. And when you read this section, you thought to  
2 yourself, this is a problem. Right?

3 A. Yeah. It was a head scratcher. It didn't make  
4 sense, because if you read the other parts of the asset  
5 purchase agreement, everything indicated that the  
6 copyrights transferred. And so when you read one part,  
7 like if you go -- I don't know if you have schedule  
8 1.1(a) --

9 THE COURT: Mr. McBride, Mr. Acker has the  
10 opportunity to ask you questions, and I want you to  
11 respond to them directly.

12 THE WITNESS: Okay.

13 THE COURT: If there is something else you  
14 think will need to be brought out in regards to a  
15 question he asks, then Mr. Singer will have another  
16 opportunity.

17 THE WITNESS: Okay. Fair enough.

18 THE COURT: But I don't want you going beyond  
19 the question asked by Mr. Acker.

20 THE WITNESS: Okay.

21 Q. BY MR. ACKER: When you read this section that  
22 says the copyrights are excluded, it was a problem. You  
23 thought it was a problem, didn't you?

24 A. I thought it was problematic, yes.

25 Q. And so it would be fair to say -- you consider

1 yourself to be a reasonable person, don't you, sir?

2 A. Yes.

3 Q. And fair to say that a reasonable person,  
4 reading this agreement, without Amendment Number 2, could  
5 come to the conclusion that the copyrights, the UNIX  
6 copyrights were not transferred under the APA?

7 A. If you -- you could come to that conclusion.

8 Q. So, a reasonable person, sitting down, picking  
9 up the APA, without Amendment Number 2, reading it, could  
10 reasonably come to the conclusion that the UNIX  
11 copyrights did not transfer?

12 A. If they only read Amendment Number 2 and didn't  
13 read the rest of the agreement, I think they could come  
14 to that conclusion. I disagree with you. If they read  
15 the entire agreement, they would come to a different  
16 conclusion about the copyrights.

17 Q. You just said if they only read Amendment  
18 Number 2. You weren't reading Amendment Number 2 --

19 A. I'm sorry. If you just read the asset purchase  
20 agreement -- if you just read the asset purchase  
21 agreement without excluded assets is what I meant to say.  
22 I'm sorry. If you only read the excluded assets portion  
23 of it, I agree that you could come to that conclusion,  
24 that the assets were excluded. I think if you read the  
25 entire agreement, it's hard to come to a conclusion that

1 SCO didn't own the copyrights.

2 Q. But you'd agree with me that somebody --  
3 differing minds could differ on this. One person could  
4 read the asset purchase agreement and say, "Well, this  
5 doesn't seem to make sense with the rest of the  
6 agreement" and come to the conclusion there's something  
7 wrong. But a reasonable person of a differing mind could  
8 also read this and see the express language excluding the  
9 copyrights and come to a reasonable conclusion that, in  
10 fact, the UNIX copyrights were excluded, right?

11 A. You could come to that conclusion, yes.

12 Q. And that would not be unreasonable to do that?

13 A. Correct.

14 MR. ACKER: We could go to section 4.16(a),  
15 please.

16 Q. BY MR. ACKER: Now, you realized that this  
17 section -- you also read this section, 4.16(a), correct?

18 A. Yes.

19 Q. And you realized that this section created an  
20 agency relationship in which Santa Cruz, and subsequently  
21 SCO, collected royalties for customers who deploy SVRX  
22 royalties, correct?

23 A. Yes.

24 Q. And so this really was setting up an agency  
25 relationship where, originally, Santa Cruz and then SCO

1 were acting as an agent to collect SVRX royalties that  
2 would flow -- 95 percent of which would flow back to  
3 Novell, correct?

4 A. Yes. That's right.

5 Q. Let me show you a document, if I could, D-11.  
6 And it's a large document, sir, and I know you're not  
7 necessarily fond of these, but I'm going to point to a  
8 specific provision of the Caldera form 10K SEC filing  
9 for the year ended October 21, 2002.

10 And this has already been admitted, Your Honor.

11 You were the CEO of Caldera, and subsequently  
12 SCO, at this time when this form 10K was filed, right,  
13 Mr. McBride?

14 A. That's correct.

15 Q. And if you go to the second -- the Bates  
16 numbered 415 near the end of the document, you see your  
17 signature down there, sir, your electronic signature?

18 A. Yes.

19 Q. So the jury understands, as the CEO, you needed  
20 to certify that statements in this document are true and  
21 accurate when it goes to the Securities and Exchange  
22 Commission, correct?

23 A. Yes. That's right.

24 Q. And you do that?

25 A. I'm sorry. I thought you were asking them.



1 Q. No. No. They won't let me ask them.

2 A. That's the way it came across. I'm sorry. I  
3 was waiting for them to answer.

4 Q. But you take that responsibility seriously,  
5 don't you, Mr. McBride?

6 A. Absolutely. Of course.

7 Q. Yes. You read these documents, SEC filings,  
8 carefully before you allow your electronic signature to  
9 be affixed and to be sent to the federal government,  
10 correct?

11 A. That's correct.

12 MR. ACKER: Now, if you take a look at -- if we  
13 go to page 42, if we can highlight that section, Mr. Lee.

14 Q. BY MR. ACKER: And so, in this section,  
15 Mr. McBride, what you're doing, as what the company SCO  
16 is doing, is describing the agency relationship that was  
17 created by the APA, correct?

18 A. Yes. It doesn't say that in here. Where does  
19 it say it's describing the agency agreement?

20 Q. Well, let's read it, and then maybe we can work  
21 through it.

22 A. Does it say "agency agreement" in there?

23 Q. It says:

24 The company has an arrangement with Novell in  
25 which it acts as an administrative agent in the

1 collection of royalties for customers who deploy SVRX  
2 technology.

3 A. Okay.

4 Q. That's a true statement, right?

5 A. Okay.

6 Q. Is that right? That is a true statement?

7 A. That is correct.

8 Q. And that was describing the relationship in  
9 which SCO was collecting royalties for SVRX licensees,  
10 right?

11 A. That's correct.

12 Q. And then it continues: Under the agency  
13 agreement, the company, SCO, collects all customer  
14 payments and remits 95 percent of the collected funds to  
15 Novell and retains 5 percent as an administrative fee.

16 Do you see that?

17 A. Yes, I do.

18 Q. And that's describing the relationship that was  
19 created by the APA in Section 4.16(a) in which originally  
20 Santa Cruz and then Caldera and then SCO were acting as  
21 an agent to collect the SVRX royalties for Novell?

22 A. Yes. I believe that's correct.

23 Q. Now, you said that after you noticed this  
24 problem with the APA, because the copyrights were in the  
25 excluded assets section --

1 A. Right.

2 Q. -- you had some communication with Novell  
3 employees. Did I get that right?

4 A. That's correct.

5 Q. And you called Gregg Jones, who you used to  
6 work with at Novell, correct?

7 A. Yes. He worked for me in the division over  
8 there.

9 Q. But, to your knowledge, Mr. Jones was not  
10 involved in the actual negotiation or execution or  
11 drafting of the APA, correct?

12 A. I didn't think so.

13 Q. And so you simply called an old colleague out  
14 of the blue and asked him about a document that had been  
15 executed seven years ago that he had no involvement with  
16 at the time?

17 A. I actually. That is true, but I actually  
18 called other Novell attorneys before calling him that  
19 were, I thought, going to be more involved.

20 Q. So Mr. Jones picks up the phone, gets a call  
21 from you, hasn't talked to you in years, I assume.  
22 Fair?

23 A. That's correct.

24 Q. And you ask him about the APA, which he never  
25 worked on, back in '95, correct?

1       A.    That's incorrect.  That's not what I called --  
2 I didn't call to ask him about it initially.  I called to  
3 talk about my transition to SCO and then started talking  
4 about it.  I never asked him about it.  I told him what  
5 the situation was.

6       Q.    And Mr. Jones' response was:

7            I need to check with the business people.

8            Right?

9       A.    No.  That's incorrect.

10       Q.   Well, Mr. Jones, who had no knowledge of the  
11 APA, didn't make any promises to you, did he?

12       A.    Yes, he did.

13       Q.    He said he would talk with the business people,  
14 didn't he?

15       A.    That's not what Mr. Jones told me.

16       Q.    All right.  Did you take notes of these  
17 conversations?

18       A.    I just remember what he told me.  I don't  
19 remember taking notes.

20       Q.    Did you take any notes of these  
21 conversations?

22       A.    No, I didn't.

23       Q.    Did you draft any e-mails to document the  
24 conversations?

25       A.    I don't recall any.

1 Q. Was anyone with you on the phone that took  
2 notes or drafted e-mails to document the conversations?

3 A. No.

4 Q. But you know Mr. Jones did, don't you?

5 A. I don't know if he did or didn't.

6 Q. Okay. Let's take a look at Exhibit K-11?

7 THE COURT: You said K-11?

8 MR. ACKER: K-11, Your Honor.

9 Q. BY MR. ACKER: Now, Exhibit K-11 is a November  
10 20 e-mail from Gregg Jones to a Mr. Jim Lumber and Joe  
11 LaSala inside of Novell, correct, Mr. McBride?

12 A. Yes. That's right.

13 Q. And you have seen this document before,  
14 correct?

15 A. Yes, I have.

16 Q. And you read it during your deposition,  
17 correct?

18 A. That's right.

19 Q. And when you read it during your deposition,  
20 you agreed --

21 MR. SINGER: Object if Mr. Acker is going to  
22 get into the substance of a document not admitted.

23 MR. ACKER: I'm going to lay a foundation, then  
24 I'm going to move it in, and then I'm going to ask him  
25 about it. Would that be okay?

1 THE COURT: You can ask him about it but not  
2 disclose the contents of it --

3 MR. ACKER: Sure.

4 THE COURT: -- until it has been admitted,  
5 please.

6 MR. ACKER: Yes, sir.

7 Q. BY MR. ACKER: You saw this during your  
8 deposition, didn't you, Mr. McBride?

9 A. I saw something like this. I thought it was a  
10 longer one, but maybe this is the one. I saw some Gregg  
11 Jones e-mails. If you want to show me my deposition  
12 exhibit, I can tell you if I saw it or not, but, yeah.

13 Q. In your deposition, you read this and you  
14 agreed --

15 MR. SINGER: Objection. If he's going to  
16 confront him with testimony, that needs to be done in the  
17 proper manner, Your Honor.

18 THE COURT: That does, Mr. Acker.

19 MR. ACKER: All right.

20 Q. BY MR. ACKER: Well, do you agree -- having  
21 read this now, do you agree that this is an accurate --  
22 Mr. Jones' e-mail is an accurate depiction of what he  
23 said to you during your call on November 20?

24 A. If you're asking me to read it, I will read it,  
25 and I will give you an answer, Mr. Acker.

1 Q. Great.

2 A. Yeah. This is not.

3 THE COURT: All right. Go ahead. Go ahead.

4 THE WITNESS: All right. So, what's the  
5 question, then?

6 Q. BY MR. ACKER: Mr. Jones accurately described  
7 what he said to you during the November 20 telephone  
8 call, correct?

9 A. No. That's not my recollection.

10 Q. Okay. During your deposition, you -- in March  
11 27, 2007, you were under oath, correct? Yes? You were  
12 under oath?

13 A. Yes.

14 Q. And you were asked the following questions, and  
15 you gave the following answers.

16 And, Mr. Singer, it's his depo at page 64,  
17 lines 4 to 9.

18 And if we can play clip 11, please.

19 MR. SINGER: May we see it first before it's  
20 played?

21 MR. ACKER: Hang on.

22 THE COURT: You have copies of the written  
23 deposition, don't you?

24 MR. ACKER: Yes, Your Honor.

25 THE COURT: Then why don't you show Mr. Singer

1 the written deposition part?

2 MR. ACKER: He has a copy, and I have given him  
3 the page and line.

4 MR. SINGER: You said page 64?

5 MR. ACKER: Yes.

6 MR. SINGER: Line?

7 MR. ACKER: Four.

8 MR. SINGER: Four.

9 MR. ACKER: To 9.

10 MR. SINGER: Could you show me where there's a  
11 reference to this document?

12 MR. ACKER: It's above that passage,  
13 Mr. Singer.

14 MR. SINGER: On which page?

15 MR. ACKER: The reference is the marked  
16 exhibit.

17 MR. SINGER: I'm looking for that, but I don't  
18 see it in page 64, 63, 62. Will you show me where this  
19 document is, the document he's being questioned on?

20 MR. ACKER: Well, do you have any objection to  
21 me playing the video clip and asking Mr. McBride if he  
22 gave that testimony?

23 MR. SINGER: Yes because I don't understand  
24 what the testimony pertains to.

25 THE COURT: Counsel, let's have a side bar.



1 (Discussion between the Court and counsel outside of the  
2 hearing of the jury.)

3 THE COURT: This is the problem. The document  
4 that he's been asked to address here, as well as in the  
5 deposition, has not been admitted. If you're going to  
6 offer it, my assumption is you'll object because you will  
7 have -- he's not laid a foundation for it because it was  
8 not prepared by him, and for you to try to get deposition  
9 testimony in regarding that document without the jury  
10 knowing what the document says is either error or  
11 worse.

12 MR. ACKER: Well, in the transcript, he's  
13 looking at this exhibit.

14 THE COURT: Yes.

15 MR. ACKER: He's asked: "Did Mr. Jones  
16 accurately recite the conversation, what he said to you?"  
17 And he says: "Yes, he did."

18 THE COURT: He says that, that's fine, except  
19 the jury will not know what this document says because it  
20 has not been admitted.

21 MR. ACKER: I know. I need to do that portion  
22 first, if he's going to agree that this says what  
23 Mr. Jones said to him.

24 THE COURT: You have done that.

25 MR. ACKER: Then I'm going to move the exhibit

1 in.

2 MR. SINGER: It's not admissible.

3 THE COURT: It's not admissible. It's hearsay.

4 MR. ACKER: He's affirming that what Mr. Jones  
5 said in the document is what he said to Mr. McBride  
6 during the phone call.

7 MR. SINGER: That's hearsay.

8 THE COURT: That's absolutely hearsay, so,  
9 no.

10 MR. ACKER: No, it isn't. It absolutely limits  
11 what it is that Mr. Jones said to him during the course  
12 of the conversation.

13 THE COURT: I'm sorry, but this document is  
14 hearsay.

15 MR. ACKER: This document is a recitation of a  
16 phone call. He's given some testimony about what he  
17 believes was in that phone call. This document says  
18 exactly what it is Mr. Jones said.

19 THE COURT: And you will be bringing Mr. Jones  
20 on?

21 MR. ACKER: And he'll come and testify.

22 THE COURT: We can deal with it when Mr. Jones  
23 comes to testify. At this point in time, Mr. Acker, it's  
24 not admitted. I will to have sustain an objection that  
25 it is hearsay.

1           MR. ACKER: Let me just ask this question of  
2 Mr. McBride, just say -- ask him: Is this, Mr. Jones'  
3 statements in this document, an accurate description of  
4 what he said to you?

5           That's all I want to ask him.

6           THE COURT: I think you have already asked him,  
7 and he said it is not.

8           MR. ACKER: Then I should be allowed to impeach  
9 him with his testimony in which he said the exact  
10 opposite.

11          MR. SINGER: You have to have an admissible  
12 document for admissible impeachment. The document isn't  
13 admissible. He can get Mr. Jones in to say something  
14 different and contradict him, but the document is still  
15 hearsay.

16          THE COURT: But the dilemma is, again, the jury  
17 will never have read what this document represents or  
18 what represents the conversation contained, and so you  
19 will be doing this completely in the abstract. You will  
20 be saying: In the deposition testimony, you said it did.

21          But the jury will never know the difference  
22 because this will not be admissible because it is a  
23 hearsay document.

24          MR. ACKER: I would respectfully disagree, and  
25 if he's to be impeached with his deposition testimony,

1 maybe he changes his mind when he sees his sworn  
2 testimony, and when he says this is what he says, then I  
3 would be allowed to admit this evidence.

4 MR. SINGER: It's still -- the document is  
5 hearsay. You're asking him in the abstract about an  
6 inadmissible document.

7 MR. ACKER: "So you don't disagree with the  
8 accounting of the November 20 materials?" when he is  
9 looking at the exhibit.

10 And he says: "I don't disagree."

11 THE COURT: Let me restate. This is the  
12 dilemma. So far the document has not been admitted. The  
13 jury does not know the contents of the document. You  
14 have asked him:

15 Does this document, a representation by  
16 Mr. Jones of what transpired in the telephone  
17 conversation, is it accurate?

18 And he said no.

19 You now want to go to deposition testimony,  
20 without the jury knowing what the document and Mr. Jones'  
21 representations were and say: Didn't you once before say  
22 that it did?

23 MR. ACKER: Uh-huh.

24 THE COURT: Are you going to try to do that  
25 without ever seeking the admission of the document?

1           MR. ACKER: Well, no. He has a choice. He can  
2 say no, that I was wrong in my deposition when I said  
3 that, or he can stick by this testimony.

4           THE COURT: You didn't answer my question. Are  
5 you going to ultimately seek the admission of the  
6 document?

7           MR. ACKER: Yes.

8           THE COURT: Based upon what?

9           MR. ACKER: Well, based upon -- if he says this  
10 is what was said, then I'm going to seek admission.

11          MR. SINGER: But it's still going to be  
12 hearsay. And it's probably not going to come in with  
13 Mr. Jones because it's still going to be hearsay with  
14 Mr. Jones.

15          MR. ACKER: Absolutely not. It's a  
16 contemporaneous recording of what his recollection was at  
17 the time.

18          THE COURT: I think it's going to be admissible  
19 with Mr. Jones. I cannot see how it can be admissible  
20 against Mr. McBride based upon what you've told me so  
21 far.

22          MR. ACKER: Okay. I'll move on.

23          MR. SINGER: And can I just put on the record,  
24 while we are on this point, on page 61, line 1, when he's  
25 asked about this document specifically and asked is this

1 consistent with his recollection of the phone call, the  
2 answer is no.

3 MR. ACKER: When he's asked about if this is  
4 what Mr. Jones said, he said yes.

5 THE COURT: Again, counsel, this is my concern.  
6 We are talking about deposition testimony where he  
7 apparently says yes, it did, no, it didn't. But the jury  
8 never knows what the document says because, again, I do  
9 not believe it is admissible.

10 MR. ACKER: Okay.

11 THE COURT: Okay.

12 (Proceedings continued in open court.)

13 Q. BY MR. ACKER: So, Mr. McBride, let me  
14 summarize. You called Mr. Jones, who you hadn't spoken  
15 to in years, correct?

16 A. That's right.

17 Q. And you had a conversation with him, several  
18 conversations with him, correct?

19 A. That's correct.

20 Q. And you asked him, at some point, to obtain  
21 some sort of document that, in your words, would clarify  
22 what rights were transferred under the asset purchase  
23 agreement, correct?

24 A. That's close enough.

25 Q. And, Mr. McBride -- or Mr. Jones refused to do

1 that, right?

2 A. That's incorrect. That wasn't my testimony  
3 either.

4 Q. You sent the document to Mr. Jones, or  
5 Mr. Sontag did, correct?

6 A. Let's go back to your question. I think your  
7 question was, I asked Mr. Jones if he would agree to go  
8 try and find a document. The answer to that question is,  
9 and it's in my testimony -- I just read this while we  
10 were sitting here. He agreed to go try and find a  
11 document to clarify the fact that the copyrights were  
12 included in the original asset purchase agreement. He  
13 agreed.

14 Q. And couldn't find such a document, correct?

15 A. In the first wave, that was correct. Okay.  
16 That was the answer to that question.

17 Q. So he couldn't find such a document and then he  
18 also said to you: Those documents from years ago are in  
19 archives and we're not going to continue to do due  
20 diligence to try and find that document, right?

21 A. That is accurate.

22 Q. And then, in February, Mr. Sontag sent a  
23 document to Mr. Jones that attempted to actually, in your  
24 words, clarify the terms of the asset purchase agreement,  
25 right?

1 A. That was -- that's correct, per Mr. Jones'  
2 request.

3 Q. And Novell refused to execute that agreement,  
4 correct?

5 A. That is correct.

6 Q. So, you had the asset purchase agreement with  
7 the excluded language, 1.1(b), that you believed caused a  
8 problem, right?

9 A. Yes.

10 Q. And you weren't successful in obtaining from  
11 Novell, between November of 2002 and May of 2003, this  
12 written document that you wanted that, in your words,  
13 would clarify what copyrights transferred, right?

14 A. The -- that's partially correct.

15 Q. And so you went to Novell, and they said: No,  
16 we won't execute that clarification document.

17 Right?

18 A. That's correct.

19 Q. And, for all of these calls, both the calls  
20 between February and into November, February of '02, into  
21 February of '03, you never took any notes, right?

22 A. I don't recall taking notes on the topic.

23 Q. And Mr. Sontag never took any notes?

24 A. I don't know if he did or didn't.

25 Q. You never saw him take any notes?



1 A. No.

2 Q. And Mr. Sontag, to your knowledge, never wrote  
3 any e-mails documenting what was said in those  
4 conversations, correct?

5 A. I don't know what he did with his e-mails.

6 Q. And you also didn't write any e-mails to  
7 document what was said, fair?

8 A. I had e-mails that were going back and forth  
9 between Gregg Jones and me and others inside the company,  
10 but I don't recall to what extent it was documenting. I  
11 don't remember anything documenting what was said.

12 Q. So, in order to -- for this jury to understand  
13 exactly what was said in those conversations, they are  
14 going to have to take your testimony and the testimony of  
15 Mr. Jones and any other documents that might exist and  
16 make up their minds what actually was said, right?

17 A. Yes. And I think it's important that they do  
18 listen to Mr. Jones' testimony.

19 Q. And they will. Who is Mike Anderer?

20 A. He is a consultant in the IT industry.

21 Q. And he was employed in your employ at SCO in  
22 the fall and winter of 2002 and 2003; is that right?

23 A. He was working as an independent contractor  
24 with us during that time frame. That's correct.

25 Q. And Mr. Anderer reviewed the asset purchase

1 agreement, didn't he?

2 A. That's my understanding.

3 Q. And he sent you an e-mail in which he  
4 documented his understanding of the asset purchase  
5 agreement, correct?

6 A. Yes, he did.

7 Q. And that was information that you had in your  
8 head when you were deciding whether or not to go forth  
9 with the SCOSource program, correct?

10 A. That was one input that I had, of many.

11 Q. Let me show you what we have marked as Exhibit  
12 C-12. Do you recognize that document?

13 A. Yes, I do.

14 Q. And this is the e-mail to you from Mike Anderer  
15 on Saturday, January 4, 2003, correct?

16 A. Yes. That's correct.

17 Q. And in it he puts his thoughts regarding what  
18 the APA did or did not transfer, correct?

19 A. Let me take a look here and see which one we're  
20 talking about. Yes. Roughly, that's correct

21 MR. ACKER: Your Honor, I move for admission of  
22 Exhibit C-12.

23 MR. SINGER: Object. It's hearsay.

24 MR. ACKER: It goes to his state of mind of  
25 what was in or out of the APA at the time he moved

1 forward with SCOSource, Your Honor.

2 MR. SINGER: Mr. McBride's state of mind isn't  
3 on trial here.

4 MR. ACKER: Well, there is a slander of title  
5 claim against SCO, so it certainly is.

6 THE COURT: The Court will allow the admission  
7 of C-12, this was an e-mail to you; is that right,  
8 Mr. McBride?

9 THE WITNESS: Yes. That's correct.

10 (Novell Exhibit C-12 received in evidence.)

11 Q. BY MR. ACKER: So, again on Saturday, January  
12 4, 2003, your consultant, Mr. Anderer, after reading the  
13 APA writes the following to you:

14 Darl, if you do not have an e-mail that will  
15 take an AMB attachment, then I will burn the Novell/SCO  
16 agreement to a CD and a floppy.

17 Do you see that?

18 A. Yes.

19 Q. Is he talking about the APA there?

20 A. I don't know what he's talking about.

21 Q. And then he writes:

22 This agreement indicates Novell transferred  
23 substantially less than what was transferred to USL in  
24 the previous agreement.

25 Do you see that?

1 A. Yes, I do.

2 Q. And then he writes:

3 It is an asset purchase and excludes all  
4 patents, copyrights and just about everything else.

5 Do you see that?

6 A. Yes.

7 Q. And that was your paid consultant's opinion of  
8 the APA in January of 2003, right?

9 A. It was. Yes. That's what he said in this  
10 e-mail. That's correct.

11 Q. And then, in the next paragraph, he wrote: It  
12 does not look like USL was purchased, just UnixWare and  
13 some other listed assets, but Streams was not listed, and  
14 there is a lot of other items that do not appear in this  
15 agreement.

16 Do you see that?

17 A. Yes.

18 Q. And then he wrote:

19 It is definitely worth reading.

20 Do you see that?

21 A. Yes.

22 Q. And is that because you hadn't read the asset  
23 agreement and he was actually just sending it to you for  
24 the first time in January of 2003?

25 A. No. I had read it multiple times at that

1 point. In fact, I had read it many months before this.

2 Q. So you had also seen the excluded assets  
3 section of the APA that excludes copyrights by this time  
4 as well, right?

5 A. Yes that's why I called Mr. Jones.

6 Q. In the next paragraph, continuing in that same  
7 paragraph, it reads:

8 I think it also leaves Novell with practical  
9 control of the license agreements with IBM and others  
10 with respect to SVRX.

11 Do you see that?

12 A. Yes.

13 Q. And then he also wrote:

14 I think they might get the call on whether to  
15 audit or pull these licenses.

16 Do you see that?

17 A. Yes.

18 Q. And the reason that you had hired Mr. Anderer  
19 was to help you negotiate with Microsoft for the  
20 Microsoft deal that you eventually did in 2003, right?

21 A. That's correct.

22 Q. And so Mr. Anderer was interested to know  
23 exactly what rights SCO had before he went into those  
24 negotiations, right?

25 A. Right. Because if we didn't have the

1 copyrights, we wouldn't have the ability to do the deal  
2 with Microsoft.

3 Q. And so, in doing his due diligence, he went and  
4 read the agreements, and these were the conclusions that  
5 he came to, correct?

6 A. At that point in time. Not later on.

7 Q. If we could go to Exhibit H-14, your May 12  
8 letter to Jack Messman. This is a letter that you wrote  
9 to Mr. Messman, as well as about a thousand other  
10 companies in the United States in the middle of May,  
11 2003, right?

12 A. Yes. We referenced this earlier.

13 Q. And what you're telling them in here is: We,  
14 SCO, believe that we own the UNIX copyrights.

15 Right?

16 A. Let's see, where are you pointing to in here?

17 THE COURT: Mr. Acker, excuse me. Is this the  
18 same as one of the plaintiff's exhibits?

19 MR. ACKER: Yes, it is, Your Honor. And if it  
20 hasn't been admitted, I would move for its admission.

21 H-12, Your Honor.

22 THE COURT: I'm fairly confident it was  
23 admitted. I just want to know which plaintiff's exhibit  
24 it was. Do you know that offhand, Mr. Singer?

25 MR. SINGER: I don't have the plaintiff's

1 number offhand on this. It is admitted, I believe.

2 THE COURT: It's always preferable to always --

3 MR. ACKER: I understand, Your Honor.

4 THE COURT: But go ahead.

5 Q. BY MR. ACKER: Well, you know this letter,  
6 don't you, Mr. McBride?

7 A. Yeah. I can't recite it chapter and verse. If  
8 you're going to quiz me on things, then I just need to  
9 see what it is you're pointing to.

10 Q. Well, as Mr. Jacobs yesterday said: I'm not  
11 going to go ask you any trick questions.

12 So, I'll raise my hand if I'm going to, okay?

13 A. You are going to?

14 Q. If I will, I'll raise my hand and let you know.

15 A. So the ones up to this point, you haven't?

16 Q. No trick questions so far.

17 A. Okay. These haven't been the trick ones?

18 Okay. I'm trying to figure out where we are in the game  
19 here. Okay. Fire away.

20 Q. You know this letter, don't you? I mean, you  
21 don't have to read it?

22 A. Yeah, but I don't memorize it. I don't have it  
23 posted in my bedroom.

24 Q. This was a big deal, wasn't it?

25 A. This was an important letter to put Linux users

1 on notice as to -- with respect to our concerns we had  
2 with Linux infringement and how it was infringing our  
3 intellectual property.

4 Q. You are sending letters to a thousand companies  
5 across the United States, many of which are running Linux  
6 operating systems and have it imbedded as part of their  
7 operations and saying:

8 Hey, guys, sorry. You're going to have to pay  
9 us a license fee.

10 Isn't that right?

11 A. That's incorrect. Can you point in here where  
12 I says I was going to --

13 Q. Isn't that the --

14 THE COURT REPORTER: Excuse me, counsel. One  
15 at a time, please.

16 THE WITNESS: I was asking Mr. Acker --

17 THE COURT: You don't get to ask him questions.  
18 I'm sorry.

19 THE WITNESS: The answer to that is no.

20 Q. BY MR. ACKER: So the jist of the letter is  
21 you're putting them on notice that SCO believes it owns  
22 UNIX and there's UNIX in Linux, right?

23 A. That part I agree with.

24 Q. And you are also putting them on notice that  
25 you have hired a law firm to enforce these rights,



1 correct?

2 A. I don't remember that that's in here.

3 THE COURT: Can you focus him to the paragraph  
4 where that might be said, Mr. Acker?

5 MR. ACKER: Sure.

6 If you will scroll down. Go to the next page.  
7 Why don't we highlight the second paragraph.

8 Q. BY MR. ACKER: You told these thousand  
9 companies:

10 We believe that Linux infringes our UNIX  
11 intellectual property and other rights.

12 You used those words, right?

13 A. That's correct.

14 Q. It's a pretty strong statement, isn't it?

15 A. Well, it's a statement that we believed in.

16 Q. And you also told them:

17 We intend to aggressively protect and enforce  
18 these rights.

19 Correct?

20 A. That's correct.

21 Q. And there was a firestorm of reaction to this  
22 letter, wasn't there?

23 A. There were definitely those that didn't like  
24 the letter.

25 Q. And there was an enormous amount of press about

1 this letter and this campaign, wasn't there?

2 A. Yes. That's accurate.

3 Q. And many, many people in the software  
4 community, and particularly the Open Source community  
5 said: There simply is no UNIX in Linux.

6 Isn't that right?

7 A. There were those that said that.

8 Q. And this caused quite a stir, didn't it?

9 A. Depending on your definition of "stir," there  
10 were definitely those that didn't like the letter. I  
11 agree with that.

12 Q. Let's look at some of the reaction to the May  
13 12 letter.

14 If we could bring up O-14, please.

15 So, Mr. McBride, O-14 is an article that was  
16 written on May 14, 2003, just about a couple days after  
17 the letters went out in e-WEEK. Do you see that?

18 A. Yes, I do.

19 MR. ACKER: And if we could highlight the first  
20 paragraph.

21 We move for admission of O-14, Your Honor.

22 MR. SINGER: It's hearsay, Your Honor.

23 MR. ACKER: So was the Wall Street Journal  
24 article. So was --

25 THE COURT: I will overrule the objection. It

1 will be received.

2 (Novell Exhibit O-14 received in evidence.)

3 Q. And in the first paragraph it reads:

4 The SCO Group on Wednesday significantly raised  
5 the stakes in its battle to prevent what it sees as the  
6 illegal and unauthorized use of its UNIX technology in  
7 the Linux operating system, warning that legal liability  
8 for the use of Linux could extend to commercial users.

9 This is a turnabout for SCO, which said in  
10 March, after announcing a \$1 billion lawsuit against IBM,  
11 that the case, quote, has nothing to do with Linux or the  
12 Open Source community.

13 You were hearing comments like that, weren't  
14 you, after you sent out your letter, Mr. McBride?

15 A. Yes.

16 MR. ACKER: If we could go to the next page,  
17 please, and highlight the second and third paragraphs,  
18 please?

19 Q. BY MR. ACKER: An IBM spokesman, on Wednesday,  
20 declined to comment on the latest SCO allegations, citing  
21 pending -- SCO's pending litigation against IBM, but Lee  
22 Day, a spokeswoman for Leading Edge distributor Red Hat,  
23 Inc., told eWEEK on Wednesday that it had yet to see any  
24 formal complaints against it from SCO. The company also  
25 had been contacted by SCO in this -- also had not been

1 contacted by SCO in this regard.

2 In the next paragraph there's a quote:

3 We've heard all these allegations and rumors  
4 and threats, but we haven't seen any specific code  
5 referenced that we were in violation of. We have done  
6 extensive work to make sure that we are not in violation,  
7 and we take intellectual property very seriously. We  
8 remain certain that we are not in violation of anyone's  
9 intellectual property, she said.

10 And wasn't it true, Mr. McBride, that you also  
11 heard comments like that after your letters went out,  
12 that, in fact, you were not going to be able to prove  
13 copyright infringement, and there was no infringement.

14 You also heard that, didn't you, sir?

15 A. Yes, I did.

16 Q. Let's take a look at another legal letter or  
17 another article, Exhibit A-16. You see this? Now, this  
18 uproar in the community also took on an international  
19 flavor, didn't it, Mr. McBride?

20 A. Yes.

21 Q. And what we have here is an article in CNET  
22 regarding a restraining order that was obtained by a  
23 Linux group in Germany, correct?

24 A. Yes. That's right.

25 THE COURT: Mr. Acker, if you would, before you

1 start testifying --

2 MR. ACKER: Yes.

3 THE COURT: -- just by way of your question,  
4 what the document says, would you please lay a foundation  
5 so we can see if it's admissible?

6 MR. ACKER: Sure.

7 Q. BY MR. ACKER: And you were aware of that  
8 action in Germany, correct?

9 A. Yes, I was.

10 Q. And you were aware of the press reports on  
11 that, correct?

12 A. Yes.

13 MR. ACKER: We move for A-16 to be admitted,  
14 Your Honor.

15 MR. SINGER: We object, Your Honor, on 802 and  
16 403. And may I approach?

17 MR. ACKER: I don't know how this is that  
18 different than the Wall Street Journal article or all the  
19 other articles that have been shown.

20 THE COURT: I don't either, Mr. Singer.

21 MR. SINGER: The only reason I suggested that  
22 was because it talks about other litigation.

23 THE COURT: Is there something in this that's  
24 going to cause a problem, Mr. Acker?

25 MR. ACKER: It has nothing related to anything

1 other than events in Germany.

2 THE COURT: You are confident of that.

3 MR. ACKER: I am.

4 THE COURT: Let me look at it just a second  
5 before you put it up.

6 MR. BRENNAN: Your Honor, I just offer, too,  
7 this will be relevant, likely, to the next witness, their  
8 damages expert.

9 MR. SINGER: Our argument is simply what's  
10 happening in Germany is not irrelevant to -- is not  
11 relevant to this case or Mr. McBride's testimony.

12 THE COURT: If that's your objection, the Court  
13 will overrule it and will allow the admission.

14 (Novell Exhibit A-16 received in evidence.)

15 MR. ACKER: If we could bring up the first few  
16 paragraphs, please, Mr. Lee.

17 Q. BY MR. ACKER: And here CNET is reporting on  
18 June 3:

19 Legal Action Hits SCO Website. As SCO Group,  
20 the company that has warned major companies that using  
21 Linux could get them in legal trouble has shut down its  
22 German website after a Linux advocacy group in the  
23 country obtained a restraining order.

24 Do you see that?

25 A. Yes, I do.

1 Q. And so not only was your actions on May 12 in  
2 sending these letters out to a thousand companies across  
3 the United States having ramifications in the United  
4 States, but it was also having ramifications in other  
5 countries, correct?

6 A. Yes.

7 MR. ACKER: If we could take a look at Exhibit  
8 P-17, please.

9 Q. BY MR. ACKER: Exhibit P-17 is another article  
10 regarding the SCOSource program on July 22, 2003. Do you  
11 see that?

12 A. Yes.

13 MR. ACKER: I'd move for admission of P-17,  
14 Your Honor.

15 THE COURT: Mr. Singer?

16 MR. SINGER: No objection, Your Honor.

17 THE COURT: It will be admitted.

18 (Novell Exhibit P-17 received in evidence.)

19 MR. ACKER: If we could highlight the  
20 beginning, with the middle -- beginning with the first  
21 paragraph:

22 July 22, 2003. Open Source advocates on Monday  
23 blasted a Linux licensing scheme that the SCO Group is  
24 proposing to address copyright violations in the Linux  
25 operating system.

1           If we could scroll down, Mr. Lee.

2           And it continued:

3           Linux advocates blasted the plan. Quote. They  
4 are selling a pig in a poke, end quote, said Open Source  
5 advocate Bruce Perens. I think they have made an error  
6 through over confidence, and that error has made them  
7 liable to be sued by every person who has code in the  
8 kernel and every company. Parens and other Open Source  
9 advocates claim that SCO's licensing program appears to  
10 violate the Free Software Foundation's GNU, general  
11 public license software license that governs UNIX.

12           Do you see that?

13       A.    Yes.

14       Q.    That governs Linux.

15           Do you see that?

16       A.    Yes, I do.

17       Q.    And that was also what you heard. In addition  
18 to "there's no UNIX in Linux," you also heard an outcry  
19 that this SCOSource plan would violate the general public  
20 license; isn't that right, around Linux?

21       A.    Some were saying that.

22       Q.    If we could take a look at the next exhibit,  
23 X-17. And here we have another article, this time in USA  
24 Today, Mr. McBride, dated July 30, 2003, again commenting  
25 on your SCOSource program, correct?



1           A.    Yes.

2                   MR. ACKER:  Move for admission of X-17, Your  
3 Honor.

4                   THE COURT:  Mr. Singer?

5                   MR. SINGER:  I'm taking a moment to read it.

6                   THE COURT:  Okay.

7                   MR. SINGER:  We object on the grounds it's  
8 cumulative with the other articles.  It's, I think, in  
9 the same vein as the other articles we've been looking  
10 at.

11                   MR. ACKER:  This is the last one I'm going to  
12 use, Your Honor.

13                   THE COURT:  The Court will overrule the  
14 objection, and X-17 will be admitted.

15                   (Novell Exhibit X-17 received in evidence.)

16                   MR. ACKER:  This is USA Today.  If we could go  
17 down to the last paragraph on the first page, please.

18           Q.    BY MR. ACKER:  This is what USA had to say on  
19 July 30, 2003:

20                   The whole thing is not unlike finding your  
21 grandmother's recipe for Bundt cake, realizing it's  
22 similar to the recipe in a number of cookbooks, suing the  
23 biggest cookbook publisher and then sending letters to  
24 everyone who makes a Bundt cake, saying they should send  
25 you some money or risk legal action.  Not a good way to

1 make friends.

2 Do you see that, sir?

3 A. Yes, I do.

4 Q. And you heard comments like that after you sent  
5 out your letters on May 12, 2003; isn't that right?

6 A. I saw this comment. It's the first one I heard  
7 about a bundt cake.

8 Q. Bundt cake. In fact, you were also hearing  
9 similar comments from your own people inside of SCO;  
10 isn't that right?

11 A. No, not about Bundt cakes.

12 Q. Let me give you A-15. This is an e-mail from  
13 Mr. Gasparro.

14 THE COURT: I'm sorry. What is --

15 MR. ACKER: Exhibit A-15, Your Honor.

16 THE COURT: A-15?

17 Q. BY MR. ACKER: It's an e-mail from Larry  
18 Gasparro to you on Wednesday, May 21, 2003. Do you see  
19 that?

20 A. Yes, I do.

21 Q. And it's referencing the SCOSource initiative,  
22 right?

23 A. Yes. That's right.

24 MR. ACKER: I'd move for admission of A-15,  
25 Your Honor.

1 MR. SINGER: No objection.

2 THE COURT: It will be admitted.

3 (Novell Exhibit A-15 received in evidence.)

4 Q. And what was Mr. Gasparro's job at SCO in May  
5 of 2003?

6 A. Let's see. At that time, I believe he was  
7 vice-president of sales.

8 Q. And he was also working with Mr. Sontag in the  
9 SCOSource division, right?

10 A. Yes. He was eventually. I'm not sure when he  
11 switched over. Yes, he was definitely in the SCOSource  
12 group.

13 Q. And he wrote to you on May 21, 2003:

14 After one week of talking to our customers and  
15 reading independent articles, we need some immediate  
16 position leverage to generate IP revenues, Q3 from end  
17 users.

18 Do you see that?

19 A. Yes, I do.

20 Q. He's talking about getting anybody to sign one  
21 of these SCOSource licenses, right?

22 A. The SCOSource license had not been -- the  
23 SCOSource program didn't get launched until August, so I  
24 don't think that's what he was talking about.

25 Q. Well, you launched the SCO tech license program

1 on January 22?

2 A. Maybe they are talking about the libraries  
3 program.

4 Q. And you also sent your letters to a thousand  
5 companies on May 12, correct?

6 A. Yes, but -- yes. That's correct.

7 Q. And he writes in the next paragraph:

8 It appears that the Linux end user community  
9 has suspected issues over IP for quite sometime. One CEO  
10 suggested to me that there could be a long line of  
11 unemployed CEO's from this fallout.

12 But then he writes:

13 However, the corporate position seems to be the  
14 wait-and-see game. The audit committee person may be the  
15 key, but until the CFO and CIO are convinced, it's,  
16 quote, prove in court.

17 Do you see that?

18 A. Yes, I do.

19 Q. Now, these comments and these articles that  
20 Mr. Gasparro is talking about, all of this occurred  
21 before Novell's announcement on May 28, 2003, that it  
22 owned the UNIX copyrights, right?

23 A. The articles we've referenced so far. Let me  
24 just see which ones we've looked at. That's not correct.  
25 The Kevin Maney article came out two months after

1 Novell's statement. This one is dated July 30, 2003.

2 The Shanklin article is dated June 3, which would have  
3 been five days after. So, those articles were clearly  
4 after.

5 Q. All right. So both articles commented on the  
6 SCOSource program both before and after Novell's May 28  
7 statement. They are saying that you're not going to be  
8 able to prove infringement, they don't think much of your  
9 program, but none of those articles, and none of the  
10 references that Mr. Gasparro has here say anything about  
11 Novell, right?

12 A. Well, you asked two questions. Can I break  
13 those down?

14 Q. Did you see any reference to Novell in any of  
15 the articles that we have looked at?

16 A. In the articles we looked at, no. This is a  
17 small subset of the articles that were out there.

18 Q. And Mr. Gasparro, on May 21, is telling you the  
19 corporate position in response to your May 12 letter is  
20 we are going to wait and see until it is proved in court.

21 Do you see that?

22 A. Yes. I do see that.

23 Q. And that's on May 21, 2003. Right?

24 A. That's correct.

25 Q. That's the feedback he's getting a week before

1 Novell says anything, right?

2 A. This was regarding infringement. That's  
3 right.

4 Q. It's a week before Novell says anything, isn't  
5 that true, Mr. McBride?

6 A. Before Novell says anything regarding what?

7 Q. Ownership of UNIX publicly?

8 A. Right. This article is not about UNIX  
9 ownership.

10 Q. I guess that's my point.

11 A. This is about the infringement.

12 Q. Mr. Gasparro is talking in communities, reading  
13 articles a week before Novell says anything?

14 A. Right.

15 Q. And they are saying we have to wait and see and  
16 you're going to have to prove it in court before you're  
17 going to get a nickel, right?

18 A. That was what was said in here.

19 Q. And that's a week before Novell said we own the  
20 copyrights, right?

21 A. This was the week before their announcement.  
22 That's right.

23 Q. Now, it's your position that -- and I believe I  
24 heard this correctly when you were answering questions  
25 from Mr. Singer -- that the May 28 press release by

1 Novell claiming that they still owned the UNIX  
2 copyrights, and also asking SCO to demonstrate there  
3 actually was any UNIX in Linux, somehow impacted your  
4 release of your quarterly results on the same day, May  
5 28, 2003; is that right?

6 A. Yes. That's right.

7 Q. And your earnings announcement on May 28, 2003,  
8 was for the quarter that ended a month earlier, on  
9 April 30, 2003, right?

10 A. Yes. That's right.

11 Q. And so the quarter had actually been closed for  
12 a month before May 28, right?

13 A. Roughly, yes.

14 Q. And the revenue and earnings you reported on  
15 May 28 was about 21 million in the top line revenue and  
16 income of a little over 4 million, right?

17 A. Yes.

18 Q. But that wasn't the first time you told the  
19 public those numbers, was it?

20 A. I don't recall.

21 Q. Let me show you Exhibit M-14.

22 THE COURT: M?

23 MR. ACKER: M. Yes, Your Honor.

24 Q. BY MR. ACKER: M-14 is a SCO press release  
25 dated May 14, 2003; isn't that right?

1 A. Yes. That's correct.

2 Q. And you're announcing a couple things in this  
3 press --

4 I move for admission of M-14, Your Honor.

5 MR. SINGER: No objection.

6 THE COURT: It will be admitted.

7 (Novell Exhibit M-14 received in evidence.)

8 Q. And you're announcing a couple of things in  
9 this press release. You're announcing, one, what you  
10 expect your earnings to be at the end of the quarter,  
11 correct?

12 A. Yes.

13 Q. And you're also saying that we did this great  
14 deal in the SCO -- in the licensing campaign we executed  
15 this deal with Microsoft, right?

16 A. Yes. That's right.

17 Q. You don't say "Microsoft," but that's what  
18 we're talking about, right?

19 A. I'm not sure if it was Microsoft or SUN. We  
20 had a couple of different deals going on at that point in  
21 time. I'd have to break this down a little bit. It was  
22 either Microsoft or SUN.

23 Q. And the reason you put out these press releases  
24 was to tell people: "Hey, we had a great quarter and we  
25 did this great deal," is so that the news gets out to the



1 market and they buy your stock, right?

2       A.   That's not correct.  That's not why we put them  
3 out.

4       Q.   But that's the reason for telling the market  
5 what's going on, so that they know what's going on with  
6 the company?

7       A.   The reason we put this out was, as a publicly  
8 traded company, when you have material information that's  
9 hit your company, whether it's good or bad, you have an  
10 obligation to publish it, so this was a material change,  
11 so part of that was published.

12      Q.   So you had an obligation on May 14 to tell the  
13 investing public the following:

14           Lindon, Utah, May 14, 2003.  The SCO Group --  
15 and then you have a NASDAQ ticker -- announced today the  
16 signing of another major SCOSource licensing agreement.  
17 This agreement marks the second substantial licensing  
18 agreement since the formation of SCOSource in January of  
19 this year.  The SCOSource division was created to manage  
20 the substantial UNIX intellectual property owned by SCO.

21           And then you also told them:

22           SCO updated its guidance on expected results  
23 for its second fiscal quarter ended April 30, 2003.  The  
24 company expects to report net income of approximately 4  
25 million or 29 cents per diluted share or an estimated

1 revenue of 21 million.

2           Q.     Correct?

3           A.     Yes.   That's correct.

4           Q.     And those were the numbers that hit the street  
5 on May 28, \$4 million in net income and 21 million in  
6 revenue, right?

7           A.     I don't see that in front of me.  It was close  
8 to that if not that.

9           Q.     So you told the investing public that two weeks  
10 before Novell said anything in the press release about  
11 the ownership of the UNIX copyrights, correct?

12          A.     Yes.

13          Q.     And do you know how much your stock went up  
14 that day?

15          A.     I don't have it in front of me.

16          Q.     Would it surprise you to know that, based on  
17 these numbers, your stock went up 39 cents?

18          A.     I don't have a reason to believe one way or  
19 another.

20          Q.     Let me show you a document so we can take a  
21 look at that.  And this is Exhibit Q-33.  And you see,  
22 Mr. McBride, what I've handed to you?  Exhibit Q-33 is a  
23 daily report of the movement of the SCO stock price over  
24 a period of time.  And if you could take a look on the  
25 fourth page in, there's a date, May 14, 2003 date.

1           First I would move for admission of Q-33, Your  
2 Honor.

3           MR. SINGER: Objection. There is no  
4 foundation. I have no idea what this is.

5           THE COURT: I think we're going to need more  
6 foundation, Mr. Acker.

7           MR. ACKER: Well, let me just ask Mr. McBride  
8 some questions and see if he'll disagree with the  
9 information in this document.

10          Q. BY MR. ACKER: You see, sir, that on May 14  
11 this chart indicates your stock opened at \$3.34, and it  
12 finished the day at \$3.55. Do you see that?

13          A. Yes, I do.

14          Q. Do you have any reason to disputes that that's  
15 what your stock did that day?

16          A. I don't know without looking at it.

17          Q. I'm sorry, sir?

18          A. I don't know offhand. I just don't know.

19          Q. Okay. You don't know one way or another. And  
20 that's the day that you told the market:

21                 We did the second SCOSource license, and this  
22 is what our numbers are going to be at the end of the  
23 month.

24                 Right?

25          A. Yes.

1 Q. Okay. Now -- now, before the market opened on  
2 May 28 --

3 If we could pull up the SCO's opening slide for  
4 that May 28 stock drop, Mr. Lee.

5 THE COURT: Which is?

6 MR. ACKER: This is a slide used by SCO in its  
7 opening statements, Your Honor.

8 THE COURT: All right.

9 Q. BY MR. ACKER: Now, so, on May 14 your stock is  
10 trading a little over \$3.00 and the news is out on the  
11 street that you're going to have \$21 million in revenue  
12 and \$4 million in income and you've signed the second  
13 Microsoft deal. And your stock, at the beginning of the  
14 day on May 28, is a little over \$10 before the market  
15 opens. Do you see that? It's on the screen,  
16 Mr. McBride.

17 A. Oh. Okay. Okay. I've got it.

18 Q. So your stock opens at ten bucks on the 28th.  
19 And then you make your second announcement regarding your  
20 earnings. You recall that your conference call was about  
21 9:00 o'clock in the morning on central mountain time?

22 A. We usually had them in the morning. I don't  
23 have any reason to disagree with that.

24 Q. And you see what happens to your stock after  
25 starting at \$10 a share, after -- even with your

1 announcement, your reannouncement of these earnings, it  
2 drops down to below \$9.00, just a little over \$8.00. Do  
3 you see that?

4 A. Okay. Yes.

5 Q. And that all happens before Novell says  
6 anything about ownership of the UNIX copyrights, correct?

7 A. I don't know what time they --

8 Q. Well, your lawyers -- your lawyers claim that  
9 the time the statement was made is a dotted line going up  
10 and down the chart. Do you see that?

11 A. Okay. So let's take that one, then. Okay.

12 Q. And so, before that statement is made, your  
13 stock has dropped from \$10.00 to just a little over  
14 \$8.00, despite the fact that you have announced to the  
15 street for the second time your revenue for the second  
16 quarter, right?

17 A. Yes.

18 Q. So, before Novell said anything about ownership  
19 of the UNIX copyrights on May 28, 2003, your stock was  
20 dropping, despite the fact that you made your second  
21 announcement about your revenue the second quarter,  
22 right?

23 A. It had gone down a little bit.

24 Q. But even after the end of the day when -- after  
25 SCO makes its announcements, the stock is still trading

1 at \$6.00, a little over \$6.00 a share, right?

2 A. Yes.

3 Q. And so it's \$3.00 higher than it actually  
4 closed when you made your first announcement of your  
5 revenue two weeks earlier on May 14, right?

6 A. Give or take some pennies. It's in that  
7 range.

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

10 MR. ACKER: A bit, Your Honor.

11 THE COURT: Okay. Would you find an  
12 appropriate time for us to break.

13 MR. ACKER: This would be an appropriate time,  
14 Your Honor.

15 THE COURT: Are you sure?

16 MR. ACKER: Yes.

17 THE COURT: All right. We'll take a recess.

18 Ms. Malley.

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

20 (Jury leaves the courtroom.)

21 THE COURT: Mr. Acker, I have to tell you that  
22 the Court is not pleased with the fact that once the  
23 document was offered and it was objected to and the Court  
24 did not admit it, you went ahead and asked questions  
25 about it and basically got the information from it you

1 wanted. And I would ask you to please show more respect  
2 for the Court's rulings.

3 MR. ACKER: Yeah. I apologize, Your Honor. I  
4 certainly will not do that in the future.

5 MR. SINGER: May we ask how long Mr. Acker  
6 plans to continue because we have other witnesses. We  
7 are trying to plan the rest of the day.

8 MR. ACKER: An hour, Your Honor.

9 THE COURT: All right.

10 MR. SINGER: Okay.

11 THE COURT: We'll take 20 minutes, counsel.

12 (Short break.)

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