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(10:40 a.m.)

THE COURT: Mr. Hatch?

MR. HATCH: Just one matter, Your Honor. If it becomes necessary for you to make that instruction, we're somewhat concerned people may, may or may not, which we don't know, know the court process. And we would like the reference to it as a unanimous decision.

THE COURT: All right. The court will grant you that.

MR. HATCH: Thank you.

MR. BRENNAN: Your Honor, on that same subject of a decision, we have two, at least two suggestions for the court to consider. First of all, we do believe the suggestion in the instruction that the decision by the District Court was without merit is contrary to the holding of the Tenth Circuit. For example, among other things, the Tenth Circuit held that Novell has powerful arguments. There were certainly aspects --

THE COURT: As far as those issues that are before this jury, I believe the court's statement is correct.

MR. BRENNAN: The second aspect, Your Honor, is that we suggest it might be a preferable course of action to see how the testimony goes and before giving an immediate instruction allowing the parties to make contributions to what the instruction ought to read like. That is a function of what action is presented to the jury. In other words, to

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1 have some period of repose simply to analyze the
2 presentation of the evidence, the testimony of the witness.
3 We are quite a ways away from a final instruction to the
4 jury, and if the court believes that some sort of
5 explanatory statement needs to be made, we do understand
6 that, but wonder whether it would be more appropriate to do
7 that after some period of reflection.

8 THE COURT: The suggestion you gave the court was that
9 it be given after Dr. Botosan's testimony and I agree.
10 Because I don't want the jury sitting here from this point
11 forward wondering why are we here if there was in fact a
12 court decision that is brought up by your cross-examination.

13 MR. HATCH: Your Honor, I think the cure instruction
14 should be given as soon as the prejudice. So I would give
15 it as soon as he brings it up.

16 THE COURT: That is probably what I will do. It will
17 depend on the context. I think the court is going to have
18 to make that judgment as to whether or not it is disturbing
19 enough to the jury that they begin to wonder. But the court
20 will just have to let you know when that decision is made.

21 Counsel, if it is not clear to you, I hope you all
22 understand that this case is going to go to the jury by noon
23 a week from tomorrow. If there is any doubt about us going
24 until midnight on Friday and somehow deeming that as
25 finishing the case within the three weeks, I think that you

1 need to be disabused of that notion.

2 MR. SINGER: Certainly what the court has said is
3 exactly what our understanding is.

4 THE COURT: All right. Let's bring the jury in,
5 Ms. Malley. Mr. Brennan, if you would try to time yourself
6 so that we stop at about five minutes to 12, please.

7 MR. BRENNAN: I will certainly do that, Your Honor.
8 Thank you.

9 THE CLERK: All rise for the jury.
10 (Whereupon, the jury returned to the courtroom.)

11 THE COURT: Go ahead, Mr. Brennan.

12 MR. BRENNAN: Thank you, Your Honor.

13 Q. (By Mr. Brennan) Dr. Botosan, before our break
14 we were talking about the so-called risk factors. And I
15 would like to draw your attention, in particular, to Exhibit
16 R21. You can find that either in the binder or it will be
17 displayed on the screen, whatever is easier for you.

18 A. Okay.

19 Q. R21 is a document that appears to be from
20 Deutsche Bank dated October 14th, 2003 entitled SCO Group,
21 Inc. A call, parenthesis, (option) in parenthesis, to arms.
22 Do you see that?

23 A. I do.

24 Q. Is this one of the two Deutsche Bank reports that
25 you made reference to in connection with your presentation

1 to the jury yesterday?

2 A. Um, this is the Deutsche Bank report that I made
3 reference to, yes.

4 Q. And when did you first review this report?

5 A. Um, well it was after January 2007, but before
6 May when I put in my report. It was in that time period.

7 MR. BRENNAN: Thank you. Your Honor, we wish to move
8 into evidence Exhibit R21.

9 THE COURT: Any objection?

10 MR. HATCH: No objection, Your Honor.

11 THE COURT: It will be admitted.

12 (Whereupon, Defendant's Exhibit R21 was
13 received into evidence.)

14 Q. (By Mr. Brennan) Now focusing then on this
15 Deutsche Bank analyst report, you will see that in the first
16 -- well, let me ask you this first. There appear to be two
17 authors, a Brian Skiba, S-K-I-B-A, and a Matthew Kelly. Do
18 you see those two names?

19 A. Yes, I do.

20 Q. Is it your understanding that those two gentlemen
21 are the authors of this report?

22 A. It is.

23 Q. Have you ever spoken with either of them?

24 A. I have not.

25 Q. Have you ever made any effort to contact them?

1 A. No, I did not.

2 Q. Did you ever do anything to reach out to Deutsche
3 Bank or Mr. Skiba or Mr. Kelly to understand the bases for
4 their statements and recommendations in the report?

5 A. Um, I did have one call to Deutsche Bank with
6 respect to the report.

7 Q. Did you speak with anyone there?

8 A. I did.

9 Q. Who was that?

10 A. Um, I don't recall the name.

11 Q. Let's look at the first paragraph. It begins
12 initiating coverage. Do you see that there?

13 A. I do.

14 Q. It states quote, "Initiating coverage with a Buy
15 rating and a \$45 price target. We view SCOX" now let me
16 pause there, did you understand SCOX to be in essence the
17 trading symbol for The SCO Group?

18 A. I do.

19 Q. Continues, "as a call option on a substantial
20 lawsuit against IBM and the potential to capitalize on
21 Linux. Investors should consider an investment in SCOX as
22 extremely high risk and volatile." Do you see that?

23 A. I do.

24 Q. And then if we can go to the next paragraph and
25 highlight that, it states quote, "We view SCOX as a

1 synthetic call option." Now do you know what a call option
2 is?

3 A. I do.

4 Q. What do you understand a call option to be?

5 A. Um, it is an option to purchase stock, um, at a
6 set price in the future.

7 Q. And those who typically engage in call option
8 trading are hoping that there might be an event in the
9 future whereby the price of the stock would rise and they
10 would benefit from buying at a low price at least a call
11 right hoping that it will rise in value?

12 A. Um, true.

13 Q. Okay. So then it continues, quote, "investors
14 with an appetite for risk should, in our view, see an
15 investment in SCO Group as the equivalent of a call option -
16 with most of the risks and rewards often associated with
17 options. The IBM lawsuit and the potential for Linux
18 licensing deals offer plenty to be excited about, while
19 failure could render the shares worthless, in our view."
20 This is the report that you relied upon, correct?

21 A. It is.

22 Q. And you understood that Mr. Skiba and Mr. Kelly,
23 the authors of the report, were suggesting that if someone
24 wanted to take a highly risky investment, what they might do
25 is buy SCO stock in the chance that perhaps SCO would

1 prevail in the lawsuit against IBM, right?

2 A. Well, there are two things, right. The lawsuit
3 with IBM and the potential for capitalizing on the Linux
4 business.

5 Q. And if there were failure in either one, that
6 failure would render SCO stock worthless, right?

7 A. Um, that is what they're saying, yeah.

8 Q. And so did you essentially understand that this
9 Deutsche Bank recommendation was being prepared by Deutsche
10 Bank stockbrokers?

11 A. Um, so it was being prepared by Deutsche Bank's
12 analysts Brian Skiba and Matthew Kelly.

13 Q. And you understood that Deutsche Bank was a
14 market-maker for SCO stock, right?

15 A. Um, I don't believe -- if we can go back to the
16 back where they talk about what their -- what their
17 relationship was with SCO, we can verify whether that is a
18 true statement or not.

19 Q. Well, if we can take just one minute and put your
20 proverbial finger, if you will, on Exhibit R21. I would
21 like to turn, if we could, to Exhibit C25 not yet in
22 evidence.

23 Now, Exhibit C25 is also a Deutsche Bank analyst
24 report; correct?

25 A. That is correct.

1 Q. And this second Deutsche Bank report is dated
2 January 21st, 2004; right?

3 A. That is correct.

4 Q. And you have reviewed this before, haven't you?

5 A. No, I don't believe I have.

6 Q. You have never seen this report?

7 A. I don't believe so.

8 Q. Are you aware that Deutsche Bank issued a report
9 in January of 2004 which was just three months after the
10 issuance of the report marked as Exhibit R21?

11 A. Um, I did not look for forecasts into 2004
12 because this was after the December 22nd reassertion of
13 ownership.

14 Q. Looking at the third page of Exhibit C25 at the
15 bottom under the heading disclosures?

16 MR. HATCH: Do you have a copy? You know, either
17 these are out of order that you gave me or I don't have a
18 copy.

19 MR. BRENNAN: I'll lend mine to you.

20 MR. HATCH: Thank you.

21 Q. (By Mr. Brennan) Do you see the reference,
22 quote, "Deutsche Bank or its affiliates makes a market in
23 securities issued by the following companies SCO Group,
24 Inc.," do you see that?

25 A. I do.

1 Q. Does that inform you that, in fact, Deutsche Bank
2 was a market-maker for SCO stock?

3 A. Um, as of that point in time, but I did not rely
4 on this report. And if we could go back to the disclosures
5 that are in the report that I actually relied upon, we could
6 confirm whether that was the case at the time of the
7 forecast that I relied upon.

8 Q. We can in just one minute we'll turn back to R21.
9 My question to you is looking at Exhibit C25, which was
10 issued less than three months after the report that you
11 relied upon, you see that Deutsche Bank declares itself to
12 be a market-maker for SCO stock; right?

13 A. I do see that, yes.

14 Q. And does that inform you that, in fact, the
15 Deutsche Bank had stockbrokers who were offering and
16 encouraging the sell and trade of SCO stock; right?

17 A. Um, that would suggest that they were making a
18 market in the securities, correct.

19 Q. So a market-maker in securities is in essence a
20 brokerage house that undertakes steps to encourage trading
21 in stock, right?

22 A. Um, so this -- it is true, um, that it is quite
23 common for investment banks to have both sides of the house.

24 Q. And Deutsche Bank --

25 A. Independent of each other.

1 Q. My apologies. Deutsche Bank has a stock trading
2 aspect of it; doesn't it?

3 A. That is true.

4 Q. And now in looking at Exhibit C25, you would
5 agree that this suggests to you that Deutsche Bank had a
6 stock trading component to it that was a market-maker in
7 particular for SCO Group -- SCO Group stock, which meant, in
8 fact, that it was encouraging trades in SCO stock; right?

9 A. That portion of the business, which is
10 independent of the analyst side, by law, um, my
11 understanding, um, was making a market. But as I said, that
12 is not atypical.

13 Q. Okay. Let's go back to Exhibit R21 which is in
14 evidence. Let's put that back on the screen. Now, if we
15 could turn to the third page of Exhibit R21 and it talks
16 about risks; correct?

17 A. Correct.

18 Q. Let's highlight that, if we might. And it says
19 quote, "The largest risk is that SCO Group's claims be
20 without legal merit. We are not lawyers and are not
21 attempting to predict the outcome of this legal case,
22 however, should this lawsuit be without merit, it would be a
23 huge blow to the shares. We believe the stock will be
24 extremely volatile, due to constant newsflow and a small
25 share count. Swings of plus or minus 20 percent in a single

1 day could be expected. A lawsuit against a large and rich
2 company such as IBM is a dangerous undertaking, and it could
3 cause SCO to overextend its legal reach and budget. In
4 addition, SCO is being sued by Red Hat. This lawsuit is a
5 risk and we imagine SCO could be the focus of other
6 lawsuits, as its legal actions could be interfering with
7 Linux business at many companies. Finally, the company is
8 angering the Linux community, which could prove to hurt
9 business down the road." Do you see that?

10 A. I do.

11 Q. So when you reviewed this report, the one that
12 you relied upon, you understood that the Deutsche Bank
13 analysts were indicating that there was huge risk for SCO;
14 right?

15 A. That this was a risky stock. That is true.

16 Q. And the largest element of the risk was legal
17 maneuvering; right?

18 A. That is what they say, yeah.

19 Q. And the analyst suggested that there are varied
20 aspects of legal risk. One is that SCO may not win its
21 lawsuit against IBM; right?

22 A. That was one of the risks.

23 Q. And the other -- excuse me, the other risk would
24 be that SCO would lose lawsuits that have been filed against
25 it, right?

1 A. That was another risk to the firm.

2 Q. There was reference to the Red Hat litigation.

3 Do you know what that litigation is about?

4 A. Um, that one I have seen reference to, but I am

5 not very familiar with it.

6 Q. Well, are you aware essentially that Red Hat is a

7 Linux provider like Novell, right?

8 A. Correct.

9 Q. And Red Hat had filed suit seeking a

10 determination that its version of Linux was not infringed,

11 did not infringe UNIX, right?

12 MR. HATCH: Objection, Your Honor. He is testifying.

13 MR. BRENNAN: It is a leading question, Your Honor.

14 THE COURT: Overruled.

15 THE WITNESS: Um, I'm not aware of that firsthand.

16 But if you purport that to be the case, I will accept it.

17 Q. (By Mr. Brennan) And you understood from reading

18 the analyst reports that the analysts at Deutsche, the

19 authors of the report that you relied upon, were also saying

20 there could be other legal actions involving Linux, right?

21 A. And that they recognize all of these as risks of

22 the company, yes.

23 Q. Now, in your analysis did you take into account

24 the fact -- let me back up. My apologies. Looking at the

25 analyst's report, Exhibit R21, you understood that

1 essentially this was a litigation based play; right?

2 A. For the stock, yes.

3 Q. Right. That what Deutsche Bank again was
4 suggesting is that there are litigation aspects out there
5 that will influence the future of SCO; right?

6 A. Um, yes, for the value of SCO's stock is what
7 they're talking about there. I would agree with that
8 statement.

9 Q. Let's go to Page 7, if we might, of the Deutsche
10 Bank report that you relied upon. If we could again there
11 is another section called risks here, right?

12 A. That is correct.

13 Q. And it begins under this section, quote, "Our
14 thesis that SCOX shares can be viewed as a call option
15 implies that investors are paying the current share price as
16 a premium. Should the legal case and the company's efforts
17 to arrange licensing agreements not come to fruition, the
18 investment could wind up worthless. The upside potential is
19 clearly huge, should the SCO be able to monetize its UNIX
20 assets." Then it continues with this language. "An
21 alternative way to look at the SCOX situation is as a
22 straddle as opposed to a pure call." Do you know a straddle
23 is in this context?

24 A. Um, I think they go on to describe it a little
25 bit later in the report, um, or they say, if you continue

1 reading, "Rather than assuming the stock goes to zero, the
2 management could decide to strike a more aggressive
3 licensing arrangement with key vendors and perhaps settle
4 all issues with IBM at a bargain price. Given this
5 strategy, we would expect the stock to support a higher
6 price than zero, perhaps \$15 per share." Um, so, that is
7 the only indication that I have of what they were referring
8 to when they said a straddle.

9 Q. Let's look at the next paragraph here. Quote,
10 "SCOX has frustrated the "Linux community" and should it not
11 prevail (in its legal claims or in selling UNIX/Linux
12 licenses), then the company could shut its doors. Notably,
13 the company's website has already been the target of at
14 least two "denial of service" attacks." Do you see that?

15 A. I do.

16 Q. Do you know what a denial of service attack is?

17 A. I don't know the technical aspects of it. I know
18 that it caused an inability for customers, I think, to
19 access the website when it was going on.

20 Q. Was this essentially because such a flood over
21 the internet of negative commentary coming into SCO that it
22 shut down, in essence, its web service?

23 A. I don't know the details or the specifics.

24 Q. Okay. Then in the next paragraph, "Lawsuits are
25 expensive and typically protracted. A lawsuit against a

1 large and rich company such as IBM is a risky undertaking,
2 and it could cause SCO to overextend its legal reach and
3 budget. The company is also being sued by Red Hat. This
4 lawsuit is a risk and we imagine SCO could be the focus of
5 other lawsuits." Do you see that?

6 A. I see all of those risks of the company listed,
7 correct.

8 Q. So you understood when you read this analysis and
9 did your report that what Deutsche Bank was doing is saying
10 there are risks to this company and the risks are primarily
11 litigation risks, right?

12 A. Um, when we're talking about the company,
13 correct.

14 Q. Now, let's talk about other litigation. When I
15 asked you earlier about your expert report, you indicated
16 that you had access to the SCO attorneys database, right?

17 A. Yes.

18 Q. And you reviewed various pleadings in this case,
19 right?

20 A. Yes.

21 Q. And you were aware that, for example, in this
22 very case, Novell had filed a motion for summary judgment
23 against SCO; right?

24 A. Yes.

25 Q. And that was filed sometime in 2007?

1 MR. HATCH: Objection, Your Honor, foundation and
2 relevance.

3 MR. BRENNAN: Your Honor, I'm asking what she looked
4 at. We have been talking about the litigation risks. I
5 would like to talk to her about litigation.

6 THE COURT: I'll overrule the objection.

7 Q. (By Mr. Brennan) Let me just back up for a
8 moment. You were aware that Novell had filed a motion for
9 summary judgment in this case in 2007, right?

10 A. Correct.

11 Q. And that motion was filed before you prepared
12 your expert report; right?

13 A. That is correct.

14 Q. Now, several years before, let's back up. You
15 understand that this lawsuit that brings us here today was
16 first filed by The SCO Group in January of 2004, right?

17 A. Correct.

18 Q. And you understand that Novell asked the court in
19 which the case was assigned to dismiss the lawsuit, right?

20 A. I'm sorry, can you repeat the question?

21 Q. You understand that when the lawsuit was first
22 filed Novell asked the court to dismiss the case, correct?

23 A. Are we talking about the --

24 Q. This case that brings us here today?

25 A. Right. No, I understand. Are we talking about

1 the pleading that you were asking me about earlier, or are
2 you talking about something different?

3 Q. I'm talking about --

4 THE COURT: Mr. Hatch?

5 MR. HATCH: Your Honor, I don't think Mr. Brennan has
6 laid a foundation yet for this kind of testimony.

7 THE COURT: Okay. Well, I'm going to sustain the
8 objection, but we're jumping back and forth rather quickly
9 here. So I'm going to sustain the objection, and ask you to
10 start over again.

11 MR. BRENNAN: I would be happy to, Your Honor.

12 Q. (By Mr. Brennan) You're aware that -- let me
13 back up. You told us earlier that people in the community
14 were following this litigation, right?

15 A. Um, that they were aware of it, correct.

16 Q. And you expected that those who were Linux users
17 would be interested in developments in the case, right?

18 A. Um, to the extent that it would affect their
19 beliefs about, for example, infringement.

20 Q. And so those who were Linux users who were
21 concerned about the issues of infringement would have
22 concerns about this litigation, right?

23 A. About the Novell litigation?

24 Q. Yes.

25 A. That is correct.

1 Q. Because one of the things that you told us
2 earlier in terms of assumptions is you were asked by SCO's
3 attorneys to assume that Novell had transferred the UNIX
4 copyrights to Santa Cruz Group, right?

5 A. Sure.

6 Q. That is one of the instructions you were given,
7 right?

8 A. One of the assumptions that I made and among
9 other assumptions. So, for example, the assumption the but
10 for world in this case didn't exist as well.

11 Q. And you were -- you also in the materials you
12 reviewed and relied upon you looked at the initial asset
13 purchase agreement, right?

14 A. Correct.

15 Q. You looked at Amendment Number 1?

16 A. Correct.

17 Q. You looked at Amendment Number 2?

18 A. Correct.

19 Q. And you were aware that decision-makers, that is
20 potential licensees of the SCO Source program would be
21 interested in and make decisions in part as a result of
22 rulings in this case, right?

23 A. And incorporated that into the forecast. That is
24 incorporated into the forecast is the market condition, yes.

25 Q. So your suggestion is that built into the market

1 conditions are results in this litigation, right?

2 A. No. What I'm saying is that there were -- there
3 was a well-known -- it was well-known in the marketplace
4 even before the Novell case was filed, the case against
5 Novell was filed, um, that -- that infringement was not
6 known, for example. So what I'm saying is those market
7 conditions were known to the market and to the analysts and
8 were incorporated into the forecasts that I relied upon.

9 Q. And you would agree that rulings by the Federal
10 District Court in which the Novell case was pending would be
11 material to decision-makers in the real world relative to
12 whether or not they should buy SCO license, right?

13 A. But my analysis is not in the real world, it is
14 in the but for world. So for my purposes, for my analysis,
15 none of those would matter. What would matter were the
16 things that existed prior to the Novell suit being filed.
17 And those are incorporated into the Deutsche Bank report.

18 Q. So in your world it is an abstract world, right?

19 A. Um, well, by definition it has to be because
20 we're trying to figure out how much damage, how much -- what
21 SCO's sales would have been if Novell hadn't done what it
22 did. So I can't look at the real world to get at that
23 because Novell did what it did. So I have to look at a
24 world that is a but for world. I have, you know, that is
25 the purpose of this.

1 Q. Let's look at the real world for a moment. I am
2 going to hand you a document entitled Memorandum Decision
3 and Order, it is dated June 4th, 2009, issued by the United
4 States District Court for the District of Utah Central
5 Division Judge Kimball.

6 MR. HATCH: Your Honor, I object. He has laid no
7 foundation. She has made it very clear that this was not
8 part of the but for analysis.

9 MR. BRENNAN: And Your Honor I --

10 MR. HATCH: Rule 403.

11 MR. BRENNAN: I apologize, I think I gave the wrong
12 date. I should have said 2004. I think I said 2009.

13 MR. HATCH: Same objection.

14 THE COURT: I'll overrule the objection and allow the
15 witness to continue.

16 Q. (By Mr. Brennan) So what I would like you to do
17 is to look at this memorandum decision and order. Again, I
18 apologize, I used the wrong date. The correct date of the
19 issuance of the order is June 4th, 2009. And I would like
20 to direct your attention -- 2004, I keep doing that, I
21 apologize. I would like to direct your attention to page
22 number eight. And I will represent to you that this is the
23 ruling of Judge Kimball in this case.

24 MR. HATCH: Do you have a copy of that, Mr. Brennan?

25 MR. BRENNAN: I certainly do.

1 Q. (By Mr. Brennan) We're going to focus on Page 8
2 and I would like you to read with me from the last full
3 paragraph on that page that begins, "it is undisputed." Do
4 you see that?

5 A. I do.

6 Q. Okay. It reads, quote, "It is undisputed that
7 the APA did not transfer any copyrights. Under the APA,
8 Novell agreed that on the closing date, December 6, 1995" --

9 MR. HATCH: Your Honor, I'm going to object. This has
10 not been admitted into evidence. It is not properly
11 admitted. He is reading from the document.

12 MR. BRENNAN: Your Honor, I'm certainly permitted to
13 read from a document to impeach the witness.

14 THE COURT: Go ahead.

15 MR. BRENNAN: Thank you.

16 THE COURT: Now, ladies and gentlemen, I want to give
17 you an instruction right now though. I want you to listen
18 to this very carefully.

19 In light of the testimony that is being elicited on
20 prior court decisions in this matter, I want you to listen
21 to this. You will hear evidence about prior court rulings
22 in this case. And it may lead you to wonder why are we
23 being asked to serve as jurors at this point in time in
24 light of those prior decisions. You have to be aware that
25 SCO appealed the rulings by the District Court, this

1 decision and perhaps another decision that you may yet have
2 reference to, to the Tenth Circuit Court of Appeals. The
3 Tenth Circuit Court of Appeals in a unanimous decision
4 reversed the District Court as to the issues before you in
5 this case and concluded that those issues were to be decided
6 by a jury.

7 And so it is important for you to understand that
8 reference to these prior decisions does not in any way
9 affect the decisions that you will be making in this case
10 because they were reversed and they were found to have been
11 in error in a unanimous decision. Thank you.

12 MR. BRENNAN: Thank you, Your Honor. I appreciate
13 that.

14 Q. (By Mr. Brennan) So if we could go back to the
15 District Court's decision that was issued on June 9th of
16 2004. I'll continue. Let me just back up. Quote, "Under
17 the APA, Novell agreed that on the closing date, December 6,
18 1995, it would assign all assets on Schedule 1.1(a), but
19 that it would transfer no assets listed on the Excluded
20 Assets Schedule, Schedule 1.1(b). There is no dispute that
21 all copyrights were excluded on Schedule 1.1(b) and,
22 therefore, no copyrights transferred on the closing date
23 under the terms of the APA. Also, Amendment Number 2 merely
24 amends the schedule of excluded assets and does not
25 constitute a transfer of copyrights on its own. Therefore,

1 the issue raised by Novell is whether the APA as amended by
2 Amendment Number 2 is a sufficient writing under Section
3 204(a)" Your Honor, I'll insert of the copyright act, and
4 then to continue, "to transfer ownership of" if we could
5 continue to the top of the next page, "copyrights."

6 Now, are you aware -- let me back up. I then will
7 continue in the next paragraph that begins "the APA
8 amendment." It reads, quote, "The APA Amendment Number 2
9 excludes from transfer, quote, all copyrights and
10 trademarks, except for the copyrights and trademarks owned
11 by Novell as of the date of the APA required" --

12 THE COURT: Mr. Hatch?

13 MR. HATCH: Your Honor, at this point Your Honor has
14 told the jury that the United States Court of Appeals by a
15 unanimous decision found this to be in error and reversed
16 it. He is just reading it to us.

17 MR. BRENNAN: This is not an objection.

18 THE COURT: It is an objection. And I am giving you
19 some leeway, Mr. Brennan, and it had better -- there better
20 be some questions asked about this that is relevant to the
21 testimony.

22 MR. BRENNAN: I intend to do that.

23 MR. HATCH: He is basically trying to read the
24 decision that is in error and it has been reversed to help
25 the jury out to see these things.

1 THE COURT: I am trusting Mr. Brennan is going to do
2 more than that. So I will overrule the objection and allow
3 him to proceed.

4 MR. BRENNAN: Thank you. And just so the record is
5 clear, this decision was never appealed. This is not the
6 subject of an appeal, what I'm reading to the court. I
7 will --

8 THE COURT: If you are somehow implying that that
9 language is the relevant language in this case, then that is
10 very inappropriate. That specific decision by Judge Kimball
11 was reversed in a subsequent decision.

12 MR. BRENNAN: I do intend to turn to that. And just
13 for the record, I want to indicate I'm reading from the
14 ruling on the motion to dismiss, not the summary judgment
15 ruling.

16 MR. HATCH: Well, that decision was denied. So he is
17 -- this is improper.

18 MR. BRENNAN: If I could just continue. I assure Your
19 Honor I will tie this together.

20 THE COURT: Go ahead, Mr. Brennan.

21 MR. BRENNAN: Thank you.

22 Q. (By Mr. Brennan) So if I could start again, "The
23 APA Amendment Number 2 excludes from transfer all copyrights
24 and trademarks except for the copyrights and trademarks
25 owned by Novell as of the date of the APA required for SCO's

1 predecessor to exercise its rights with respect to the
2 acquisition of UNIX and UnixWare technologies. The
3 amendment does not identify which copyrights are required
4 for SCO to exercise its rights with respect to the
5 acquisition of UNIX and UnixWare and provides no date for
6 the transfer. The amendment mentions copyrights owned by
7 Novell as of the date of the APA, but it is not retroactive
8 to the date of the APA. Furthermore, although Amendment
9 Number 2 states that its effective date is the date of the
10 amendment, the language of Amendment Number 2 does not state
11 that a transfer of the copyrights is to occur as of the date
12 of the amendment." End quote. Now, here is my question to
13 you.

14 THE COURT: Ladies and gentlemen, I want to again to
15 impose here. To the extent that language that was just read
16 to you from that 2004 decision pertains to the issues in
17 this case, you are to disregard it. This is being offered
18 for a limited purpose and that is to allow Mr. Brennan the
19 opportunity to challenge the testimony of this witness as to
20 her conclusions about damages. But as to the issues of
21 contract interpretation, as you will be instructed by the
22 court subsequently, you are to disregard the language you
23 have just heard and rely only on those instructions that
24 will be given to you by the court at the end of the case.

25 MR. BRENNAN: Thank you, Your Honor.

1 Q. (By Mr. Brennan) So looking at, as you do now,
2 at the language of the court's ruling in June of 2004, would
3 you expect that a potential licensee of a SCO source license
4 in June of 2004 who read that language might come to the
5 conclusion that it would not enter into a license agreement
6 because of the question as to whether or not SCO owned the
7 UNIX copyrights?

8 A. No.

9 Q. So you believe that a potential SCO licensee, in
10 June of 2004 who read that language issued by the court at
11 that time, would form no decision or opinion whatsoever as
12 to whether or not they should acquire a SCO source license?

13 A. In my analysis, nobody would be able to read this
14 document because it wouldn't exist.

15 Q. Because you're in an abstract world, right?

16 A. Because I am in a world where Novell has done
17 nothing wrong, and so there would not be a court case, so
18 there would not be this decision, so there wouldn't be
19 anything to read. You can't pick and choose what parts of
20 the but for world you're going to stick with. When you're
21 calculating damages, you have to define what the parameters
22 are of that but for world and then calculate the damages in
23 that context. I can't -- I can't sort of say but, you know,
24 I'm going to assume that Novell did nothing wrong and yet
25 all of a sudden there is a court case with decisions

1 associated with it. It makes absolutely no sense from a
2 logical perspective.

3 Q. Let me see if I understand what you're telling
4 us. Are you telling us that the world, the but for world
5 that you created, is a world where Novell did nothing wrong?

6 A. I am saying that in the but for world that I am
7 looking at, it is one where Novell did not slander the
8 title. What would SCO's -- SCO's source revenues have been
9 if Novell had not interfered in their market.

10 Q. I apologize. I must have misunderstood what you
11 told us yesterday and this morning. I thought that what you
12 told us is that SCO's attorneys came to you and instructed
13 you and asked you to assume that, in fact, Novell had
14 transferred the UNIX copyrights and had slandered SCO's
15 claim of title?

16 A. So you're mixing up the -- there is two different
17 points here. One is I have to assume liability for there to
18 be any potential for damages. And then having assumed that
19 there was, then for the purposes of actually calculating the
20 damages, you have to assume that they didn't do what it was
21 that they did. So, you know, both of those have to hold but
22 they're getting at different issues.

23 Q. So what I would like to do is compare your but
24 for abstract world and the real world. Would you concede
25 that in the real world, in June of 2004, potential SCO

1 licensees having read or been informed of this decision by
2 the district court may have chosen not to acquire a SCO
3 license because there was a serious question as to whether
4 in fact there had been a transfer of copyrights?

5 A. In the but for world the document would not exist
6 and the real world is not relevant to a damages analysis.

7 Q. The real world is not relevant to what you have
8 done, right?

9 A. The real world is not relevant to a damages
10 analysis including mine.

11 Q. Let me ask you this. You were relying upon
12 Dr. Pisano's analysis, right?

13 A. I incorporate some aspects of his calculations,
14 correct.

15 Q. And what he did is he relied upon real world
16 surveys, right?

17 A. He used it as a proxy, I think is what he said.
18 We're going to characterize what he said. He used it as a
19 proxy, the best that he could get, for an input that he
20 needed to create his but for world. I also used forecasts
21 created in the real world.

22 Q. Thank you. So you used real world forecasts, and
23 I am asking you to consider real world developments in terms
24 of litigation and the forecast that you relied upon were
25 real world forecasts prepared by Deutsche, right?

1 A. But what you're asking me to do is to start
2 paying attention to aspects of the real world that couldn't
3 exist in the but for world. The forecast exists in the but
4 for world and in the real world. What you're asking me
5 about doesn't exist in both of those worlds.

6 Q. It doesn't exist in the abstract, artificial
7 world, does it?

8 A. It doesn't exist in the but for world that I have
9 to take into consideration to do my job as an expert.

10 Q. Now, you were asked earlier by myself as to
11 whether you had reviewed a document called Novell's Motion
12 for Summary Judgment, right?

13 A. I'm sorry. Can you repeat the question?

14 Q. Certainly. One of the documents that you said
15 you considered in forming your opinions was a document that
16 was filed in this case, a real world filing, a real world
17 case, and it was Novell's Motion For Summary Judgment
18 Against SCO, right?

19 A. I did review that document.

20 Q. You read it, correct?

21 A. Um, I think I did.

22 Q. And you saw Novell's legal arguments?

23 THE COURT: Mr. Hatch?

24 MR. HATCH: I think we're going to go into a line of
25 objection again. We're objecting on foundation. I mean we

1 would like to have a side bar to discuss it.

2 THE COURT: We will have a side bar.

3 (Whereupon, a side bar conference was held.)

4 MR. HATCH: Your Honor, Mr. Brennan said he was going
5 to lay a foundation. She has made it eminently clear this
6 has nothing to do with her calculation. Now he is just
7 wanting to read into it the record, you know, things that
8 don't matter to her analysis. I don't think he has any
9 business going into it. Secondly, I think a curative
10 instruction to the jury would also include that the judge
11 was found in error and has been removed from the case and a
12 new case --

13 THE COURT: He was not removed. He chose to recuse.

14 MR. HATCH: He recused himself.

15 MR. BRENNAN: Under the Federal Rules the case would
16 have come back to him but for the decision to recuse
17 himself.

18 THE COURT: Well, if we do anything of that sort,
19 we'll do it in a final jury instruction and not at this
20 point.

21 MR. BRENNAN: Your Honor, just so we're clear, I will
22 do the same that I did on the prior line of questioning, no
23 more, no less. And it is for all of the reasons that we
24 have identified.

25 MR. HATCH: He is reading from documents. He hasn't

1 laid any foundation for it. She indicated it had nothing to
2 do with her analysis. You know, she is trying to deal with
3 the real world, trying to do his analysis rather than hers.

4 THE COURT: You're now going to go to the 2007 summary
5 judgment?

6 MR. BRENNAN: Yes.

7 THE COURT: Remind me again when it was issued?

8 MR. BRENNAN: It was issued on August 10th, 2007.
9 That is within the damage period that they're claiming.
10 That is why it is important.

11 MR. HATCH: They have taken that into account, her
12 damages in the but for world, and they're trying to put
13 something in it that she doesn't consider that the but for
14 world is if none of this happened. He is now trying to put
15 this in and she says no. We shouldn't go any further than
16 this. He shouldn't be able to read into evidence what he
17 says he can't get out of her. It is not part of it. But to
18 sit and read, you know, read in language from the decisions
19 that is -- that is simply 403 and it is not probative.

20 THE COURT: Go ahead, Mr. Brennan.

21 MR. BRENNAN: Briefly, Your Honor, because I think I
22 have made most of these points previously. We have heard in
23 the last line of questioning that she mixed and matched real
24 world with the but for world. So it is not a pure
25 artificial world that she is suggesting it has been

1 represented. And in addition, this opinion was issued
2 during the damages period and, in fact, if we look over at
3 that chart, The SCO Group is seeking in excess of
4 \$50,000,000 in damages for 2007 alone. And the suggestion
5 has been that parties would continue through 2007 to acquire
6 SCO source licenses, both RTU and vendor licenses, at a rate
7 in excess of \$50,000,000 in 2007. Clearly, the fact that
8 Judge Kimball issued a decision granting summary judgment
9 would have an impact on those damage calculations. We
10 didn't put them at issue, they did.

11 MR. HATCH: Couldn't possibly in any way, given her
12 calculations, they don't exist. He hasn't laid any
13 foundation that those decisions are anywhere in that number.

14 THE COURT: He has laid the foundation that at least
15 the Deutsche Bank Report relies on conclusions about the
16 real world. And I do believe that those real world
17 conditions that they rely upon are often considered by the
18 jury. The dilemma is whether or not these specific court
19 rulings were relied upon by that report.

20 Go ahead, Mr. Singer.

21 MR. SINGER: If I might address this, Your Honor. The
22 Deutsche Bank Report was in October of 2003. It is
23 contemplating certain litigation, IBM litigation, perhaps
24 other litigation, as being risk factors. This case is
25 January 2004. There is nothing to do with the Deutsche Bank

1 Report. The assumptions of the Deutsche Bank Report are
2 fair game, but they have nothing to do with this decision or
3 any decisions in this case which are reactions to the public
4 announcement in December 22, 2003, republishing the claim of
5 slander which led to the January 2004 filing of this lawsuit
6 and all of the decisions that followed. There is not one
7 word in the Deutsche Bank Report that relates to this case
8 which is on the slander of title.

9 THE COURT: Mr. Brennan, the court is going to require
10 of you additional foundation to establish that the Deutsche
11 Bank Report contemplated if not these specific rulings at
12 least rulings similar to this, all right?

13 MR. BRENNAN: Okay.

14 THE COURT: It is based on the court's assumption that
15 as you pointed out she has relied on that real world report.
16 Again, if the foundation can be laid that this was the type
17 of lawsuit and the potential rulings that you are referring
18 to would be a possible result of that lawsuit, then I
19 believe I have to allow the testimony to proceed. But only
20 because of that connection. But you have got to lay more
21 foundation for that. If you cannot, I will sustain the
22 objection. And I don't want you reading anything from the
23 2007 summary judgment decision until the court has ruled
24 there has been proper foundation laid.

25 MR. BRENNAN: Very well, Your Honor. Thank you.

1 (Whereupon, the side bar conference concluded.)

2 Q. (By Mr. Brennan) Dr. Botosan, when you looked
3 earlier, if we can go back to Exhibit R21, and we have been
4 looking at various risk factors, do you recall that?

5 A. I do.

6 Q. If we can just revisit those to make sure that we
7 have all of that. Let's turn, if we could, to page number
8 ten. Again, this is the Deutsche Bank Report.

9 THE COURT: Mr. Brennan, you're aware that the jury is
10 not looking at this?

11 MR. BRENNAN: R21 should be in evidence, Your Honor.
12 I apologize.

13 THE COURT: All right.

14 MR. BRENNAN: My mistake. I will be more clear. My
15 apologies.

16 Q. (By Mr. Brennan) We're back to Exhibit R21 which
17 is in evidence. I'm going to look at, for example, page
18 number ten. And there at the top of that page it says UNIX,
19 Linux, SCO and IBM. Do you see that heading?

20 A. I do.

21 Q. Then in the second section it says, "How SCO Got
22 UNIX: A chronology of System V ownership." Do you see
23 that?

24 A. I do.

25 Q. Let's focus on that, if we might, for just a

1 moment. It states, "In addition to its work with the
2 OpenServer, SCO acquired all right, title and interest in
3 and to the UNIX Software Code. After AT&T sold UNIX to
4 Novell in 1993, Novell renamed UNIX UnixWare. In 1995, SCO
5 acquired the UNIX software designed for the Intel processor
6 as well as UnixWare from Novell. In acquiring UNIX from
7 Novell, SCO acquired the licensing agreements for the UNIX
8 OS software source code, object code, and related
9 schematics, documentation, derivative works, and the sale of
10 binary and source code licenses. It is this acquisition
11 that is at the heart of SCO's lawsuit with IBM." Do you see
12 that?

13 A. I do.

14 Q. Now, do you understand from reading that that
15 both in the IBM case and in this litigation there is a
16 question of SCO's claim of ownership to UNIX, right?

17 A. Well, I understand from reading that that the
18 analysts' beliefs at the time that they were writing this
19 was that there wasn't a question of ownership.

20 Q. And, in fact, there was reference made to the
21 fact that there was going to be other related litigation
22 regarding SCO's claims. In fact, we read earlier in the
23 report under the risk section a specific reference by the
24 analysts to other Linux related litigation; correct?

25 A. That is correct. They talked about other

1 litigation.

2 Q. In fact, if we could now go to Page 7, we looked
3 at this before, just so we're clear, Page 7, the third
4 paragraph if we could highlight that reference to lawsuits,
5 in the last sentence of that paragraph said, "This lawsuit
6 is a risk and we imagine SCO could be the focus of other
7 lawsuits." Right?

8 A. I see that. But I do want to make the point that
9 not any of this is relevant to the analysis that I did.
10 This was a risk to SCO, the company. My focus was on the
11 SCO source revenue. That was not a risk to the SCO source
12 revenue.

13 Q. Would you agree that a lawsuit filed by SCO that
14 put into question its ownership to the UNIX copyrights would
15 be a risk to SCO Group, Inc.?

16 A. Well, I think we're back to the same issue that
17 we were at a few moments ago which is in the but for world,
18 SCO would not have filed a lawsuit related to the ownership
19 of the copyrights because in the but for world, Novell would
20 not have slandered the title which means that SCO would not
21 have had to file the lawsuit.

22 Q. So again, what I want to do is compare and
23 contrast your but for world with the real world. And Your
24 Honor, I believe that there is proper foundation laid just
25 from what we have looked at for me to continue.

1 MR. HATCH: Objection, Your Honor, for the reasons we
2 discussed before there clearly is not.

3 THE COURT: I'll overrule the objection. You may go
4 ahead, Mr. Brennan.

5 Q. (By Mr. Brennan) Now, we had talked earlier
6 about your having read Novell's motion for summary judgment
7 in this very case and you had a chance to review Novell's
8 legal arguments by reading that motion, right?

9 A. Yes.

10 Q. And, in fact, you were interested in the real
11 world in 2007 because that is why you relied upon Novell's
12 motion for summary judgment in this case, right?

13 A. Um, it is important to be cognizant of, you know,
14 of everything that has gone on. But it doesn't necessarily
15 mean that it is going to get incorporated into my damages
16 estimate.

17 Q. So you felt that it was important to be cognizant
18 of what was really going on in the real world, but you chose
19 not to include it in your damages analysis, right?

20 A. No, that mischaracterizes what I just said.

21 Q. I'm sorry, maybe I misunderstood you. Let's take
22 it one piece at a time. You believed, in forming your
23 conclusions, that it would be important to be cognizant of
24 what was going on in the real world, right?

25 A. True.

1 Q. And you believe that one of the things that you
2 ought to be cognizant of were actual developments in the
3 real world regarding litigation over SCO's claim that it had
4 been slandered in terms of its claim of right to UNIX,
5 right?

6 A. I think it is important for me to be
7 knowledgeable about what is going on in the case, correct.

8 Q. And you likewise would believe it would be
9 important for the jury to have that same knowledge that you
10 sought after, right?

11 A. Um, that I am -- that is up to the judge.

12 Q. Fair enough.

13 A. That is not up to me.

14 Q. You believe that people in the real world who are
15 considering acquiring licenses would have an interest in a
16 legal determination as to whether or not Novell had
17 transferred the copyrights, correct?

18 A. But now you're getting back into damages and the
19 damages are not computed assuming the real world. The
20 damages are computed assuming the but for world. So now
21 you're mixing things up again.

22 Q. Well, so that I don't mix anything up, I want to
23 be clear I'm in the real world right now. And I would like
24 to show you a document issued by this court, Judge Kimball,
25 dated August 10th, 2007. It is entitled Memorandum Decision

1 and Order. And I'm going to represent to you that this
2 decision was issued by the District Court in ruling on
3 Novell's motion for summary judgment that you said you had
4 reviewed.

5 MR. HATCH: Your Honor, I'm going to object to this.
6 He hasn't tied this to her report or her damages study.

7 THE COURT: The objection is noted but will be
8 overruled.

9 Q. (By Mr. Brennan) Just so we're clear, um, when
10 you -- when you came to the jury yesterday you came up with
11 this five year period of damages, right?

12 A. Correct.

13 Q. And your suggestion was that in 2004, for vendor
14 license agreements, that your expectation, your projection
15 would be that for vendor license agreements in that year
16 alone, SCO would sell some \$30,000,000 worth of vendor
17 licenses, right?

18 A. I want to make sure that we're accurate. That is
19 what I recall. But I will pull my numbers out so I have
20 them close by.

21 Q. I am happy to have you confirm them. Just so you
22 know, I'm reading from the chart that you presented
23 yesterday.

24 A. Correct.

25 Q. And also for 2004, your projection was that there

1 would be these right to use licenses that would generate
2 revenue to SCO in the amount of \$23,000,000 for just 2004,
3 right?

4 A. Correct.

5 Q. And these right to use licenses again would be
6 licenses that Linux users would buy in order to protect
7 themselves against a copyright infringement action filed
8 that SCO might file against them, right?

9 A. True.

10 Q. And 2004 where you have this combined total of
11 revenues, 30,000,000 for vendor license agreements and
12 23,000,000 for right to use licenses, that is a total of
13 \$53,000,000 in projected revenues in an abstract world;
14 right?

15 A. That is, as I said yesterday, based on my
16 analysis, my best guess of what SCO would have generated in
17 revenues if Novell had not interfered in the market.

18 Q. So your best guess is in the artificial world you
19 have described is that SCO would have sold some \$53,000,000
20 worth of licenses, right?

21 A. Correct.

22 Q. But in 2004 alone, we have a -- as we looked at
23 earlier, language from a ruling by this court indicating
24 that there were questions about copyright ownership, right?

25 A. But that ruling would not exist in the but for

1 world.

2 Q. It would exist in the real world?

3 A. Yes, because Novell did something bad.

4 Q. Well, Novell did something bad in the real world
5 or in your artificial world?

6 A. Novell did something bad in the real world and my
7 damages are calculated assuming that Novell didn't do
8 anything bad. I just don't understand why we're having such
9 difficulty with this concept.

10 Q. I confess I may not be as bright. I thought that
11 you had --

12 THE COURT: Mr. Brennan, if I may on that?

13 MR. BRENNAN: Yes.

14 THE COURT: Dr. Botosan, is it not true that you rely
15 upon certain real world documents to reach your conclusions?

16 THE WITNESS: I do.

17 THE COURT: Those real world documents included
18 considerations of real world matters, not just your own
19 make-believe world; isn't that correct?

20 THE WITNESS: That is correct.

21 THE COURT: All right.

22 MR. BRENNAN: Thank you, Your Honor.

23 THE COURT: Mr. Brennan, I do want to instruct you if
24 you go to the 2007 decision, I don't want you to read from
25 it. I just want you to simply state its conclusions.

1 MR. BRENNAN: Fair enough, Your Honor. Thank you.

2 I'll do that.

3 Q. (By Mr. Brennan) What you have been handed, as I
4 mentioned, is an order issued by the court on August 10th,
5 2007. Now, between June 9th of 2004, when the first
6 decision was issued that we read to you, and August 10th,
7 2007, are you aware of any other court decisions in that
8 interim period rendering decisions regarding the issues of
9 ownership of the copyrights or slander of title?

10 A. I don't recall any.

11 Q. So to your knowledge, up to the date of
12 August 10th, 2007, from the time of June of 2004 when Judge
13 Kimball issued his first ruling, until a little more than
14 three years later, there were no subsequent rulings that
15 dealt dispositively with the issue of copyright ownership or
16 with the issue of slander of title, right?

17 A. Not that I'm aware of.

18 Q. So during that more than three year period, what
19 the consuming public would know is what had been issued by
20 the court in June of 2004; right?

21 A. Um, in reality, yes. But for my damages
22 calculation, no.

23 Q. Okay. So mindful of the court's suggestion to
24 me, I am going to not read language from the court's
25 decision but I will attempt to summarize. In the court's

1 decision it granted Novell's --

2 MR. HATCH: Before he does that, Your Honor, can I
3 have an ongoing objection to this line of questioning? That
4 way I don't have to interrupt.

5 THE COURT: I understand and the court will note that
6 you object to this line of questioning.

7 MR. HATCH: I would also ask for a curative
8 instruction at the end of this as well.

9 THE COURT: I will do that.

10 Q. (By Mr. Brennan) Focusing on the District
11 Court's decision on August 10th, 2007, just so we're clear
12 you have it in front of you, there was a decision issued
13 that is 102 pages in length, right?

14 A. It looks like it.

15 Q. And the conclusion among others of the court was
16 to grant Novell summary judgment. That is a determination
17 that is a matter of law that under the Asset Purchase
18 Agreement, including Amendment Number 1 and Amendment Number
19 2, Novell did not transfer the UNIX copyrights to SCO,
20 right?

21 A. Can you repeat that, please.

22 Q. I would be pleased to, if I can get it right.
23 One of the determinations made by the District Court in its
24 order dated August 10th, 2007 was to grant to Novell
25 judgment as a matter of law that Novell did not under the

1 Asset Purchase Agreement, including Amendment Number 1 and
2 Amendment Number 2, transfer ownership of the UNIX
3 copyrights to Santa Cruz Operation or its successor The SCO
4 Group, right?

5 A. Can I ask if that was one of the decisions that
6 was overturned?

7 Q. You certainly may. I will represent to you two
8 things. First of all, that what I have just stated to you
9 is an accurate statement of the court's record. Do you
10 understand that?

11 A. Okay.

12 Q. Any reason to question that?

13 A. I don't think so.

14 Q. I'll also represent to you that as the court has
15 instructed you, that there was an appeal taken and that the
16 Tenth Circuit Court of Appeal determined that there was a
17 factual issue that would require trial on that point?

18 A. Okay.

19 THE COURT: Which is another way of saying, ladies and
20 gentlemen of the jury, that that specific finding --
21 decision, excuse me, not finding but that decision by the
22 court previously in 2007 was reversed by the Court of
23 Appeals and that is the reason why we're having this trial.

24 Q. (By Mr. Brennan) Now, understanding that in 2007
25 the court, the District Court had issued judgment in

1 Novell's favor, would you expect in the real world that in
2 2007 anyone would buy a license from SCO?

3 A. That is in fact the entire problem right there.
4 That is the whole --

5 Q. That is the problem.

6 A. -- that is the whole basis of the damages
7 analysis. Because Novell did what it did and SCO couldn't
8 convince users that it owned its copyrights, that is why
9 there are damages. That is why there are damages.

10 Q. If you would listen to my question carefully and
11 I apologize if I'm not phrasing it well. I'll do my best to
12 do better. Would you agree with me that in the real world,
13 that if there are real potential licensees and real
14 potential customers, if they learned that there had been a
15 judgment issued in Novell's favor finding that SCO did not
16 own the UNIX copyrights, that those potential customers or
17 licensees would not have purchased a SCO source license in
18 2007?

19 MR. HATCH: Your Honor, just to be clear, I think it
20 is ambiguous. Is he asking about the particular finding
21 here or the fact that it has been reversed and it is of no
22 effect? I mean I don't know. The question seems a little
23 odd to me.

24 MR. BRENNAN: Well clearly, Your Honor, I'm not. The
25 -- excuse me, the Tenth Circuit decision was not issued

1 until 2009. I'm asking about 2007.

2 MR. HATCH: But being --

3 THE COURT: I think that is clear, Mr. Hatch.

4 Ms. Botosan, if you would please answer the question?

5 THE WITNESS: I can. So again, it is not relevant to
6 the damages analysis in the real world. That -- that is the
7 point. People wouldn't buy SCO source licenses because
8 Novell had slandered the title. Because Novell had said
9 that there weren't copyrights, that the copyrights weren't
10 owned by SCO which was also the case which yielded those
11 decisions which in the real world have been overturned. So
12 but for my damages analysis, again, all of this is
13 irrelevant because Novell would not have slandered the
14 title, there wouldn't have been a court case, there wouldn't
15 have been a question about ownership. The only question
16 that would have existed would have been about whether the
17 copyrights were infringed. And that I will grant exists in
18 the real world and it exists in my but for world. But all
19 of the rest of this can't exist in the world that I'm
20 examining.

21 Q. (By Mr. Brennan) And what I'm asking you to do
22 is focus your attention on the real world. And the real
23 world I would like you to focus on is the following. That
24 SCO filed this lawsuit against Novell on January 20th, 2003;
25 correct?

1 A. Incorrect.

2 Q. Excuse me, 2004, my apologies. I misspoke.

3 Would you agree with January 20th, 2004?

4 A. I would.

5 Q. Thank you. That is a real world fact to your

6 knowledge, right?

7 A. That is true, yes.

8 Q. And that several months later in June of 2004 the

9 Federal District Court issued a ruling that included the

10 language that we read together, right?

11 A. True. And subsequently they overturned it.

12 There is a lot of things that have happened in the real

13 world. It is not relevant to my analysis.

14 Q. And if you will just bear with me, I'm going to

15 go step-by-step line-by-line. Do you have the patience to

16 do that with me?

17 A. I don't know, but we'll give it a shot.

18 Q. I think I have tried a lot of people's patience.

19 Let me just take one more shot at it here. Would you agree

20 that in the real world in 2004 there was a decision issued

21 by the Federal District Court that included the language

22 that we read together today?

23 A. I would agree and I would say that it is not

24 relevant to my analysis.

25 Q. And then would you agree with me that from the

1 date of the issuance of that decision in June of 2004 until
2 the date of the summary judgment ruling on August 10th,
3 2007, there were no intervening rulings by the court
4 dispositively examining the question as to who owned the
5 UNIX copyrights or whether there had been a slandered title?

6 A. I would agree with that and state it is equally
7 irrelevant to my analysis.

8 Q. And then would you agree with me that on
9 August 10th, 2007 the Federal District Court issued its
10 order granting Novell summary judgment on the question of,
11 among other things, the fact according to that ruling that
12 Novell had not transferred copyrights to UNIX under the
13 Asset Purchase Agreement as amended?

14 A. I would agree with that statement and state that
15 it is irrelevant to my analysis.

16 Q. And do you believe that the Tenth Circuit's
17 ruling is also irrelevant to your analysis?

18 A. Which ruling is that?

19 Q. Well, as the court has shared with us, and as I
20 represented to you, in 2009 the Tenth Circuit Court of
21 Appeals --

22 A. Oh, the appeal? That would also be irrelevant
23 because there wouldn't have been a need for an appeal.

24 Q. So in your mind the Tenth Circuit ruling is
25 entirely irrelevant?

1 A. To my damages analysis, yes.

2 Q. And that would be for two reasons. Because your
3 calculation of damages only goes through 2007, right?

4 A. That is correct. That is the date of my report
5 and that is when I ended the damages, yes.

6 Q. And to your understanding, SCO is only seeking
7 damages through 2007, right?

8 A. That is my understanding.

9 Q. So what happened in 2008 or 2009 or 2010 in terms
10 of the amount of damages and the period for which it is
11 seeking, those aren't relevant, right? That is 2008, 2009
12 or 2010, correct?

13 A. Can you rephrase that?

14 Q. I would be happy to. That may not have been a
15 very good question. I'll try again. To your understanding,
16 SCO is not seeking damages for the years 2008, 2009 or 2010,
17 right?

18 A. Correct.

19 Q. And so for purposes of the damages claim in this
20 case, the only events that are relevant are those that
21 occurred in 2003, 2004, 2005, 2006, 2007, right?

22 A. So are you talking about real events or events
23 that happened in the but for world?

24 Q. I'm assuming real events because the numbers that
25 you put up on the screen were real numbers, right?

1 A. They were.

2 Q. Okay. So I'm focusing on real world, real
3 dollars, real people?

4 A. Okay. So, yes, that in the damages period those
5 -- yes, I guess.

6 Q. So for purposes of your analysis, in the real
7 world the events that would be relevant for a person making
8 a decision as to whether to acquire a SCO source license,
9 whether it be a vendor license or a right to use license,
10 would be events that occurred between 2003 and 2007, right?

11 A. So again, for my damages analysis those real
12 world events, the ones that you're describing, don't matter.
13 There are real world events that do matter. So, for
14 example, how much sales did SCO actually generate? That is
15 in the real world and that matters. And I deducted that off
16 of my calculation. So there were -- there is information in
17 the real world that matters, but there is also events in the
18 real world that can't matter because they're simply --

19 Q. Too real?

20 A. -- completely at odds with the but for world.

21 Q. Okay. All I'm trying to find out from you so
22 that we're clear is that the range of events, real or
23 artificial, real or imagined, are those that occurred
24 between 2003 and 2007, right?

25 A. I wouldn't agree with that. As I said before,

1 when I -- when I, you know, as I have done my analysis and
2 gotten prepared for my testimony, it is important for me to
3 understand as best that I can what, you know, what has gone
4 on in the case. And so, you know, you can't -- again, you
5 can't sort of pick and choose what you want me to pay
6 attention to and what you don't want me to pay attention to.

7 MR. BRENNAN: Your Honor, I'm mindful of the clock.
8 Would you like me to go for another five minutes? I'm
9 nearing the end.

10 THE COURT: Yes, if you would, please, but only until
11 five to or as close to that as you can.

12 MR. BRENNAN: I will, Your Honor.

13 Q. (By Mr. Brennan) I would like to switch gears
14 with you for a minute. Um, now, when you were talking about
15 your calculations yesterday, you came up with essentially
16 three computations. One is a projection in your but for
17 world of what revenues might have been, correct?

18 A. So what I came up with was my computation, my
19 best estimate of what SCO's lost revenues -- what SCO's
20 revenues would have been if Novell had not slandered the
21 title. And then from that I arrived at the revenues that
22 they lost.

23 Q. Okay. So I want to break it into three pieces so
24 we're clear. Your first calculation was an estimation of
25 what revenues might have been, right?

1 A. What the revenues would have been, yes, if they
2 had not slandered title.

3 Q. Then you felt that you needed to come up -- those
4 are revenues and the simple formula for profits is revenues
5 minus costs equals net revenues or profits, right?

6 A. I think it was profit, yeah.

7 Q. So you then had to come up with some calculation
8 as to what the costs would be that you would subtract from
9 the revenues, right?

10 A. Correct.

11 Q. And the difference between those two would have
12 been your lost profits number, right?

13 A. That is correct.

14 Q. So I want to ask you a couple of questions about
15 your cost estimation. Now first of all, did you include in
16 your cost estimation legal fees that might attach to SCO's
17 attempts to enforce its licensing program?

18 A. For that I used three categories of expense,
19 three broad categories of expense, as I explained to the
20 jury yesterday, cost of goods sold, marketing expenses and
21 selling, general and administrative expenses. And normal
22 amounts of legal expenses would be included amongst those.

23 Q. Now, in terms of legal costs, were those real
24 numbers that you used, or again were these artificial
25 numbers based on a but for world?

1 A. Well, as I explained yesterday, the way that we
2 would go about estimating the costs would be to try to
3 determine what the relationship is between -- between costs
4 and revenues. And so what I did was using SCO's data, real
5 data, from 2002 through 2007, I ran a progression analysis
6 that helped me to determine what the relationship is between
7 a dollar of revenues and how many cents of costs. And so
8 using that real data, I came up with an estimate of \$0.46
9 per dollar.

10 Q. Or 46 percent, right?

11 A. Yes.

12 Q. So you essentially suggested that SCO was
13 realizing a profit margin on its operations of 54 percent,
14 right?

15 A. That is correct.

16 Q. Now, in terms of the base of your calculation, I
17 think you told us yesterday that SCO had entered into two
18 vendor license agreements in 2003, right?

19 A. That is correct.

20 Q. One was with Microsoft, correct?

21 A. Correct.

22 Q. And the other was with Sun Microsystems, right?

23 A. Correct.

24 Q. And you understand that those license agreements
25 were for UnixWare, correct?

1 A. Yes, it was my understanding that they were
2 UnixWare licenses within the SCO Source Division.

3 Q. In fact, you heard Dr. Pisano say yesterday that
4 his understanding of those two licenses were for the
5 UnixWare, right?

6 A. Yes, I believe so.

7 Q. And just so we're clear here, what you have done
8 is suggested that because SCO entered into these two license
9 agreements, one with Microsoft and one with Sun Microsystems
10 for an amount combined in about the range of \$27,000,000,
11 right?

12 A. Roughly.

13 Q. That that was the basis for projections for the
14 future, right?

15 A. No.

16 Q. Well, isn't that what Deutsche Bank based its
17 projections on?

18 A. No.

19 Q. Okay. Now those two license agreements, because
20 they were for UnixWare, did not implicate UNIX copyrights,
21 did they?

22 A. I'm not sure I understand your question. I'm
23 sorry.

24 Q. You have told me that your understanding is that
25 the Microsoft agreement and the Sun Microsystems agreement

1 were for UnixWare, right?

2 A. They were UnixWare licenses within the SCO Source
3 Division is my understanding of what those two were. But
4 they were vendor licenses.

5 Q They were vendor licenses. When you say within
6 the SCO Source Division, that is they were -- they were
7 managed through this division of SCO Group called SCO
8 Source; right?

9 A. Correct. And they were reported that way in the
10 financial statements.

11 Q. My last question before we take our break, just
12 so we're very clear, because they were UnixWare licenses
13 they did not implicate or involve UNIX, right?

14 A. I just don't understand the question, I'm sorry.
15 You must be outside of my field of expertise because I
16 honestly do not understand the question.

17 Q. Well, you understand that the primary question in
18 this litigation is whether or not Novell transferred right
19 of ownership to UNIX copyrights; correct?

20 A. Correct.

21 Q. And so my question to you is the UnixWare --

22 MR. HATCH: Your Honor, I'm going to object. That
23 misstates it because UNIX and UnixWare has been in evidence
24 in this case for two weeks.

25 MR. BRENNAN: Your Honor, I asked the question and she

1 gives the answer she gives me as did Dr. Pisano yesterday.

2 THE COURT: You may ask the question.

3 MR. BRENNAN: This will be the last one. I'm mindful
4 of the break.

5 THE COURT: Okay.

6 Q. (By Mr. Brennan) Just so we're clear, because
7 you understand that the subject matter of this litigation is
8 whether Novell transferred ownership of the UnixWare
9 copyrights to SCO, the subject of the SCO source licenses
10 was one where SCO asked Linux users to pay a royalty or a
11 fee to protect them against claims of infringement of the
12 UNIX copyrights, correct?

13 A. So my understanding is that when -- so that
14 UnixWare included everything up to and including UnixWare.
15 That was my understanding. So UNIX, UnixWare that is all,
16 um, incorporated in that word that we use which is UnixWare
17 because it is all the versions up to and including UnixWare.

18 MR. BRENNAN: I'm mindful of the time, Your Honor.
19 I'll pause at this moment.

20 THE COURT: All right. Ladies and gentlemen, I think
21 you were informed that we'll take a little bit longer lunch
22 break today until approximately 12:30. Ms. Malley?

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

24 (Whereupon, the jury left the courtroom.)

25 THE COURT: How much more do you think you have,

1 Mr. Brennan?

2 MR. BRENNAN: I think I have about 20 minutes, Your
3 Honor.

4 MR. SINGER: Is Mr. -- what are we going to do with
5 Mr. Stone? Because my understanding was he would be here at
6 12:30. If you have 20 minutes, there will be some redirect.
7 We're not going to be able to get to Mr. Stone or at least
8 certainly not finish Mr. Stone.

9 MR. ACKER: We can do him tomorrow. I can bring him
10 back tomorrow.

11 MR. SINGER: Why don't we do this, why don't we do him
12 all at once and we will put on a deposition or something if
13 there is 30 minutes left at the end of the day. But I would
14 rather start with Mr. Stone in the morning rather than start
15 him --

16 THE COURT: That is not my understanding of what
17 Mr. Acker said.

18 MR. ACKER: I need to check with him, but I think I
19 can bring him in in the morning.

20 THE COURT: We will assume that he will not be called
21 until tomorrow morning. Is that all right, Mr. Singer? Is
22 that all right?

23 MR. SINGER: That is fine.

24 THE COURT: Counsel, I do want to again state about
25 the court's reason for allowing the line of questioning of

1 Mr. Brennan. It is true that Dr. Botosan has focused her
2 report entirely in her make-believe world, but I believe
3 that it is the right of the defendant to try to draw the
4 disconnect between her world and the real world. I believe
5 that the defendants have the opportunity not only to
6 challenge the premise of her make-believe world, but to
7 again draw that disconnect. But I do have to caution
8 Mr. Brennan that there is a limit and I do not want any
9 specifics, if you intended to go there, about legal fees to
10 a specific law firm or anything of that sort that is going
11 to be highly prejudicial.

12 MR. BRENNAN: Thank you, Your Honor, for the
13 admonition. Your Honor, the only thing that I had mentioned
14 of what I intended to do, so that I don't again have any
15 difficulty with the court which would deeply chagrin me, is
16 to point out that on these two license agreements that there
17 was a 20 percent fee that was paid to the firm for those
18 license agreements which directly impacts the purported
19 bottom line which directly impacts the projections. In
20 other words, the cost structure is grossly different than
21 what was represented in the objections.

22 THE COURT: I understand that is what you're doing,
23 but I think you can do that without specifying a law firm.

24 MR. BRENNAN: I would be happy to do that, Your Honor.

25 MR. HATCH: Your Honor, one small matter. I say this

1 with the greatest respect, but I would appreciate it if -- I
2 think that the term that Dr. Botosan has used and
3 Mr. Brennan has been a but for world and not a make-believe
4 world.

5 THE COURT: All right. You're correct, Mr. Hatch.

6 MR. HATCH: Thank you.

7 THE COURT: Mr. Brennan, you should make reference to
8 it as a but for world as will the court.

9 MR. BRENNAN: Thank you, Your Honor.

10 THE COURT: All right.

11 MR. SINGER: Your Honor, may I? I know you have to go
12 but can we, perhaps before the jury comes back, revisit the
13 issue of any reference to attorney's fees? That is no
14 different than any case where an award might have some
15 implications.

16 THE COURT: Isn't it true, Mr. Singer, that she
17 testified yesterday as to what she presumed the costs of
18 this program would be?

19 MR. SINGER: That is true.

20 THE COURT: And that included legal fees. And she
21 based it upon certain assumptions. To the extent
22 Mr. Brennan can establish those assumptions are incorrect, I
23 believe he has the right to do so.

24 MR. SINGER: But I think that would be the same as
25 telling a jury in a case that a certain percentage of the

1 award is going to have to be used to pay the lawyers because
2 the only relevancy of those agreements would be --
3 MR. BRENNAN: I don't want to belabor this. They have
4 suggested this is a business with a cost structure. That is
5 what we're talking about.
6 THE COURT: Okay. I understand your objections,
7 Mr. Singer. It is noted. But the court will allow the
8 questioning. I have just cautioned Mr. Brennan to not be so
9 specific that it becomes prejudicial.
10 MR. SINGER: Thank you, Your Honor.
11 THE COURT: Court will be in recess.
12 (Whereupon, the hearing concluded at 12:00 p.m.)
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