

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

14
15 BEFORE THE HONORABLE TED STEWART
16 -----
17 March 19, 2010
18 Jury Trial

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24 REPORTED BY: Patti Walker, CSR, RPR, CP
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1 SALT LAKE CITY, UTAH; FRIDAY, MARCH 19, 2010; 8:30 A.M.

2 PROCEEDINGS

3 THE COURT: Good morning, counsel.

4 Are we ready for the jury?

5 MR. BRENNAN: Your Honor, we just have a couple of
6 brief housekeeping matters that we would like to raise with
7 the Court, if we could.

8 THE COURT: Go ahead.

9 MR. BRENNAN: First of all, I wanted to inform the
10 Court that Mr. Dana Russell, who has been Novell's client
11 representative, the CFO, was not able to be in court today.
12 Mr. Jim Lundberg, who is in-house general counsel, is with
13 us today. I want to introduce you to Mr. Lundberg.

14 Mr. Jacobs, has two matters, and I have a brief
15 one that I would like to raise with Your Honor after that.

16 THE COURT: Go ahead, Mr. Jacobs.

17 MR. JACOBS: Your Honor, I will raise the ones
18 that may relate to the activities in the next hour and a
19 half and then at the next break we have a few other
20 housekeeping matters.

21 With respect to trial time, first of all the
22 clock, which may relate to how both sides use their time in
23 the next hour and a half. Our calculation of the clock so
24 far is that SCO has used 14 hours, 40 minutes, Novell has
25 used 15 hours, four minutes. SCO's calculation is that SCO

1 has used 14 hours, 37 minutes, virtually identical to ours,
2 and then Novell has used 15 hours and 38 minutes.

3 Mindful of the Court's reminder that we need to be
4 getting this case to the jury by Friday at noon, our
5 calculation is then that closing arguments are on Friday
6 morning and that evidentiary matters are finished by the
7 close of the court day on Thursday, we're neck in neck in
8 terms of use of the clock. And really what we now have to
9 be looking at is not necessarily where we are on the clock
10 to date, but how much time we have remaining and to budget
11 our time accordingly based on what each side has used. The
12 differences between us and our clock times, I don't mean to
13 debate now, it's just to signal to Your Honor that we're
14 close.

15 Interestingly, we're also calculating the amount
16 of evidentiary time each day is about three hours and 43
17 minutes on average. So in terms of sort of a warning to
18 ourselves and to the other side about budgeting time going
19 forward, we're going to adhere to the Court's schedule.

20 The second matter, Maureen O'Gara's video
21 deposition will be played today. We sent over last night an
22 additional authenticating snippet of her testimony to
23 authenticate a document that's already on the trial exhibit
24 list. SCO objects to that.

25 Then previously --

1 THE COURT: Let's deal with these one at a time.

2 Why do you object, Mr. Normand?

3 MR. NORMAND: Mr. Jacobs, can I ask you if you
4 were just referring to SCO Exhibit 172 or Novell Exhibit
5 C-29?

6 MR. JACOBS: I'm referring to that which would
7 authenticate, C-29.

8 MR. NORMAND: Your Honor, our understanding is
9 that Novell wants to put in this Exhibit C-29. May I
10 approach and give Your Honor a copy of this proposed
11 exhibit?

12 THE COURT: I have it right here unless it's new.
13 Is this new?

14 MR. NORMAND: This is not a new exhibit, Your
15 Honor. This is an exhibit that has at least two fundamental
16 problems. One, it's extremely prejudicial to SCO. It's an
17 e-mail string that refers -- the second page which is really
18 a screet against SCO, and the third or fourth page which has
19 testimony that we had previously agreed with Novell --
20 actually, that Your Honor may have excluded as to the
21 testimony from the deposition that prefers to Bill and
22 Hillary Clinton and draws a comparison between that and the
23 SCO situation. That testimony in the deposition was
24 excluded.

25 Now, as I understand it, Novell wants to put in

1 the e-mail chain that has both that reference and it has the
2 reference with the screet against SCO that Your Honor can
3 see is extremely prejudicial, and has nothing to do with the
4 point that Novell wants to make, which the testimony will
5 already make, which is there's a connection, Novell argues,
6 between Blake Stowell from SCO and Maureen O'Gara. That
7 point will have been made. So this is of very marginal
8 probative value and extremely prejudice.

9 MR. JACOBS: We have no problem with redacting
10 that on the portions that Mr. Normand is referring to on the
11 exhibit that goes to the jury. We'll not highlight that for
12 the jury.

13 THE COURT: You're talking about the paragraph you
14 take SCO's side like Hillary took Bill Clinton's side, et
15 cetera?

16 MR. JACOBS: That would not be shown to them.

17 THE COURT: What is the probative value of this
18 e-mail?

19 MR. JACOBS: This e-mail is an e-mail in which Ms.
20 O'Gara says to the public relations guy at SCO, I want more
21 pay because she has received an angry e-mail from a reader.
22 It's part of our case that Ms. O'Gara and SCO had an
23 unwholesome relationship in the way they interacted with
24 each other and that therefore Mr. O'Gara was biased.

25 THE COURT: Mr. Jacobs, I remember from the

1 deposition testimony that was disputed and therefore I had
2 the opportunity to read, regarding Ms. O'Gara. I think the
3 Court allowed sufficient amount of deposition testimony to
4 come in to really make that point. I see nothing to be
5 gained by reinforcing it with this e-mail.

6 MR. JACOBS: Thank you, Your Honor.

7 Then another exhibit that's referred to in
8 deposition testimony that was previously designated, we
9 realized in reviewing the designations last night that the
10 exhibit that's being referred to there was not on our
11 exhibit list. Of course, the designations were done after
12 the exhibit lists were done. That's S-45, and it is the
13 e-mail in which SCO's public relations person says to
14 Maureen O'Gara, I need you to send a jab PJ's way. So this
15 is part of the discussion that you did allow, it's the
16 e-mail. Otherwise the jury is going to be looking at this
17 testimony and wondering where is the document that the
18 witness is referring to. We redacted from that version of
19 the e-mail, Your Honor, the actual typewritten references to
20 Groklaw.

21 MR. NORMAND: Your Honor, I don't know if Your
22 Honor has a copy of this exhibit.

23 THE COURT: It's P --

24 MR. JACOBS: S-45, Your Honor.

25 MR. NORMAND: Our concern with this, Your Honor,

1 is two or threefold. One, the deposition testimony will
2 have already made the point that Novell wants to make, which
3 is that Mr. Stowell asked O'Gara to send a jab to PJ.

4 The testimony, as Your Honor will recall from the
5 discussion last week, will already have mentioned Groklaw.
6 We fought and lost on that front. The letter has multiple
7 redactions to Groklaw.

8 THE COURT: They are out.

9 MR. NORMAND: They are redacted. It's going to be
10 self-evident to the jurors what the letter is referring to.
11 Although we appreciate Your Honor's instruction to the jury
12 and we hope they will follow the instructions, we're getting
13 to the point of really pushing the line on both the
14 marginal relevance of getting to the letter and really
15 testing the capacity of the jury's curiosity not to follow
16 up on this.

17 In addition, it's a new exhibit that we hadn't
18 seen until last night. The O'Gara depositions have been
19 sitting around for three days and ready to go.

20 THE COURT: It was apparently used at the
21 deposition, though; is that correct, Mr. Normand?

22 MR. NORMAND: That's correct, yes.

23 THE COURT: So it's not new to you?

24 MR. NORMAND: Oh, it's not, but we went through
25 this exercise a week ago.

1 THE COURT: I see what you're saying. But it's
2 not totally new to you. It's unlike those exhibits that
3 they sought yesterday, which were all brand new, which the
4 Court did not allow.

5 MR. NORMAND: This is not an exhibit that we've
6 never heard about.

7 THE COURT: Mr. Jacobs, do you want to respond?

8 MR. JACOBS: No, Your Honor.

9 THE COURT: The Court will allow you to reference
10 it, but do not reference it showing the e-mail.

11 MR. JACOBS: Thank you, Your Honor.

12 MR. NORMAND: Thank you, Your Honor.

13 MR. BRENNAN: Your Honor, just one other brief
14 matter, and maybe I can outline the issue so if the Court
15 would prefer to take this up a break, that might be
16 something the Court would be mindful. We were told
17 yesterday that the concluding witness of plaintiff will be
18 Ryan Tibbitts, who is SCO's in-house counsel. During
19 Mr. Tibbitts' deposition, there were a number of questions
20 that were asked to which privilege or work product
21 objections were asserted and no testimony was allowed. And
22 we think exercising that shield will preclude those subject
23 matters being raised during his examination.

24 In addition, he was also -- that is Mr. Tibbitts,
25 as I understand it, was also designated as SCO's 30(b)(6)

1 witness with respect to certain categories. In connection
2 with deposition examination, the representation was made
3 that Mr. Tibbitts would not be a witness on the issue of any
4 damages.

5 So this is precautionary in that we think there
6 are some subject matters that if they seek to elicit
7 testimony, they have already objected or stated they would
8 not present him as a witness, and I wanted to highlight
9 that.

10 THE COURT: Your point is if they, at the
11 deposition, refused to allow him to answer questions, you do
12 not think it would appropriate for him to be allowed to
13 answer those questions?

14 MR. BRENNAN: Precisely, Your Honor.

15 THE COURT: Mr. Normand.

16 MR. NORMAND: Your Honor, I propose that we speak
17 with Mr. Brennan about what subject matters he thinks are
18 off limits and come back to the Court if we can't agree.
19 And Mr. Tibbetts is not planning to speak to the issue of
20 damages.

21 I would also flag for the Court that with respect
22 to at least Novell witnesses, Mr. LaSala and Mr. Jones -- at
23 least potential witnesses, the same issue is going to arise.

24 THE COURT: Why don't the two of you visit at the
25 first break and see if you can't take care of this.

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

3 MR. NORMAND: Thank you, Your Honor.

4 THE COURT: Mr. Singer.

5 MR. SINGER: Your Honor, we have two brief bits of
6 evidence to present to the jury. We wanted to find out what
7 the appropriate procedure from Your Honor is for doing this.
8 There are three admissions in the answer, responses to three
9 paragraphs in the complaint that we wish to present to the
10 jury. I could, with the Court's permission if that was
11 appropriate, just read the allegation and the answer, and
12 they are obviously admissions of Novell.

13 THE COURT: Are you going to object to this, Mr.
14 Jacobs?

15 MR. JACOBS: I think I would like to see what he's
16 referring to and maybe Mr. Singer and I could work on that
17 at the break.

18 THE COURT: Would you do that, please, Mr. Singer?

19 MR. SINGER: Yes.

20 The other item, as Novell is aware, we now have a
21 claim for punitive damages. There is one additional piece
22 of evidence that relates solely to punitives but not
23 otherwise would be in the case, and that is as of their most
24 recent 10-K, what the market capitalization and shareholders
25 equity is of the company, which would be relevant to the

1 jury's consideration for damages. We would propose simply
2 to mark a redacted version of the 10-K, have that stipulated
3 into evidence, note what that amount is but not otherwise
4 call a witness or have to deal with that point.

5 MR. JACOBS: Your Honor, I would propose that this
6 be dealt with later. We are going -- we have been planning
7 ahead for what we're going to do by way of Rule 50 motions,
8 and one thing that we are thinking of doing, even though
9 there is a very short period between the close of SCO's case
10 and the close of the case, is file a motion that the
11 question of punitives should not go to the jury.

12 I think, as a practical matter, if Mr. Singer
13 wants to just move it into evidence, we'll stipulate that
14 the document is in evidence -- maybe we shouldn't even do
15 that.

16 THE COURT: Let's wait and deal with this after
17 your Rule 50 motion.

18 MR. JACOBS: Sure. Thank you, Your Honor.

19 THE COURT: All right, Mr. Singer?

20 MR. SINGER: Thank you.

21 THE COURT: Anything else?

22 MR. SINGER: No.

23 MR. JACOBS: No. Thank you, Your Honor.

24 THE COURT: Ms. Malley.

25 (Jury present)

1 THE COURT: Good morning, ladies and gentlemen.

2 Red seems to be the color of the day for you here.

3 Is this in protest of BYU's victory yesterday?

4 The next witness.

5 MR. SINGER: Thank you, Your Honor. We call as an
6 adverse witness Mr. Chris Stone.

7 THE COURT: Mr. Stone, if you would please come
8 forward.

9 CHRISTOPHER STONE,
10 Having been duly sworn, was examined
11 and testified as follows:

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

14 THE WITNESS: Christopher Stone.
15 C-h-r-i-s-t-o-p-h-e-r, S-t-o-n-e.

16 DIRECT EXAMINATION

17 BY MR. SINGER:

18 Q Good morning, Mr. Stone. My name is Stuart Singer.

19 I'm one of the attorneys for SCO in this lawsuit.

20 Am I correct that you served two periods of employment
21 with Novell?

22 A Correct.

23 Q The first was as a senior vice president in corporate
24 development from 1997 to 1999, correct?

25 A That's correct.

1 Q Then you left the company and returned in 2002; is that
2 right?

3 A That's right.

4 Q In 2002, you were there until 2004, approximately two
5 years or so?

6 A That's right.

7 Q The second time around your position was vice chairman,
8 correct?

9 A That's correct.

10 Q Am I correct the position of vice chairman made you the
11 number two man at the company, second only to Jack Messman?

12 A That's correct.

13 Q You were in that position as vice chairman in
14 March 2004 when you addressed a business conference called
15 the open source business conference?

16 A That is correct.

17 Q You delivered a speech to the conference; is that
18 correct?

19 A That's correct.

20 Q You are aware that that was videotaped?

21 A Yes.

22 Q I would like to show you Exhibit 582.

23 Mr. Stone, you were shown this before at your
24 deposition. I'm going to ask if you can identify if this
25 transcript of the videotape is correct with respect to the

1 statement that appears on page 5 in the last paragraph, if
2 that was, in fact, part of your address in March 2004 to the
3 conference?

4 A Yes, I said that.

5 MR. SINGER: I move the admission of Exhibit 582.

6 MR. ACKER: No objection, Your Honor.

7 THE COURT: It will be admitted.

8 (Plaintiff's Exhibit 582 was received into
9 evidence.)

10 MR. SINGER: Your Honor, 582 consists of the
11 videotape together with the transcript and we would like at
12 this time to play that excerpt of the videotape which is in
13 question.

14 THE COURT: Was that your understanding, Mr.
15 Acker, that it was both?

16 MR. ACKER: It wasn't my understanding, but I have
17 absolutely no objection to the video, Your Honor.

18 (Videotape played)

19 BY MR. SINGER:

20 Q You said those words at the open source conference?

21 A Yes, I did.

22 Q The we refers to Novell?

23 A That's correct.

24 Q The Darl refers to Darl McBride?

25 A That's correct.

1 Q The chief executive officer at the time.

2 But when you made the statement we still own UNIX, sir,
3 was that a true statement or a false statement at that time?

4 A That's a true statement.

5 Q So it's your position in March of 2004 that Novell
6 still owned UNIX; is that correct?

7 A That Novell owned the copyrights and patents, that's
8 correct.

9 Q Well, let's first stick with my question. Did you say
10 copyrights in that statement?

11 A No. I said own UNIX.

12 Q Is that statement, we still own UNIX, a true or false
13 statement?

14 A It is true. I was referring to the copyrights, the
15 patents.

16 Q So you equate ownership of the copyrights to
17 essentially ownership of the business; is that right?

18 A Not the business.

19 Q When you say we still own UNIX, in your view that is a
20 correct statement because you were referring to the
21 copyrights?

22 A That's correct, copyrights and patents.

23 Q Now with respect to the business of UNIX, was Novell
24 selling any UNIX products in 2004?

25 A Nope.

1 Q Was Novell developing any UNIX products in 2004?

2 A No.

3 Q Did Novell employ engineers in 2004 to develop the UNIX
4 code?

5 A No.

6 Q Now did you understand at the time of your speech that
7 your claim, we still own UNIX, would be an important
8 statement because there were questions on people's minds,
9 the group that you were addressing, as to the ownership of
10 UNIX copyrights?

11 A Yes.

12 Q That was a wide issue -- a widely interested issue,
13 correct?

14 A Every day.

15 Q Now earlier in 2003, did you have conversations with
16 Darl McBride about copyrights?

17 A Yes.

18 Q You knew Mr. McBride, correct?

19 A I never had met Mr. McBride prior to -- actually I had
20 never met him personally. We talked on the phone.

21 Q You had conversations in the early part of 2003
22 regarding the UNIX copyrights, correct?

23 A That is correct.

24 Q Am I correct that in those conversations Mr. McBride
25 never asked Novell to transfer copyrights to SCO but rather

1 to clarify that copyrights, in fact, were owned by SCO; is
2 that correct?

3 A When you said Novell, he never asked me specifically
4 that question. He may have asked other people in Novell. I
5 am not aware of that.

6 Q I'm asking about the conversations you know of from
7 your testimony -- from your personal knowledge with Mr.
8 McBride. Did Mr. McBride ever ask you to transfer the
9 copyrights from Novell to SCO?

10 A No, he never said it as you said it.

11 Q Did he ask, however, that there be some clarification
12 that the copyrights were owned by SCO?

13 A He asked for clarification many times on the copyrights
14 with respect to the agreements, that's correct.

15 Q Now I would like to talk about the press releases of
16 Novell. As vice chairman, Mr. Stone, did you approve the
17 Novell press releases before they were issued?

18 A Yes.

19 Q And I would like you to look at SCO Exhibit 525.

20 MR. ACKER: Do you have copy?

21 MR. SINGER: This has already been moved into
22 evidence. It's the May 28th release. I can give you
23 another copy.

24 BY MR. SINGER:

25 Q Mr. Stone, these points will be on the -- the documents

1 will be on the screen, but I will also give you a hard copy.

2 A Okay. Thank you.

3 Q This is in evidence. And you recognize this to be a
4 Novell press release issued May 28th, 2003?

5 A Yes, I do.

6 Q You are familiar with this document, correct?

7 A Correct.

8 Q You understand that in this document Novell says that
9 it still owns UNIX copyrights and SCO does not, correct?

10 A Correct.

11 Q And you approved this May 28th press release before it
12 was issued, correct?

13 A That is correct.

14 Q And at the time you approved it, you had not
15 investigated what the actual intent of the transaction in
16 1995 was between Novell and Santa Cruz by talking with the
17 people who negotiated that transaction; is that right?

18 A I never personally spoke to anyone on that transaction.

19 Q At the time when you released this press release on May
20 28, 2003, at that time you had knowledge that there was an
21 unsigned Amendment No. 2 that changed the original APA,
22 correct?

23 MR. ACKER: Objection, it's argumentative as to
24 change the APA, Your Honor.

25 //

1 BY MR. SINGER:

2 Q That amended the APA?

3 A Correct.

4 Q So you had a copy of Amendment No. 2 to the APA that
5 was unsigned at the time you released this press release of
6 May 28th, correct?

7 A I did not. I personally did not.

8 Q You had not seen an unsigned copy of the June 2 -- of
9 Amendment No. 2 at that time?

10 A Yes, I had seen it, but I did not have it in my
11 possession.

12 Q Just so we're precise here, prior to your approval of
13 this press release, while you did not have a copy in your
14 possession, you had seen and read the unsigned version of
15 Amendment No. 2, correct?

16 A Correct.

17 Q Now at that time you didn't take any steps to determine
18 whether Amendment No. 2 was signed before the press release
19 was issued, correct?

20 A Could you rephrase that? I'm sorry.

21 Q Did you take any steps to see whether Amendment No. 2
22 had been executed and, in fact, was a signed agreement prior
23 to issuing or approving this press release?

24 A I did not personally. Our legal staff internally did.

25 Q Well, as of the time that you released this press

1 release, had you been told that Amendment No. 2 had been
2 signed?

3 A No.

4 Q So you went ahead and approved the press release at
5 that point without knowledge as to whether or not Amendment
6 No. 2 was signed; is that correct?

7 A That's correct.

8 Q Did you understand that this press release by asserting
9 to the world that SCO didn't own the copyrights in UNIX
10 would harm SCO?

11 A Not at all.

12 Q You didn't think that would harm SCO?

13 A No.

14 Q Well, let's talk about the timing of the release.

15 I am showing you here a calendar of 2004. Hopefully
16 both you and the members of the jury can see it.

17 A I can see the calendar. I can't see the dates.

18 THE COURT: Mr. Stone, if you need to, you can go
19 to wherever you need. I don't know what the questions will
20 be asked. Don't hesitate to go look at it if you need to.

21 BY MR. SINGER:

22 Q If at any time you need to, please step down and ask me
23 to identify a date. But I don't think we're going to be
24 doing too many complex calculations on the calendar.

25 Are you aware, sir, that earnings releases are

1 important dates for a public company?

2 A Yeah.

3 Q That they are announced in advance to the investment
4 community and the public, generally?

5 A Yes.

6 Q I would like you to assume that in 2003, earning
7 release dates for SCO, when they announced their earnings,
8 were the following dates: February 26th -- we'll put this
9 green -- May 28th, August 14, and December 22. You have no
10 reason to disagree with that assumption, do you?

11 A I have no reason to disagree, no.

12 Q Now I would like you to look at SCO Exhibit 254. This
13 is in evidence. And do you understand this to be a press
14 release that SCO issued on May 28th, 2003 reporting earnings
15 for the period ending April 30th?

16 MR. ACKER: Objection, calls for speculation, Your
17 Honor.

18 THE COURT: He can look at it and reach his own
19 conclusion, can't he, Mr. Acker?

20 MR. ACKER: He can, but the question was was that
21 his understanding. He hasn't laid a foundation for that.

22 THE COURT: Fair enough.

23 Mr. Singer.

24 BY MR. SINGER:

25 Q Would you take a look at the press release.

1 THE COURT: Can you see it, Mr. Stone?

2 THE WITNESS: Yes, I can see it.

3 BY MR. SINGER:

4 Q I'll show you the document.

5 THE COURT: If you can read that, you've got
6 better eyes than I do.

7 BY MR. SINGER:

8 Q Well, let's give you a hard copy of this document.

9 This is -- you see that this a press release issued by the
10 SCO Group on May 28th, 2003?

11 A Yes.

12 Q Do you see that it states, for the second quarter of
13 fiscal 2003 ended April 30th, The SCO Group, Inc. reported
14 net income of \$4.5 million, or \$0.33 per diluted share, on
15 revenue of \$21.4 million, compared to a net loss of
16 \$6.6 million, or \$0.47 per diluted share, on revenue of
17 \$15.5 million for the comparable quarter of the prior year.
18 Do you see that?

19 A Yes, I do.

20 Q Do you recognize this, then, to be what is considered
21 in business to be an earnings release by SCO, a public
22 company, that was issued on May 28th, 2003?

23 A Yes. It looks to be that.

24 Q Now do you claim that you didn't know that SCO was
25 releasing on May 28th, 2003 its earnings?

- 1 A I had no idea.
- 2 Q You had no idea.
- 3 Do you know Maureen O'Gara?
- 4 A Not personally. I know who she is.
- 5 Q But you don't know her personally?
- 6 A No.
- 7 Q Didn't have any type of business relationship with her?
- 8 A Only through the press. She was a journalist in the
- 9 computer business.
- 10 Q In fact, sir, you had given her your cell phone,
- 11 correct?
- 12 A A lot of people have my cell phone number,
- 13 unfortunately.
- 14 Q You had given her your home phone number?
- 15 A No, I did not.
- 16 Q And you had spoken to her previously as a reporter?
- 17 MR. ACKER: Objection, vague. Previous to what?
- 18 BY MR. SINGER:
- 19 Q Previous to May 28th, 2003?
- 20 A Yes.
- 21 Q Going back all the way to 1998, in fact, correct?
- 22 A Sure, yes. She was a very prolific reporter.
- 23 Q And she focused on the technology business, correct?
- 24 A Correct.
- 25 Q Which was the business you were in?

- 1 A That's correct.
- 2 Q Did you have a conversation with Maureen O'Gara on the
3 evening of May 27th, 2003?
- 4 A Yes, she called me.
- 5 Q She told you that she had heard that there was going to
6 be a press release issued by Novell the next day, correct?
- 7 A That's correct.
- 8 Q That press release would assert that Novell owned the
9 UNIX copyrights, correct?
- 10 A That's correct.
- 11 Q And in that conversation, did you tell Maureen O'Gara
12 that that was, in fact, true, that the press release was
13 forthcoming?
- 14 A No.
- 15 Q Didn't tell her that?
- 16 A No.
- 17 Q Did you, in fact, then not tell her that the reason you
18 were releasing the press release the next day was because it
19 was the day of SCO's earnings?
- 20 A Absolutely not.
- 21 Q Absolutely not.
- 22 I suppose, then, you didn't tell her that you were
23 doing this to up end SCO's stock or throw a monkey wrench
24 into SCO, or any words of similar effect?
- 25 A No.

1 Q You do agree that you spoke with Maureen O'Gara on the
2 night of May 27th about this subject?

3 A I prefer to say I listened to her.

4 Q She knew that the press release was going to come out,
5 correct?

6 MR. ACKER: Objection, calls for speculation. You
7 said she.

8 BY MR. SINGER:

9 Q Ms. O'Gara knew that this press release was going to be
10 issued the next day, correct?

11 MR. ACKER: Objection, which press release?

12 BY MR. SINGER:

13 Q The May 28th, 2003 press release from Novell, correct?

14 A Yes, that's correct. She had an enormous amount of
15 information.

16 Q If you didn't tell her that the Novell press release
17 was forthcoming on May 28th, 2003, do you have an
18 understanding of how she knew that already when you spoke to
19 her on May 27th?

20 A She made a lot of insinuating statements to me along
21 the lines of a hot and cold game, you know, am I getting
22 warmer or am I getting colder. She kept quizzing me on
23 product names, code names, press releases, talking to
24 different journalists, you know, The Wall Street Journal and
25 other places. She knew an enormous amount of information

1 and I was concerned about that.

2 Q My question, sir, specifically was if you didn't tell
3 her that the press release was coming out the next day, do
4 you have an understanding of how she knew about it on May
5 27th?

6 A No idea.

7 Q Did you tell other press reporters, such as The Wall
8 Street Journal, in advance that this press release was
9 forthcoming?

10 A The only people that we spoke with -- we, meaning
11 myself and Harry Shuster, who was the PR representative for
12 The Wall Street Journal.

13 Q At least one element of the press, The Wall Street
14 Journal, did know that the press release was forthcoming?

15 A Yes. That's typical in our business is to alert the
16 press the evening before.

17 Q Sir, what is your testimony as when you first learned
18 that May 28th, 2003 was also the date of a SCO earnings
19 release?

20 A After the release.

21 Q How long after?

22 A A day or two. I'm not sure.

23 Q You are not sure?

24 A It was after the release. I was not aware.

25 Q In fact, sir, didn't you learn that very day, that you

1 knew of it that very day, May 28th, 2003?

2 A That day, after we had done our release, it was fairly
3 in the public.

4 Q Well, let's talk about that. May 28th, 2003 -- I'll
5 put a red circle on -- that's when Novell put out one of
6 these press releases. May 28th, 2003 you acknowledge, the
7 same day that press release was issued by Novell, you did
8 learn that day that SCO had issued a press release on its
9 earnings, right?

10 A Later in that day.

11 Q How did that come to your attention?

12 A Through the press.

13 Q Well, can you be more specific as to how that came to
14 your attention on May 28th, 2003?

15 A Reading it in the press headlines on line on the
16 Internet.

17 Q Sir, were you aware that on May 14th that SCO had
18 announced that on May 28th it would be announcing its
19 earnings?

20 A No.

21 Q I would like to show you what has been marked as
22 Exhibit M-14 and admitted into evidence. This is a press
23 release on May 14, 2003.

24 Can you see that indicates under conference call, the
25 company will host a conference call at 9:00 a.m. Mountain

1 Daylight Time. You were in Boston -- working in Boston for
2 Novell; is that correct?

3 A Back and forth, actually, between Provo and Boston.
4 Most of the time I was in Provo.

5 Q The headquarters of the company were in Boston,
6 Massachusetts?

7 A That's correct.

8 Q And the press release was released by SCO at 9:00 a.m.
9 Mountain Daylight Time, correct?

10 MR. ACKER: Objection, calls for speculation, Your
11 Honor.

12 BY MR. SINGER:

13 Q The document suggests that it will be -- that a
14 conference will be held at 9:00 a.m Mountain Daylight Time
15 on May 28th, 2003 to discuss second quarter fiscal 2003
16 results. Do you see that?

17 A I see that.

18 Q So would you agree with me that it was public
19 information that SCO would issue its earnings releases and
20 have a press conference on the 28th day of May?

21 A Yes, that's what it says.

22 Q But it is your position that you are announcing your
23 press release regarding the ownership of the copyrights in
24 UNIX which is coincidentally on that same day?

25 A That's correct.

1 Q Just a coincidence.

2 I would like you to take a look at the June 6th press
3 release, Exhibit 97. Let's take a look at the statement in
4 the press release. I will give a hard copy, but I think
5 this one is large enough to read on the screen.

6 A It is, but thank you.

7 Q You also -- well, sir, let's take a look at the press
8 release. Do you recognize this to be a press release issued
9 by Novell eight days after May 28th, on June 6th, 2003,
10 correct?

11 A Yes.

12 Q In this press release Novell states the following -- in
13 fact, can you read it out loud, first paragraph of the press
14 release?

15 A In a May 28th letter to SCO, Novell challenged SCO's
16 claims to UNIX patent and copyright ownership and demanded
17 that SCO substantiate its allegations that Linux infringes
18 SCO's intellectual property rights. Amendment No. 2 to the
19 1995 SCO-Novell asset purchase agreement was sent to Novell
20 last night by SCO. To Novell's knowledge, this amendment is
21 not present in Novell's files. The amendment appears to
22 support SCO's claim that ownership of certain copyrights for
23 UNIX did transfer to SCO in 1996. The amendment does not
24 address ownership of patents, however, which clearly remain
25 with Novell.

1 Q You approved this press release before it was issued by
2 Novell on June 6th, 2003?

3 A Yes. I was part of the team.

4 Q And at this time you had -- by this time, on June 6th
5 when this was released, you had seen a signed copy of
6 Amendment No. 2, correct?

7 A That is correct. I saw it the day before.

8 Q And would you agree with me that the content of this
9 press release is accurate?

10 A Yes, it is.

11 Q In fact, you would not have written it any differently?

12 A No. It's very clear.

13 Q And, in fact, you, sometime shortly after the events in
14 question here, created a memorandum that discussed these
15 events, for internal use, correct?

16 A Yes.

17 MR. SINGER: And I would like to mark a redacted
18 copy of that.

19 THE COURT: What is this marked as?

20 MR. SINGER: E-32.

21 BY MR. SINGER:

22 Q Is E-32 a memorandum that you created?

23 A Well, there's a lot of blank pages.

24 Q I can show you the unmarked copy if you need that in
25 order to assist you in your identification.

1 A It appears to be part of my notes, yes.

2 Q And were these notes which you made for the purpose of
3 documenting closer to the time in question what you thought
4 about certain events?

5 A It appeared -- I'm sorry. It was not what appeared.
6 It was exactly the events as they took place.

7 MR. SINGER: I move the admission of the redacted
8 version of Exhibit E-32.

9 MR. ACKER: We object to the redactions. We will
10 be seeking the admission of the entire document, Your Honor.

11 MR. SINGER: Your Honor, we can talk about the
12 entire document. I'm using it for one purpose.

13 THE COURT: You may go ahead. I will accept E-32
14 in the redacted portion and rule on the issue of what it
15 will actually look like when it goes to the jury later.

16 (Defendant's Exhibit E-32 was received into
17 evidence.)

18 BY MR. SINGER:

19 Q Sir, if you turn to the last page, you wrote, quote,
20 Novell -- June 6th -- responds that Amendment 2 does, in
21 fact, appear to give some copyright ownership, but not
22 patents, correct?

23 A Correct.

24 Q That's a true statement, correct?

25 A It's a true statement.

1 Q Now later did you take the position that Amendment 2
2 clearly means that SCO doesn't own any copyrights?

3 A Yes, I did.

4 Q Even though in your internal statement you stated,
5 Novell responds that Amendment 2 does, in fact, appear to
6 give some copyright ownership, but not patents; is that
7 correct?

8 A That is correct.

9 Q I would like to talk a little bit about your
10 relationship with IBM. IBM and Novell had a long term
11 business relationship as of 2003, correct?

12 A That's correct.

13 Q And, in fact, in 2003, Novell and IBM worked together
14 to promote Linux; is that right?

15 A That's right.

16 Q You attended a meeting in spring '93 with IBM?

17 A I probably attended many meetings with IBM.

18 Q Do you recall a specific meeting that you attended with
19 Mr. Messman, your chairman, together with Jim Stallings of
20 IBM and Bill Zeitler of IBM?

21 A Yes. We had a number of meetings.

22 Q Mr. Stallings was in charge of IBM's Linux business; is
23 that correct?

24 A That's correct.

25 Q You were, would it be fair to say, one of the leading

1 advocates of Linux inside Novell?

2 A That's correct.

3 Q Bill Zeitler was also a senior IBM officer in charge of
4 all hardware and certain software; is that correct?

5 A That's correct.

6 Q That meeting was in IBM's headquarters in Armonk,
7 right?

8 A That's right.

9 Q That was a discussion of Novell's relationship with
10 IBM?

11 A That's right.

12 Q And part of your relationship building with IBM?

13 A That's correct.

14 Q In June of 2003, are you aware that Novell sought to
15 waive rights that SCO was seeking to exercise regarding
16 IBM's misuse of UNIX technology?

17 A Yes.

18 Q Did IBM request Novell to do so?

19 A Not at all.

20 Q Is it your testimony that no one from IBM had any
21 conversation with anyone from Novell prior to the exercise
22 of that waiver?

23 A We acted on our own. No input from IBM at all.

24 Q How did you happen to be aware of the fact that IBM had
25 received a notice from SCO seeking to terminate its AIX

1 license?

2 A It's publicly known.

3 Q And were you aware that there were conversations going
4 on between IBM and SCO at that point?

5 A Not at all.

6 Q Now what consideration did you give to SCO's business
7 interests in connection with exercising that waiver of their
8 rights against IBM?

9 A We were concerned more about the industry. We were
10 concerned more about Novell support for Linux and support
11 for the open source movement, if you will.

12 Q You gave no consideration to SCO's interest; is that
13 right?

14 A No.

15 Q In fact, by waiving those rights, you were trying to
16 prevent the courts from resolving that issue itself,
17 correct?

18 A Not at all.

19 Q Sir, if you hadn't waived your rights, ultimately a
20 court would decide whether or not IBM had violated those
21 rights on the merits, correct?

22 MR. ACKER: Objection, calls for speculation, Your
23 Honor.

24 THE COURT: Sustained.

25 //

1 BY MR. SINGER:

2 Q Sir, were you aware whether or not there was a lawsuit
3 pending between SCO and IBM as of June of 2003?

4 A It was very public, yes.

5 Q Did Novell, through the waiver in June 2003 as well as
6 subsequent waivers, take steps to try to prevent SCO from
7 exercising rights under its software development agreements
8 with IBM?

9 A That's correct.

10 Q And you understood that if you did nothing, IBM could
11 defend itself in court, were able to do so, correct?

12 MR. ACKER: Objection, calls for speculation as to
13 what IBM can and cannot do.

14 THE COURT: I'll overrule this objection.

15 BY MR. SINGER:

16 Q Mr. Stone, can IBM defend itself in court?

17 A That's up to IBM. I would imagine they probably could.

18 Q And if IBM's position was correct, they would have a
19 court to determine it. If SCO's position was correct, then
20 the court could determine that as well, correct?

21 A I would imagine so.

22 Q You tried to shortcut that process by Novell going in
23 to waive SCO's rights under these agreements against IBM; is
24 that right?

25 A No, that's not right. We were not trying to shortcut

1 any process. We were concerned about Novell and Linux and
2 the open source movement in the industry, and this was
3 damaging to that process.

4 Q Sir, at the time --

5 THE COURT: Excuse me, Mr. Singer.

6 Mr. Acker, do you want to sit down?

7 Are you through with the chart, Mr. Singer?

8 MR. SINGER: I'm going to be going back to the
9 chart, but I'll let you know when I'm doing that.

10 MR. ACKER: I'll stand, Your Honor.

11 BY MR. SINGER:

12 Q Now in August and October of 2003, are you aware that
13 Novell exercised other waiver claims or sought to claim it
14 could waive other rights that SCO had against IBM? Are you
15 aware of that?

16 A I was aware of that.

17 Q I would like to show you Exhibit 413, October -- 691.

18 MR. SINGER: Why don't we start with 243, Exhibit
19 243, and can we expand this letter.

20 BY MR. SINGER:

21 Q This is a letter from Mr. LaSala. Had you approved
22 this letter before it was sent?

23 A No.

24 Q Did you subsequently learn that Mr. LaSala was
25 demanding that SCO drop certain claims against IBM?

1 A I was aware.

2 Q And are you aware that after this occurred, SCO did not
3 do so?

4 A That's correct.

5 Q And that Novell sought to waive those claims for SCO?

6 A Yes.

7 THE COURT: Are you going to offer --

8 MR. SINGER: I will offer Exhibit 243.

9 MR. ACKER: No objection, Your Honor.

10 THE COURT: It will be admitted.

11 (Plaintiff's Exhibit 243 was received into
12 evidence.)

13 BY MR. SINGER:

14 Q So this was October 7th of 2003.

15 Are you aware that on November of 2003, Novell bought a
16 UNIX company called SuSE Linux?

17 A Yes.

18 Q If fact, you were very instrumental in that
19 transaction, correct?

20 A Yes, yes, I was.

21 Q You paid over \$200 million for SuSE Linux; is that
22 correct?

23 A That's correct.

24 Q I would like you to take a look at Exhibit 260. Do you
25 recognize Exhibit 260 to be an announcement, press release

1 of Novell's agreement to acquire a leading enterprise Linux
2 technology company called SuSE Linux?

3 A Yes.

4 Q By enterprise Linux technology, did you mean to refer
5 to a Linux business that would work with corporations?

6 A That is correct.

7 Q If we turn to the first paragraph --

8 MR. SINGER: I move the admission of Exhibit 260.

9 MR. ACKER: No objection, Your Honor.

10 THE COURT: It will be admitted.

11 (Plaintiff's Exhibit 260 was received into
12 evidence.)

13 BY MR. SINGER:

14 Q And in the first paragraph it says, Novell expands its
15 open source commitment and will become the first offer
16 comprehensive Linux solutions for the enterprise from and
17 desktop to the server. Do you see that?

18 A I do.

19 Q And do you see in the third paragraph --

20 MR. SINGER: One paragraph below that, Mr. Calvin.

21 BY MR. SINGER:

22 Q -- Novell today also announced that IBM intends to make
23 a \$50 million investment in Novell convertible preferred
24 stock? That was announced exactly at the same time,
25 correct?

1 A That's correct.

2 Q And that commitment was subsequently funded when the
3 transaction closed in early 2004?

4 A That's correct.

5 Q Now I would like to go back for a moment to June of
6 2003. We're at June 6th where you had a public press
7 release. We have seen that later in June -- you had the IBM
8 waiver on July 9th and July 12th. Does that sound right to
9 you?

10 A Sounds right.

11 Q I'll mark those in blue.

12 We just looked at October 7th. And then November 14th
13 that we were just looking at; is that correct?

14 MR. ACKER: You took the exhibit down.

15 THE WITNESS: It's not on the screen.

16 BY MR. SINGER:

17 Q And back in June there was another statement by Mr.
18 LaSala with respect to copyright ownership issued on
19 June 26th, Exhibit 103, correct?

20 Take a look at that, sir.

21 MR. ACKER: I think he should be able to see the
22 exhibit, Your Honor.

23 THE COURT: Yes.

24 MR. SINGER: I will give you a copy of that.

25 THE WITNESS: Thank you.

1 BY MR. SINGER:

2 Q Exhibit 103. And are you familiar with this document?

3 A Yes, I've seen it.

4 Q It's a letter where Novell made further assertions with
5 respect to the ownership of the UNIX copyrights, correct?

6 A Correct.

7 Q This was not publicly released at that time, was it?

8 A I'm not aware of that.

9 Q Are you aware of a letter of August 4th, which I'll
10 show you, which Mr. LaSala wrote, Exhibit 105?

11 A Thank you.

12 Q This is already in evidence.

13 Do you understand that the letter Mr. LaSala wrote on
14 August 4th also made assertions of Novell's claims regarding
15 UNIX copyrights, correct?

16 A Yes, that's correct.

17 Q Were you aware this wasn't also publicly released on
18 August 4th, 2003?

19 A I'm not sure.

20 Q So we have June 26th, that isn't publicly released.

21 You are not aware of any public release at the time,
22 August 4th, of this letter, are you?

23 A No, I'm not aware of any -- at this point I'm not
24 involved in approval or participating in any of these letter
25 writings.

1 Q And are you aware that in September and October 2003
2 Novell sought to register UNIX copyrights with the U.S.
3 Copyright Office?

4 A I'm aware.

5 Q You are aware of that?

6 A I learned it, but I was not involved in that.

7 Q You were not aware at the time of that?

8 A Nope.

9 Q I would like to show you Exhibit F-21.

10 A Thank you.

11 Q Mr. LaSala, have you subsequently seen that these
12 copyright registrations that Novell obtained with respect to
13 certain UNIX copyrights?

14 MR. ACKER: I actually think he misspoke and
15 called Mr. Stone Mr. LaSala.

16 BY MR. SINGER:

17 Q Mr. Stone, I apologize.

18 Mr. Stone, do you recognize that these are copyright
19 registrations that Novell obtained in August, September,
20 October 2003?

21 MR. ACKER: Calls for speculation. He gave his
22 prior testimony.

23 MR. SINGER: He may have seen these later and
24 perhaps recognized them.

25 THE COURT: Ask him.

1 THE WITNESS: I've never reviewed or read these.

2 I appreciate the upgrade to Mr. LaSala.

3 BY MR. SINGER:

4 Q You were aware at the time, though, that copyrights
5 were being sought, or was that done without your knowledge?

6 A I was not participating in any of this. At this point
7 I was actually trying to build products.

8 Q Did you know whether or not Novell made a public
9 statement at the time in September or October 2003 that it
10 obtained certain copyrights?

11 A I'm not aware. Again, I was not participating in any
12 of these issues at this point. I was more interested in
13 building products.

14 Q I would like you to take a look at the December 22,
15 2003 press release, which is Exhibit 517.

16 MR. SINGER: This is already in evidence. I think
17 you have copies of it.

18 BY MR. SINGER:

19 Q Can you see this sufficiently?

20 A I can.

21 Q Will you read this press release out loud, please?

22 A Sure. Novell believes it owns the copyrights in UNIX,
23 and has applied for and received copyright registrations
24 pertaining to UNIX consistent with that position. Novell
25 detailed the basis for its ownership position in

1 correspondence with SCO. Copies of our correspondence, and
2 SCO's reply, are available here. Contrary to SCO's public
3 statements, as demonstrated by this correspondence, SCO has
4 been well aware that Novell continues to assert ownership of
5 the UNIX copyrights.

6 Q Were you aware at the time that this was a press
7 release that Novell put out publicly on December 22, 2003?

8 A Yes.

9 Q You, as vice chairman, approved this press release,
10 correct?

11 A I did not approve this one. I got to read them, but I
12 did not approve this one.

13 Q You were aware that this was being issued as an
14 official statement?

15 A Yes.

16 Q And the correspondence which SCO referred to occurred
17 in earlier dates, which we've been discussing, the June 26th
18 letter, the August 4th letter, correct?

19 A That's correct.

20 Q And as we have seen, December 22, 2003, I asked you to
21 assume, and you had not disagreed, was also the day of the
22 SCO earnings release, correct?

23 MR. ACKER: Calls for speculation, Your Honor.

24 MR. SINGER: I would like him to assume that that
25 is, in fact, the date of SCO's earnings release, okay.

1 MR. ACKER: He's not an expert. I don't why he
2 would be given a hypothetical question.

3 MR. SINGER: Well, he can look at the press
4 release.

5 BY MR. SINGER:

6 Q Look at A-24.

7 MR. SINGER: I believe A-24 is in evidence.

8 THE COURT: It is.

9 BY MR. SINGER:

10 Q Were you aware, Mr. Stone, that on December 22nd, 2003,
11 SCO Group was announcing its earnings for the third quarter
12 and for the year?

13 A Not at all.

14 Q Do you agree, if you look at this press release, that
15 that, in fact, was what occurred on December 22nd, 2003,
16 that was the day SCO released earnings?

17 A Looks to be, yeah.

18 Q We don't have to assume anymore. We see that's the
19 case.

20 Now December 22, 2003 is also the day that Novell
21 publicly again asserts ownership of the UNIX copyrights,
22 correct?

23 A That's correct.

24 Q And is it your position that the fact that occurred on
25 December 22, 2003 is also a coincidence?

1 A Yes.

2 MR. SINGER: Nothing further.

3 THE COURT: Mr. Acker, will you be using the
4 calendar?

5 MR. ACKER: No, Your Honor. I'm going to muddle
6 through without it.

7 MR. SINGER: Actually, Your Honor, I did have one
8 or two more questions. If I may reopen my direct?

9 THE COURT: Go ahead.

10 BY MR. SINGER:

11 Q Mr. Stone, you subsequently left Novell in 2004; is
12 that correct?

13 A That's correct.

14 Q Were you asked to leave?

15 A Yes, I was.

16 Q You were given a severance package?

17 A Yes, I was.

18 Q You were given a contract that had -- you had a
19 contract that had continuing obligations to the company?

20 A No obligations.

21 Q Well, you had a noncompete agreement?

22 A Excuse me. Yes, I have a noncompete.

23 Q You have provisions regarding cooperation with the
24 company?

25 A Yes, I do.

1 Q How much was the amount of the payment that you
2 received at the time of your severance?

3 A Over a period of time, it equated to \$2 million.

4 MR. SINGER: Thank you very much.

5 CROSS-EXAMINATION

6 BY MR. ACKER:

7 Q Good morning, Mr. Stone.

8 A Good morning.

9 Q Let me ask you about the speech you gave in March of
10 2004. Could you first tell the ladies and gentlemen of the
11 jury what the open source business conference was, what sort
12 of gathering that was?

13 A Sure. It was a gathering of business people, not
14 technical people, in the open -- interested in open source
15 computing. It was becoming a very popular way of writing
16 software and developing software applications and software
17 services. And it was the first conference of its kind to
18 try to support the notion this was a good thing, and that it
19 was a direction that the industry was heading in. And we
20 had quite a good turnout. It was mainly business people.

21 Q What was the nature, what was the theme of your speech?

22 A The theme of my speech was very much to move -- to not
23 be afraid of moving towards supporting the open source
24 technology movement, and that older operating systems and
25 development environments were closed and this provided a

1 much more open and freer model of developing software
2 applications.

3 Q Between May 12th of 2003 up until this conference in
4 March of 2004, was the issue of SCO's assertion that there
5 was UNIX in Linux and SCO's attempt to obtain licenses on
6 that theory, was that something that was prevalent in the
7 software community?

8 A It was the headlines every single day.

9 Q Did it impact your business or the business you were
10 running at Novell?

11 A Yes, it did.

12 Q How so?

13 A It was clearly a distraction. It was affecting our
14 ability to promote Linux in the open source movement as a
15 development model, as a business for Novell going forward.
16 I was very concerned that this was harming Novell's future
17 business.

18 Q I'm going to show you a clip again of your speech, the
19 tail end of your speech, and I'm going to show you the whole
20 tail end of your speech as opposed to what the plaintiff's
21 counsel has shown to you.

22 MR. ACKER: If we could do that, Mr. Lee.

23 (Videotape played)

24 BY MR. ACKER:

25 Q Do you still believe each of those statements to be

1 true today?

2 A Absolutely.

3 Q What was the basis for your belief that there is no
4 UNIX in Linux?

5 A I actually reviewed it.

6 MR. SINGER: Your Honor, I think he claimed
7 attorney/client privilege on this statement later in this
8 deposition.

9 MR. ACKER: I don't believe so, Your Honor.

10 THE COURT: Let's pause for a moment, please.

11 Do you have something I can be looking at, Mr.
12 Singer?

13 MR. SINGER: This would be in his deposition.

14 THE COURT: All right.

15 If you find it, I want you to show it to Mr. Acker
16 before you say anything more about it.

17 MR. SINGER: Yes.

18 Also show a copy of the transcript to the Court.

19 Page 68, line 16 -- and 15, through page 69, line
20 11.

21 THE COURT: You don't need to show me, Mr. Singer.
22 Let me ask Mr. Acker if he wishes to respond.

23 MR. ACKER: I will move on, Your Honor.

24 THE COURT: All right.

25 //

1 BY MR. ACKER:

2 Q Let's step back so the ladies and gentlemen --

3 THE COURT: Mr. Acker, excuse me.

4 Mr. Singer, I need to ask whether or not you want
5 me to ask the jury to disregard the question and the answer?

6 MR. SINGER: I would like, if Your Honor would, to
7 explain what just happened here with respect to the
8 invocation of privilege at the deposition and disregard the
9 answer.

10 THE COURT: Ladies and gentlemen, during the
11 course of depositions, as you would have picked up, there
12 are oftentimes objections made by the attorneys representing
13 the parties for the other side during the course of the
14 deposition. Apparently, in the deposition of Mr. Stone,
15 questions of this sort were asked, an objection was made by
16 his attorney saying that information is privileged because
17 of attorney/client privilege. So for that reason, it would
18 be inappropriate, since the privilege was requested during
19 the deposition, it would be inappropriate for that testimony
20 to now come before the jury.

21 Does that accurately reflect what happened?

22 MR. ACKER: Yes, Your Honor.

23 BY MR. ACKER:

24 Q Can we step back and can you tell the ladies and
25 gentlemen of the jury, briefly, your educational background.

1 A I have an undergraduate degree in computer science. I
2 have what is called an IMT, an executive MBA from Harvard
3 business school.

4 Q Now you explained two periods of time that you were at
5 Novell. Can you explain for the ladies and gentlemen of the
6 jury the first time you were at Novell and what your
7 responsibilities were?

8 A Sure. I was at Novell in early 1997. My
9 responsibilities were as a senior vice president. I was
10 responsible for our corporate development technology
11 direction, business development, support, developer
12 services.

13 Q Who was the CEO at that time when you were at
14 Novell during the first period of time?

15 A Eric Schmidt.

16 Q Where is Mr. Schmidt now?

17 A He is the CEO and chairman of Google.

18 Q Did you leave Novell at some point during that first
19 stint?

20 A Yes, I did.

21 Q When was that?

22 A 1999.

23 Q Why did you leave?

24 A About 400,000 miles a year. I was traveling far too
25 much and I wanted to get my life back after working so hard.

1 So I decided I wanted to do a startup company in Boston.

2 Q Then what did you do during the period of time after
3 leaving Novell after the first stint and when you returned
4 in 2002?

5 A I was running a software startup company in Boston.

6 Q What caused you to come back to Novell?

7 A I received a phone call from Jack Messman, who was then
8 chairman of the company, and he asked me to come back.

9 Q How did you know Mr. Messman?

10 A He was on the board of directors since the beginning of
11 the company.

12 Q During your first period of time at Novell, were you
13 involved at all in the negotiation or execution of the asset
14 purchase agreement or any of its amendments?

15 A I was never involved.

16 Q After coming back to Novell in 2002, when was your
17 first recollection of issues arising with respect to Mr.
18 McBride and SCO?

19 A In the later part of 2002, e-mails were coming in to
20 people that worked for me as well as the legal department
21 from Mr. McBride with respect to whether or not Novell
22 wanted to participate in a campaign that they were putting
23 together called the SCOSource.

24 Q At some point in time did you put together a document,
25 E-32, that Mr. Singer showed to you that detailed your

1 interactions with Mr. McBride?

2 A Yes, those are my notes.

3 Q Let me show you an unredacted copy.

4 A This is redacted.

5 Q If you could take a look at that and let the ladies and
6 gentlemen of the jury know if you recognize it.

7 A Yes, these are my notes.

8 Q Were these notes -- when were these notes prepared,
9 approximately?

10 A I prepared them in -- well, I had been preparing --
11 writing them all along, but I prepared the notes in early
12 June.

13 MR. ACKER: We move for admission of the
14 unredacted version of E-32, Your Honor.

15 MR. SINGER: We object to E-32 as hearsay, it's
16 his notes, the one part that previously was an admission.

17 MR. ACKER: Well, he's here. He's subject to
18 cross-examination. These are his notes prepared
19 contemporaneous with the time of the events. I think they
20 are admissible, Your Honor. At the very least he should be
21 allowed to use them while testifying.

22 THE COURT: Counsel, I agree they are hearsay, so
23 I will not permit the unredacted version to go the jury, but
24 he may use those certainly to refresh his memory during the
25 course of his testimony.

1 MR. ACKER: Thank you, Your Honor.

2 BY MR. ACKER:

3 Q Do you remember the first time that you yourself had
4 conversations with Mr. McBride?

5 A Yes I, do.

6 Q When was that?

7 A According to my notes --

8 MR. SINGER: Your Honor, I believe the appropriate
9 procedure is for him to testify from his present
10 recollection. If he doesn't have that, he may look at notes
11 to refresh that recollection.

12 THE COURT: That is correct, Mr. Acker. It will
13 not be as efficient, but I do believe that is the way to
14 proceed.

15 BY MR. ACKER:

16 Q Do you have a memory without looking at your notes?

17 A Yes.

18 Q When was the first time you talked to Mr. McBride?

19 A It was in early March of 2003.

20 Q Who called whom?

21 A Mr. McBride called me with respect to a consortium
22 called UnitedLinux.

23 Q What is UnitedLinux?

24 A It was a consortium of four companies that was
25 promoting a version of Linux.

1 Q Was SCO part of that consortium?

2 A Yes.

3 Q What was Novell's interest, if any, in that consortium?

4 A Novell was interested in participating in that
5 consortium because it was supporting and operating an
6 environment for a distribution called SuSE, which we later
7 acquired.

8 Q Why was Novell interested in being part of UnitedLinux?

9 A It was part of our strategy to support the open source
10 movement and support Linux going forward, and we saw that as
11 a public and business mechanism for us to support that
12 environment.

13 Q What was the substance of your conversation with Mr.
14 McBride during this first call?

15 A Whether or not we would like to participate in that
16 organization as a board member.

17 Q He was asking you that or vice versa, you were asking
18 whether he would help you get --

19 A He was asking whether or not we would like to
20 participate, and then in return for that he was looking for
21 money, and then he was looking for us to give up our
22 \$8 million royalty stream, so he was negotiating.

23 Q What was your response?

24 A No.

25 Q Was there subsequent contacts with Mr. McBride in '02

1 and '03 between yourself and him?

2 A Yes, there were other e-mails and phone calls.

3 Q When was the next contact, do you recall?

4 A I believe the next series of calls were in the April,
5 May time frame. There was one I recall where we had a
6 conversation with Mr. McBride, who was getting into a taxi
7 in New York City. Mr. LaSala and I were in my office.
8 Again, we were asking him what is going on with this whole
9 SCOsource issue and copyrights and patents. He continued to
10 ask us to, you know, if you could just clear up this issue,
11 if you could just fix and address the copyrights and patents
12 issue, it would be great. We asked him if we could see --
13 am I going on too long?

14 Q No. You're fine.

15 A We asked him if we could see the code he kept claiming
16 was in Linux. And he asked me if I would meet with a
17 gentleman named -- his chairman.

18 Q Who was that?

19 A A gentleman named Ralph Yarro.

20 Q How did you leave the call with Mr. McBride when he was
21 in New York and you and Mr. LaSala were in Massachusetts?

22 A We left it primarily that I would meet -- that they
23 would prepare a nondisclosure agreement and that I would
24 meet with Mr. Yarro.

25 Q Did you have other conversations with Mr. McBride or

1 Mr. Yarro after that?

2 A Yes. I met with Mr. Yarro, it was late May. It was in
3 my office in Provo, Utah. Again, a relatively strange
4 conversation. He came by asking the same questions that Mr.
5 McBride was asking, if you just could take care of -- he was
6 more explicit, if you could take care of this copyright
7 issue. He also -- at that time he owed us \$18 million.

8 Q What was Mr. Yarro's position at that point with
9 respect to SCO?

10 A He was the chairman.

11 Q When you say he owed you \$18 million, who owed Novell
12 \$18 million?

13 A SCO.

14 Q For what?

15 A If was an old lawsuit that had to do with a product
16 called DR DOS. And we had won a case. They clearly owed us
17 \$18 million for a long period of time.

18 Q What did Mr. Yarro say to you?

19 A He was trying to negotiate a price concession.

20 Q What was your response?

21 A No.

22 Q Was there any other conversation between yourself and
23 Mr. Yarro?

24 A He asked if I would like to meet with Darl -- with Mr.
25 McBride and his team and review the code -- the offending

1 code between UNIX and Linux, and I said absolutely.

2 Q Did that ever take place?

3 A No, that never took place.

4 Q Why not?

5 A Because we made a number of attempts -- this was in
6 around May, I believe it was the 24th, we made a number of
7 attempts to meet with Mr. McBride and his team. I asked for
8 an NDA, I asked for it four or five times, the detail that
9 we would be able to review the source code.

10 Q When you say NDA, what do you mean?

11 A A nondisclosure agreement that gave us the right to
12 look at the source code. He had made -- he, meaning Mr.
13 McBride, had made many public statements that they were
14 going to show the offending code and never did. So I wanted
15 a legal agreement allowing me to see it.

16 Q Was SCO or Mr. McBride willing to do that?

17 A He appeared to be, but I never received it.

18 Q So what happened?

19 A I canceled the meeting.

20 Q Now Mr. Singer asked you a number of questions -- let
21 me back up.

22 On May 12th, you are aware that Mr. McBride sent a
23 letter to Mr. Messman as well as a thousand other companies
24 across the United States with respect to the accusations of
25 there being UNIX in Linux?

1 A That is correct.

2 Q What was the response inside Novell as well as across
3 the industry when that occurred?

4 A We were very concerned that he was damaging an industry
5 and that it was hurting Novell's business.

6 Q Was there some -- was a decision made at Novell to
7 respond to it?

8 A Yes.

9 Q What was that response to be?

10 A The decision was made to put up statements to the
11 effect that Novell owns the copyrights and patents to UNIX.

12 Q Why did Novell do that?

13 A Enormous pressure. I was receiving no fewer than 250
14 e-mails a day on this topic, 30 to 35 phone calls from
15 shareholders, from customers, from employees, from business
16 partners, you know, Novell, why are you so quiet, why aren't
17 you saying something. And I think we had reached a point
18 that we believed it was time to state our case given that
19 Mr. McBride, you know, was stating his.

20 Q Why was the press release put out on May 28th?

21 A That's when we were ready and done.

22 Q Did you have any knowledge that SCO's earnings release
23 was set for that day?

24 A None whatsoever.

25 Q Did you speak with Ms. O'Gara the evening prior to May

1 28th, on May 27th?

2 A Yes, I did.

3 Q What was the substance of that call?

4 A She kept quizzing me asking me questions about
5 products, about press releases, about UNIX and Linux. As I
6 said previously, she had an enormous amount of information
7 that I was very concerned about. I told her nothing -- she
8 played the hot and cold game. I told her nothing and that
9 she had to call our PR representative, Mr. Shuster. She
10 called me again the next morning, and I said nothing, please
11 call Mr. Shuster.

12 Q Did you ever tell Ms. O'Gara that Novell was
13 intentionally putting out its press release on May 28th to
14 somehow impact SCO's earnings release?

15 A No, I did not.

16 Q After the press release went out on May 28th, how did
17 you become aware of Amendment No. 2 to the APA?

18 A The signed Amendment No. 2 apparently went to The New
19 York Times. I think it was sent to them by SCO, I'm not
20 sure. I was aware of it the morning of June 5th.

21 Q Had you ever seen an executed copy of Amendment No. 2
22 before that?

23 A No.

24 Q After reviewing Amendment No. 2, did it change your
25 mind as to whether or not copyrights had transferred from

1 Novell to Santa Cruz in 1995?

2 A Not at all.

3 Q Mr. Singer asked you some questions about IBM. Were
4 any of the actions that Novell took in 2003 or 2004 with
5 respect to SCO motivated at all by something said or done by
6 IBM?

7 A None whatsoever.

8 Q Was there any relationship between IBM's decision to
9 purchase \$50 million worth of Novell's stock and the actions
10 that Novell took in 2003 and 2004 with respect to SCO?

11 A No.

12 Q Did you have a conversation with Mr. McBride in the
13 last few months?

14 A Yes, I did.

15 Q Can you tell the ladies and gentlemen, first of all,
16 what you do for a living, and the substance of that call?

17 A I am a venture capitalist here in Salt Lake City with
18 Epic Ventures. It's affiliated with Zions Bank. He called
19 me and asked me if I would be willing to invest in a new
20 company he was working with.

21 Q Did that surprise you?

22 A Yes. I thought it was fairly strange. I had not
23 talked to him in years. And he also said to me something I
24 thought was odd is that, oh, don't worry about the Maureen
25 O'Gara thing, it's not an issue. I said whatever. Thank

1 you for calling.

2 Q Have you had any further conversations with Mr.
3 McBride?

4 A No.

5 MR. ACKER: I don't have any other questions, Your
6 Honor.

7 MR. SINGER: I just have a few, Your Honor.

8 THE COURT: Go ahead, Mr. Singer.

9 REDIRECT EXAMINATION

10 BY MR. SINGER:

11 Q Mr. Stone, you said you were ready to put out the press
12 release on May 28th -- or you put out the press release on
13 May 28th because that's when you were ready to do so, right?

14 A That's correct.

15 Q However, as of May 28th, you only had an unsigned copy
16 of Amendment 2. You didn't know if it was signed, right?

17 A That's correct.

18 Q So you didn't wait past May 28th to see whether or not
19 it was signed before putting out the press release, correct?

20 A That's correct.

21 Q In fact, you found out later that it had been signed,
22 several days later when SCO sent it?

23 A That's correct.

24 Q And, in fact, if we look at that press release --

25 MR. SINGER: Can we bring back up the June 6th

1 press release, Mr. Calvin.

2 BY MR. SINGER:

3 Q This is Exhibit 97. It says in the press release that
4 Amendment No. 2 to the 1995 SCO-Novell asset purchase
5 agreement was sent to Novell last night by SCO. To Novell's
6 knowledge, this amendment is not present in Novell's files.

7 That turned out to be false, right?

8 A Apparently, yes.

9 Q In fact, at the time this was sent, you didn't tell the
10 public that we had an unsigned version even on May 28th,
11 right?

12 A That's true.

13 Q In fact, even the signed agreement turned out to be
14 present in Novell's files on further inspection, correct?

15 A Apparently, yes.

16 Q Now let's talk about -- so you agree the statement is
17 false, that to Novell's knowledge, this amendment is not
18 present in Novell's files?

19 A I don't believe that's false.

20 Q You don't believe that's false.

21 You don't believe anyone at Novell knew that it was in
22 the files of an executive officer?

23 A I do not.

24 Q Now with respect to the issue regarding a conversation
25 with Mr. McBride and UnitedLinux, I would like you to look

1 at Exhibit 563, which I believe is in evidence. We blow up
2 this document, which is an e-mail from Greg Jones --

3 MR. SINGER: Can I confirm that 563 is in
4 evidence? That's what our notes reflect.

5 THE CLERK: It is not, no.

6 BY MR. SINGER:

7 Q Have you seen this before?

8 A Yes.

9 MR. SINGER: I move the admission of 563.

10 MR. ACKER: No objection.

11 THE COURT: It will be admitted.

12 (Plaintiff's Exhibit 563 was received into
13 evidence.)

14 BY MR. SINGER:

15 Q This is November 20th, 2002.

16 Do you see the second paragraph of the letter -- of the
17 e-mail?

18 A I do.

19 Q Mr. Jones is an attorney who works for Novell, correct?

20 A Correct.

21 Q Mr. Lundberg is an attorney who works for Novell, who
22 is sitting at counsel table, correct?

23 A That's correct.

24 Q Mr. LaSala is an attorney who at the time worked for
25 Novell; is that correct?

1 A That's correct.

2 Q He says this is reflecting a conversation with Darl
3 McBride, correct?

4 MR. ACKER: Your Honor, I'm going to object. It
5 calls for speculation. Mr. Stone was not a part of the
6 conversation. He's not copied on this e-mail.

7 MR. SINGER: The e-mail suggests that it's a
8 conversation with Mr. McBride.

9 MR. ACKER: It calls for speculation. He's asking
10 him about a document that he wasn't part of the conversation
11 and he's not on the e-mail.

12 MR. SINGER: I can re-word the question.

13 THE COURT: Re-word the question.

14 BY MR. SINGER:

15 Q Since this is in evidence, I am just going to read to
16 you part of the e-mail. Today Dave Wright and I -- the I
17 would be Greg Jones, attorney for Novell -- spoke with Darl.
18 He wants Novell documents that help give the history of
19 SCO's rights to UNIX.

20 Mr. Stone, that's consistent with what conversations
21 you had with Mr. McBride where he asked not for a transfer
22 to copyrights but something to clarify the ownership of the
23 copyrights, correct?

24 A That's correct.

25 Q As far as you know, neither SCO nor Novell at this

1 point had Amendment No. 2 in its possession -- or at least
2 was aware of Amendment No. 2, correct?

3 A As far as I know.

4 Q He says he wants this information to support possible
5 efforts by SCO to assert claims relating to infringing uses
6 of SCO UNIX libraries by end users of Linux. Then you see
7 it says, as Novell still receives more than \$8 million each
8 year from retained revenue streams for old versions of UNIX,
9 Darl suggested that SCO's efforts may lead to Novell
10 receiving greater revenues.

11 Now is it your testimony, sir, that in the early part
12 of 2003, Mr. McBride reversed course and said we don't want
13 you to keep receiving any of this revenue? Is that your
14 testimony?

15 A Yes.

16 Q Now Novell was not a member of UnitedLinux; is that
17 correct?

18 A That's correct.

19 Q Novell wanted to become a member of UnitedLinux?

20 A That's correct.

21 Q You wanted Mr. McBride's assistance to become a member
22 of UnitedLinux, correct?

23 A No. We actually wanted to take their place. He
24 offered it.

25 Q You wanted to replace them?

1 A There were four members.

2 Q Now with respect to the nondisclosure agreement, you
3 were offered the opportunity to see information if a
4 nondisclosure agreement was signed and at the last moment
5 you canceled; is that correct?

6 A That's correct.

7 Q Mr. McBride was there waiting for you and you just
8 decided to cancel; is that right?

9 A I wouldn't suggest he was there waiting for us. It was
10 quite a number of hours before the meeting, but we never
11 received the NDA.

12 Q To be exact, you received an NDA. You just didn't find
13 the NDA to your liking; is that correct?

14 A That's true. It did not detail the ability to look at
15 the source code.

16 Q Finally, with respect to Mr. Yarro, you said that
17 \$18 million was owed by SCO. That wasn't right, was it?

18 A Yes, it was right.

19 Q Wasn't it a company called Canopy that owed the
20 \$18 million?

21 A Yes. It was Canopy Group, which Ralph Yarro was
22 chairman of.

23 Q But not SCO?

24 A Correct.

25 MR. SINGER: Nothing further.

1 MR. ACKER: No questions, Your Honor.

2 THE COURT: Counsel, may this witness be excused?

3 MR. SINGER: We do not intend to re-call him.

4 MR. ACKER: Yes, Your Honor.

5 THE COURT: That means, Mr. Stone, you do not need
6 to worry about being re-called as a witness. But I will
7 instruct you do not discuss your testimony with any other
8 witness in this case or in the presence of any other witness
9 or communicate the content of your testimony to anyone else.

10 THE WITNESS: Yes, Your Honor.

11 THE COURT: Thank you, Mr. Stone.

12 THE WITNESS: Thank you.

13 THE COURT: How long will the deposition be?

14 MR. SINGER: Twenty minutes, Your Honor.

15 THE COURT: We probably ought to go ahead and take
16 a recess before we go to the deposition.

17 Ms. Malley.

18 (Jury excused)

19 THE COURT: Counsel, let me make you aware of one
20 thing. Because of the way this trial has unfolded,
21 specifically the fact that plaintiffs will not rest until
22 very late in the case, I'm going to request that your Rule
23 50 motion deal only with those issues that the jury will be
24 asked to consider in the end and not those that will be
25 dealt with by the Court subsequently by you making proposed

1 findings of fact and conclusions of law. That way you will
2 be able to focus more on the important issues that will have
3 to be decided relatively quickly and the Court will be able
4 to do the same.

5 Does that pose a problem for any of you?

6 MR. JACOBS: It does not, Your Honor. Actually,
7 the way we understand the rule to work, we don't need to
8 file a Rule 50 motion on bench issues in order to protect
9 our rights.

10 THE COURT: I just wanted to make certain we're
11 all clear on that.

12 Are you all right with that, Mr. Singer?

13 MR. SINGER: Yes, Your Honor. This would relate
14 solely to, from our perspective, the slander of title claim
15 that Novell has counterclaimed, Novell has brought.

16 MR. JACOBS: I'm sorry. Now I think I understand
17 him. The jury issue for you is our slander of title claim?

18 MR. SINGER: Yes.

19 THE COURT: Is there anything before we recess?

20 MR. JACOBS: I did have a couple of other matters
21 that could be dealt with now if you would like or --

22 THE COURT: Let's go ahead.

23 MR. JACOBS: You asked us about the jury
24 instruction on the litigation privilege, and whether we were
25 not going to seek such an instruction. I think we're in

1 alignment with SCO on this, but it's worth stating it on the
2 record and letting you know what we would be asking you to
3 do.

4 We understand that SCO is not alleging that any
5 statement made in the course of the litigation itself,
6 whether by way of pleading or oral argument or any other
7 litigation, specific comment is being alleged as part of
8 their slander of title claim. In other words, what is the
9 subject of their slander of title claim are statements made
10 outside the course of the litigation, such as the May 28th
11 press release, the December 22nd press release. On that
12 understanding, we do not think the jury needs to be
13 instructed on the litigation privilege. We would ask the
14 Court to instruct the jury that what I just said is true,
15 that is that statements made in the actual course of the
16 litigation itself are not actionable, if you will, under a
17 slander of title claim.

18 We understand SCO to be in agreement with the
19 principal. I am not sure we're in agreement on the content
20 of the instruction. But that's where we are today on the
21 litigation privilege.

22 THE COURT: Mr. Normand.

23 MR. NORMAND: Your Honor, we are in agreement with
24 the principal on the instruction as a I hear Mr. Jacobs
25 articulated. I think what it's going to come down to is

1 this evidence that Mr. Singer spoke to this morning about
2 allegations in the complaint and subsequent Novell
3 admissions in its answer, and argue that is relevant
4 evidence on the issue of statements that we are claiming are
5 slanderous.

6 So I would propose, on the run as I think about
7 it, the first half of what Mr. Jacobs proposes is fine, or
8 what he proposes would be the first half of the instruction,
9 but I think the second half should be you are entitled to
10 conclude from what have come in as admissions that certain
11 statements were made in a slanderous context.

12 THE COURT: Why don't you two work out an
13 instruction and get it to us sometime Monday, please.

14 MR. JACOBS: We will, Your Honor. Thank you.

15 The second topic is the topic I raised the other
16 day, and this is the potential to augment the record on the
17 issues before the bench. We've not reached an agreement
18 with SCO on a mechanism or stipulation by which that would
19 occur. So we're back to whatever motion we might make to
20 Your Honor in that regard. It's something we couldn't reach
21 agreement on.

22 THE COURT: Well, my inclination is just simply
23 let these witnesses play out during the course of the trial.

24 MR. JACOBS: Thank you, Your Honor.

25 THE COURT: Anything else?

1 MR. SINGER: Not from us.

2 THE COURT: We'll take 15 minutes.

3 (Recess)

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