

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 23, 2010  
18   Jury Trial

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24 REPORTED BY: Patti Walker, CSR, RPR, CP  
25 350 South Main Street, #146, Salt Lake City, Utah 84101

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## I N D E X

3 Witness

Examination By

PAGE

4 James Tolonen

Mr. Brennan (Direct)

1999

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Mr. Hatch (Cross)

2038

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Mr. Brennan (Redirect)

2090

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Mr. Hatch (Recross)

2100

8 Allison Amadia

Mr. Brennan (Direct)

2103

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1 EXHIBITS RECEIVED INTO EVIDENCE:

2 Plaintiff's:

3 754 2062

4 503 2101

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12 Defendant's:

13 N-8 1999

14 T-34 2038

15 X-4 2093

16 B-6 2096

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1 SALT LAKE CITY, UTAH; TUESDAY, MARCH 23, 2010; 8:30 A.M.

2 PROCEEDINGS

3 THE COURT: Good morning.

4 Do we have anything before we bring the jury in?

5 MR. JACOBS: A brief report, Your Honor. In the  
6 wake of your ruling on Mr. Keller yesterday, that Mr. Keller  
7 would be allowed to testify, we took his deposition  
8 yesterday afternoon. Shortly after the deposition, SCO  
9 reported to us that they do not plan to call Mr. Keller in  
10 their case in chief. They reserve the right to call him in  
11 their rebuttal case.

12 MR. SINGER: Mr. Jacobs' report is accurate. With  
13 respect to all the issues of privilege, we decided we  
14 weren't going to call him, at least in our case in chief.

15 We have raised with the other side, Your Honor,  
16 now that the end is somewhat in sight, the issues of  
17 closing. We wanted to make sure our discussions are  
18 consistent with what the Court's requirements are.

19 First, we indicated that we intended, if it meets  
20 with the Court's approval, to split our closings as we did  
21 in the opening where Mr. Hatch and I would both address the  
22 jury as part of closing.

23 THE COURT: That will be fine.

24 MR. SINGER: Second, we're talking about the time  
25 for each side. I think we -- well, an hour and 15 minutes.

1 They suggested an hour and a half. Either of those would be  
2 okay with us if it meets with the Court's schedule.

3 THE COURT: An hour and 15 minutes.

4 It's our intention, counsel, to try to get this to  
5 the jury by noon. It will take at least 45 minutes to  
6 instruct the jury. If you can confine it to an hour and 15  
7 minutes, that would include your rebuttal time.

8 MR. SINGER: Yes. Thank you, Your Honor.

9 THE COURT: Mr. Brennan.

10 MR. BRENNAN: Thank you.

11 Just so we're all clear, it's our anticipation  
12 that the last witness and the last presentation of evidence  
13 would conclude by 1:30 on Thursday?

14 THE COURT: Yes.

15 MR. BRENNAN: Then the Court's intention would be  
16 to instruct essentially first thing Friday morning, then go  
17 to the closings, as you've indicated, and be done by noon  
18 for them to take the case?

19 THE COURT: Yes. Is that going to work? I mean,  
20 is that going to be a great disadvantage to cut you to an  
21 hour and 15 minutes?

22 MR. BRENNAN: We were hoping for an hour and a  
23 half, Your Honor, but we're mindful of the schedule. We  
24 thought we had worked out a mechanism that would permit an  
25 hour and a half. It might be that it would run to 12:30.

1           THE COURT: That is your mechanism?

2           MR. BRENNAN: Yes, that's the mechanism.

3           THE COURT: Let's keep our language simple here  
4 for the Judge.

5           Counsel, I am mindful of the complicated nature of  
6 this case. I'm also mindful of the fact that the issues for  
7 the jury are somewhat limited. And I, frankly, worry more  
8 than anything about the jury's ability to benefit from too  
9 lengthy of closings. If you feel strongly that an hour and  
10 a half is necessary for you, then I will give you both of  
11 you an hour and a half. But I will tell you that my  
12 experience is that after a while, there are diminishing  
13 returns. But I'll ultimately leave that up to you. If you  
14 think an hour and a half is necessary, I'll give it to you.

15           MR. BRENNAN: I can tell you have listened to me  
16 long enough to give that direction. What if we were to  
17 report to the Court tomorrow whether we felt we needed the  
18 extra 15 minutes.

19           THE COURT: Really, we can decide Friday morning,  
20 if we need to. There is no hurry. Just understand that I  
21 really do expect us to finish the testimony Thursday at 1:30  
22 without question. And then the closer we can keep to noon  
23 for the jury, the better off we all are.

24           I might remind you that one of the jurors -- Ms.  
25 Malley reminded me of this this morning -- number ten,

1 indicated she had a vacation that begins Saturday. It was  
2 actually going to begin Friday, but when I asked her if it  
3 can be delayed one day, she said yes. She is still planning  
4 on a vacation Saturday and Sunday. She will be back Monday.  
5 If they have to go beyond late Friday night, I'll have to  
6 tell her go ahead and take your vacation and the jury can  
7 come back next week, which is not a problem. But just keep  
8 that in mind, if you would please, counsel.

9 MR. BRENNAN: We will. Thank you, Your Honor.

10 THE COURT: Is there anything else?

11 MR. SINGER: Not from the plaintiffs.

12 MR. BRENNAN: No, Your Honor.

13 THE COURT: What will we be doing first thing?

14 MR. BRENNAN: Our first witness will be James R.  
15 Tolonen. And that will be followed by Allison Amadia, Your  
16 Honor.

17 THE COURT: All right. Thank you.

18 Ms. Malley, if you would, please.

19 Counsel, Ms. Malley just informed me that  
20 apparently there was an accident on the freeway south, and a  
21 juror may be on the other side. So that you don't have to  
22 sit here and be nervous, I will excuse myself and come back  
23 as soon as we have all the jurors.

24 (Recess)

25 THE COURT: Ms. Malley, if would you please bring



1 the jury in.

2 (Jury present)

3 THE COURT: Good morning, ladies and gentlemen.

4 Mr. Brennan.

5 MR. BRENNAN: Thank you.

6 Your Honor, Novell wishes to call as its next  
7 witness Mr. James Tolonen.

8 JAMES TOLONEN,

9 Having been duly sworn, was examined

10 and testified as follows:

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

13 THE WITNESS: Sure. My name is Jim Tolonen.  
14 T-o-l-o-n-e-n.

15 DIRECT EXAMINATION

16 BY MR. BRENNAN:

17 Q Good morning, Mr. Tolonen.

18 A Good morning.

19 Q Have you ever worked for Novell?

20 A Yes, I have.

21 Q When was it that you worked for Novell?

22 A I worked for Novell from 1989 to 1998.

23 Q During that time period, what position or positions did  
24 you hold at Novell?

25 A Throughout that entire period as the chief financial

1 officer. I was also, for part of that, senior vice  
2 president and executive vice president, and then a member of  
3 the office of the president, which was a three-member  
4 strategy council.

5 Q As a member of the office of the president, what  
6 essentially did you do?

7 A It was really the highest group of all the executives.  
8 We probably had maybe 6,000 employees world around and a  
9 dozen or more executives. This was a small group that met  
10 regularly just to discuss strategy with Ray Noorda.

11 Q Please tell the jury a little bit about your  
12 educational background, if you might.

13 A That's going way back, but I have a master's -- let's  
14 go back, an engineering degree from the University of  
15 Michigan. I later also received an MBA in finance and  
16 accounting. I later also have achieved a certified public  
17 accountant, a CPA, as well.

18 Q You mentioned that you began formally working for  
19 Novell in 1989. If you could summarize for us your work  
20 experience from the time that you obtained your MBA from  
21 Michigan to the time that you started with Novell in 1989.

22 A After college I worked as a certified public accountant  
23 for about five years. That's part of the training required  
24 to achieve the CPA certificate is direct public accounting  
25 experience. I then worked in several small technology

1 start-ups, generally in the California Bay area, Silicon  
2 Valley area. One of those was a company called Boshier where  
3 I met Ray Noorda. He was brought in as a CEO there while I  
4 was vice president of finance. That company later got  
5 acquired and he left. Several years later I left and went  
6 to a technology start-up in networking in the Bay Area  
7 called Excelan. We took that company public and in 1987 ran  
8 it as a successful public company for several years, and  
9 then Novell acquired it in 1989.

10 Q Thank you.

11 You mentioned an individual by the name of Ray Noorda.  
12 Can you tell us who Ray Noorda is?

13 A Certainly. Ray Noorda was the chief executive officer  
14 of Novell. He was brought in at the founding of Novell long  
15 before -- I mean, somewhere between my earlier work  
16 experience with him and later, and continued as the CEO of  
17 Novell through 1994 or so.

18 Q What was your personal relationship with Mr. Noorda?

19 A I directly reported to him the entire time at Novell,  
20 and also I guess at some level a mentor. He was someone I  
21 looked up to and learned a lot from.

22 Q I'm going to have jump forward a bit. You've described  
23 for us your work experience prior to joining Novell in 1989.  
24 You've told us that you worked there until 1998. If you  
25 could summarize your work and professional experience from

1 1998 to the present, please.

2 A Sure. After leaving Novell, I was at that time an  
3 existing board member of a small public company that asked  
4 me to step in as president and chief financial officer of  
5 that company to help it out for about a year, and I did  
6 that. I took a little time off with my family, and then I  
7 moved back after that, that one-year experience.

8 I then went to -- became an investor, then a board  
9 member, and then chief operating officer and chief financial  
10 officer and took another company public in the early 2000s.  
11 I then joined a third -- next company after that, which is  
12 Business Objects, maybe a half billion dollar corporation  
13 when I joined it, large multinational, traded both in Europe  
14 and in the United States on both exchanges, dual listed,  
15 dual traded, very complex structure. And I was the chief  
16 financial officer there for about seven years. And then  
17 just retired about a year ago when that company was sold to  
18 SAP.

19 Q At present, do you have any board positions or other --

20 A I do. I stay active. I'm a board member of a public  
21 company called Glu-Coat systems, a technology company in the  
22 Bay Area. Also a board member of a philanthropic  
23 organization doing green work as El Coral, interacting with  
24 Coral Reef Alliance, trying to help out indigenous people in  
25 the coral areas around the world.

1           If I keep going -- I find it hard to retire, so I'm  
2 also doing advisory services on several small start-up  
3 companies in the Bay Area.

4   Q    You mentioned various positions that you've held either  
5 as a senior executive officer or as a board member. I would  
6 like to have you focus for a moment on the experience you  
7 have had as a senior executive officer of publicly traded  
8 companies. And, in short, can you explain to the jury what,  
9 in your view, the duties and responsibilities are of a  
10 senior executive officer of a publicly traded company?

11   A   Most of my experience has been as a chief financial  
12 officer. Although I think that term is often not well  
13 understood. People think about it as the guy with the green  
14 armband that is doing the books, which is a very important  
15 part of the role.

16           For virtually all of the companies I was chief  
17 financial officer or president, or chief operating officer,  
18 I had that role, which includes the treasury function, the  
19 investments, the cash, the credit functions of screening for  
20 new customers, the paying the bills functions of accounts  
21 payable, all of worldwide payroll responsibilities,  
22 information services and technology, all the computing  
23 systems of the company worldwide, investor relations.

24           As a public company, you are always communicating with  
25 shareholders, analysts and investor relations. Often

1 facilities comes with that, the real estate aspects of  
2 expansion and contraction and dealing with landlords and  
3 construction and operation and occupancy of buildings.

4 Because of my background being fairly broad in not just  
5 the finance but the engineering background, I often got  
6 involved in sales presentations, customer briefings and  
7 presentations, a very broad role.

8 Q Let me have you now focus on the experience you've had  
9 as a member of boards of directors of publicly traded  
10 companies. What, in general, have you viewed your  
11 responsibilities to be as a member of the board of directors  
12 of these various companies?

13 A It's really a strategic adviser and a shareholder  
14 representative. It's a fiduciary role. It's representing  
15 sort of the inside in. Its helping the company be  
16 successful.

17 One of my good friends who's a senior, he was a  
18 publisher in the internal auditing field, says the perfect  
19 board member keeps his nose into everything but his fingers  
20 out of everything. You observe, you're a fiduciary, you're  
21 an oversight, but you don't actually do the work. You  
22 encourage and help and inspect management.

23 Q What was it that brought you to Novell in 1989?

24 A As I mentioned, a company that I was the chief  
25 financial officer of, a public company called Excelan, was

1 acquired by Novell.

2 Q You've described for us your general duties and  
3 responsibilities of a senior officer, particularly a chief  
4 financial officer. Would you describe for us, particularly  
5 focused on the time that you were the CFO of Novell, what  
6 your job duties were at Novell as chief financial officer?

7 A In fact, they were the same. Let me cover those, but  
8 also try and be more a little more specific. I talked about  
9 the financial aspects. So there is running the accounting  
10 systems of the company. There is the external reporting.  
11 As a public company, you have all the Securities and  
12 Exchange Commission reports that are required to be filed  
13 periodically, the public company documents.

14 There is all the internal reporting, budgeting,  
15 forecasting, comparison of actual versus those plans,  
16 management operational accounting, the treasury investment,  
17 the global tax strategy, certainly mergers and acquisitions.  
18 Particularly at Novell, I think while I was there we did --  
19 I guess 15 or more acquired acquisitions of smaller  
20 companies. And often with those there is also divestitures.  
21 All that is complicated accounting transactions. Often the  
22 CFO, in my case, I was involved with virtually all of those.

23 Q Are you familiar with what is known as the UNIX  
24 operating system?

25 A I am familiar with it. I have never actually

1 programmed in it, but I'm quite familiar with it.

2 Q Explain to us what your understand is of the UNIX  
3 operating system.

4 A I'll give some context for that. The computers -- or  
5 the hardware aspects require two kinds of software,  
6 operating systems software, which is really the things that  
7 translate the machine language into instructions, then there  
8 is what most of us deal with, which is the applications,  
9 what you actually see on the screen. So UNIX was a very  
10 broad, stable operating system that was developed by an  
11 organization called the UNIX Systems Laboratories. Most of  
12 its early life was owned by AT&T. There was even a company  
13 called Bell Laboratories. People heard of Bell Lab  
14 sometimes. That's where UNIX was invented as a software  
15 operating system.

16 It was originally designed for high power computers and  
17 mini computers before the existence of PCs. It later  
18 revolved to be, because of that, a very broad and often  
19 called ruggedized because it had the trial by fire of lots  
20 of large system transactions using it. So it was very --  
21 considered a stable industrial strength company operating  
22 system.

23 Q You mentioned UNIX System Laboratories. Is it true  
24 that Novell acquired UNIX System Laboratories?

25 A Yes, it did.



1 Q Do you recall when about that acquisition took place?

2 A '92 or three probably.

3 Q Let me have you focus, if you would, on UNIX System  
4 Laboratories and the UNIX system before Novell acquired it.  
5 Did Novell have any relationship relative to the UNIX  
6 operating system or UNIX System Laboratories before it  
7 acquired UNIX System Laboratories?

8 A Not so much directly with the Bell Laboratory and UNIX  
9 operating system as with the dozens to hundreds of licensees  
10 of that operating system. What Novell's early claim to fame  
11 was was that it could connect dissimilar computers so they  
12 could share information. That's called networking.

13 And because UNIX had proliferated across anything from  
14 HP, UX, UNIX, Sun UNIX, IBM UNIX, and people licensed some  
15 of that technology that were deploying it in their unique  
16 computer systems, Cray, Andel, it was widely used. If those  
17 computers could talk to one another, we were helping connect  
18 those computers as a network operating system so they could  
19 talk to one another.

20 Q What was the Novell product or system that would allow  
21 that --

22 A It was called NetWare.

23 Q Are you familiar with a product known as UnixWare?

24 A I am.

25 Q Could you describe your understanding of UnixWare?

1 A As UNIX -- as the personal computer started coming on  
2 to the corporate world, there was a question of what was the  
3 right operating system for the personal computer.  
4 Microsoft, of course, had a DOS version. There were other  
5 DOS versions, ER DOS that Novell owned for a period of time.  
6 But those systems were not considered at that time strong,  
7 ruggedized and powerful enough for corporate usage. They  
8 were still evolving, very young in their infancy and  
9 testing. So there was a question could UNIX fulfill that.  
10 A version of UNIX for the PC or Intel processor was called  
11 UnixWare.

12 Q Who developed UnixWare?

13 A We did that.

14 Q Novell?

15 A Novell.

16 Q Were you involved in Novell's acquisition of UNIX  
17 System Laboratories?

18 A I was.

19 Q Would you describe what your role was in that  
20 acquisition?

21 A I was one of the three or four key executives assigned  
22 to doing that transaction. If you think about corporate  
23 acquisitions as three or four phases, life cycles just like  
24 people or plants or animals, one is the discovery or finding  
25 a company or fit and having some level of social

1 interaction. Often there is an illusion between mergers and  
2 acquisitions and marriages. There is a dating phase. Then  
3 there is actually the event, the marriage. That's the  
4 transaction itself. The documents are on. That tends to be  
5 much more legal and finance driven.

6 THE COURT: Mr. Tolonen, could you slow down a  
7 little bit so the court reporter can get down what you are  
8 saying.

9 THE WITNESS: I would be happy to. I get excited.  
10 So the marriage phase, the transaction phase which  
11 tends to be more ceremonial. At some level it's very  
12 complicated because there are a lot of issues. There are  
13 people issues, technology issues, ownership rights issues,  
14 there's negotiations of cost and price, and everything is a  
15 tradeoff.

16 Then there is an integration and an operating  
17 phase and that's where, like a marriage, it's the reality of  
18 living together. So different people get involved in  
19 different phases of that.

20 BY MR. BRENNAN:

21 Q Can you tell us why it was Novell decided to acquire  
22 UNIX System Laboratories?

23 A It was part of a large strategy for the Novell entity.  
24 We were rapidly growing. It was a time of great change in  
25 the computer industry. Microsoft was coming in the stage

1 of -- again, thinking about the size and the time, personal  
2 computers were just coming out networking. The Internet, as  
3 we know it, wasn't described in a public way. It was in a  
4 technology way. People knew it could be done. It was  
5 evolving from a very early military system which was  
6 connecting military computers and getting into the public  
7 domain to what we now call the Internet.

8 In that kind of system we believed there needed to be a  
9 lot of applications that were network aware. There needed  
10 to be a networking operating system. There needed to be a  
11 very powerful operating system. So we were expanding in  
12 each of those areas, acquisition of application software and  
13 then also operating systems software.

14 Q And UNIX essentially filled the role of the operating  
15 system?

16 A It did. It served a significant role in terms of a  
17 computer operating system that would scale and grow and be  
18 very powerful.

19 Q Now when Novell acquired UNIX System Laboratories, did  
20 it acquire all of the company's assets or only a subset?

21 A It acquired the entire business.

22 Q How much did Novell pay to acquire all of the UNIX  
23 System Laboratories business?

24 A I believe it was something in excess of \$300 million.

25 Q To your understanding, did that include the acquisition

1 of any copyrights that pertained to the UNIX software?

2 A Absolutely, everything. It was the entire business,  
3 all of its assets, all of its liabilities, all of its  
4 property.

5 Q Just jump forward for a minute. Were you also involved  
6 in the sale of certain assets by Novell to a company called  
7 Santa Cruz Operation?

8 A Yes, I was.

9 Q Just so we can understand perhaps the distinction  
10 between the acquisition by Novell of all of the UNIX System  
11 Laboratories business and the sale of some of the assets by  
12 Novell to Santa Cruz Operation, was there a difference  
13 between those two transactions?

14 A Yes, there was.

15 Q Could you describe what the basic difference was?

16 A In the case of an acquisition of a company, the  
17 acquirer, the buyer acquires everything about the company,  
18 all of its assets, all of its liabilities and risks  
19 associated with ownership. You know, the people involved,  
20 generally the entire operation think of it as an all kind of  
21 a purchase.

22 In a different kind of a purchase, it's called a  
23 purchase of specific assets, there is a -- rather than just  
24 saying you get everything, you say, here's the list of  
25 things you get, here's the list of things you don't get. So

1 there's a much more of a carve out, a specific target of a  
2 particular asset being acquired.

3 We were, in the case of The Santa Cruz Operation,  
4 selling only a specific part of the business. In fact, we  
5 kept some other parts and we had licensed other parts to  
6 other businesses.

7 Q Now focusing on the transaction between Novell and  
8 Santa Cruz Operation, was there a point -- perhaps using  
9 your dating and marriage metaphor, was there a point in this  
10 dating, marriage stage where there was contemplation given  
11 to selling all of the business to Santa Cruz rather than  
12 just part of it?

13 A I'll say yes to that, meaning that we were in the  
14 process of diversifying UNIX into the marketplace. At the  
15 time Novell was competing very heavily with Microsoft.  
16 Microsoft had DOS and then came out with Windows and was --  
17 if you remember the terminology of the days, Windows 97 was  
18 kind of the first stable version of Windows that seemed to  
19 work. That was coming and wasn't even out yet. They were  
20 talking about an NT, or a new technology that would be more  
21 powerful. We wanted to proliferate UNIX in as many strong  
22 company hands as possible to make it a viable competitor in  
23 the marketplace.

24 Q Ultimately did Novell sell all of the assets relative  
25 to UNIX that it had acquired from UNIX System Laboratories

1 to Santa Cruz or only a smaller subset of those assets?

2 A Smaller subset.

3 Q Could you explain to the jury why it was that Novell  
4 did not sell all of its related assets to Santa Cruz?

5 A Probably two or three reasons. We had talked to other  
6 companies as well. Santa Cruz Operation had been a licensee  
7 of the UNIX technology from Novell. They had a product in  
8 the marketplace on the Intel platform that was using UNIX,  
9 and they had a product in that space. They were therefore a  
10 good candidate to help us take this product into the PC  
11 space.

12 We had many other customers who were also licensees and  
13 much, much larger customers. IBM was a licensee. Hewlett  
14 Packard was a licensee. And Sun Computer Systems was a  
15 licensee. In fact, Novell itself had incorporated much of  
16 the UNIX technology we had purchased from UNIX System  
17 Laboratories into other areas of our business.

18 An example would be the Tuxedo product, which, that's  
19 again, assuming acronyms, t-u-x-e-d-o, transactions for UNIX  
20 extended to distributing operations. So it was a networking  
21 aspect of UNIX to connect to similar UNIXs. We wanted to  
22 keep that.

23 We had other parts of UNIX that were potentially in our  
24 code because we merged engineering organizations. We needed  
25 to keep that. We were really selling the rights to continue

1 the UNIX operation to SCO but only for the Intel chips, that  
2 business, and not in competition or not to take away our own  
3 ownership rights, our own other products, or our own  
4 relationship with our other licensees.

5 Q What was Novell hoping the Santa Cruz Operation would  
6 do with the assets relative to UNIX if Novell did sell?

7 A Proliferate it into the PC marketplace through a  
8 product called UnixWare.

9 Q How did Novell expect that to be beneficial to get that  
10 into Novell?

11 A It would give another strong competing operating system  
12 in the marketplace to the Microsoft version. It would give  
13 a company that wanted to continue to develop and operate and  
14 extend that operating system in the PC space. And if they  
15 were very successful, we could have also reaped some further  
16 benefits. There was a royalty structure such that below a  
17 certain level Santa Cruz Operation would not owe any  
18 additional money to Novell, and in the middle range they  
19 would cross a hurdle, and then there was a cap of how much  
20 royalties they would pay, assuming they were successful at  
21 that.

22 Q What was your role in the transaction whereby Novell  
23 sold certain specified assets to Santa Cruz Operation?

24 A I was one of the key three or four executives assigned  
25 to the project to sell those assets. It was myself, the



1 technology head of UNIX Systems Labs, a guy by the name of  
2 Mike DeFazio, the general counsel of Novell, David Bradford,  
3 and our outside primary counsel, Tor Braham, from Wilson  
4 Sonsini was the negotiating team and the development of the  
5 agreement team.

6 Q You mentioned the law firm of Wilson Sonsini. Did  
7 Novell at the time have a member of its board of directors  
8 by the name of Larry Sonsini?

9 A Yes, it did.

10 Q What was the relationship between Larry Sonsini and the  
11 Wilson Sonsini firm?

12 A He was one of the founders. That's his name in the  
13 Wilson Sonsini.

14 Q To your observation, what was the relationship between  
15 Larry Sonsini, one of the founding members of the firm, and  
16 then this Tor Braham who you indicated was with Wilson  
17 Sonsini?

18 A Tor was one of the Wilson attorneys. I worked with him  
19 on many transactions and accounts. He was a prime  
20 representative of Wilson for Novell. His specialty was in  
21 technologies, mergers, acquisitions, software licensing. A  
22 very bright guy. And at some level was sort of an up and  
23 comer that was assigned to our company because Larry wanted  
24 sort of an oversight, and wasn't doing work as a board  
25 member, he wanted to make sure his firm was representing us

1 well.

2 Q Now you've mentioned that during your tenure at Novell  
3 you worked on a number of merger and acquisition deals. Had  
4 you worked with the Wilson Sonsini firm prior to the  
5 transaction involving Santa Cruz Operation?

6 A Yes, I had.

7 Q What was the Wilson Sonsini's firm relationship to  
8 Novell?

9 A They were our primary outside counsel on corporate  
10 matters, on SEC matters, and then contract, merger,  
11 acquisition matters.

12 Q Had you worked with Tor Braham before the Santa Cruz  
13 Operation transaction?

14 A Yes, I had.

15 Q What were your impressions of Mr. Braham?

16 A I liked him a lot. He was a very smart attorney.

17 Q I would like to have you focus on the specifics of the  
18 asset purchase agreement. Did you ever see any drafts of  
19 the asset purchase agreement before it ultimately was signed  
20 by the parties?

21 A Yes, I did.

22 Q What, to your understanding, was the purpose of  
23 reviewing drafts going back and forth?

24 A It really was a business review. And the chief  
25 financial officer, as I mentioned, has certain fiduciary

1 responsibilities to the business in its reporting. And  
2 transactions, acquisitions and divestitures have complex  
3 accounting issues, so I was a business executive reviewer of  
4 the transaction and probably virtually every draft.

5 Q In terms of the asset purchase agreement itself, what  
6 was your relationship with Novell's general counsel, David  
7 Bradford, in connection with this transaction?

8 A He was probably the lead in the transaction -- in  
9 creating the document with Tor Braham and senior executives  
10 both assigned to this project.

11 Q Was it your understanding that under the asset purchase  
12 agreement Novell would be selling certain specified assets  
13 to Santa Cruz?

14 A Yes.

15 Q To your understanding, what did Novell get in return  
16 for the assets that it did transfer or sell to Santa Cruz?

17 A Essentially stock in the company. The company was  
18 relatively small. It didn't have a lot of cash to buy the  
19 business. We eventually came to an agreement that they  
20 would issue new shares to Novell to become a partial owner,  
21 smaller owner, I think it was 17 percent of the company  
22 ultimately, in exchange for the assets that they wanted to  
23 acquire.

24 Q And did you ever attempt to place some sort of  
25 valuation on the stock shares in Santa Cruz that Novell

1 obtained from Santa Cruz as part of this transaction?

2 A Absolutely. We had to do that both in terms of  
3 negotiating, understanding the value, but also in terms of  
4 external reporting, what do we get. So that's part of our  
5 books and records.

6 Q What was the valuation that Novell arrived at in terms  
7 of the Santa Cruz stock it obtained?

8 A It was -- I would say around \$50 million. Six million  
9 shares, and we determined a price of -- it was about \$8.50  
10 or 70 cents. If you like, I can tell you how that gets  
11 arrived at.

12 Q Perhaps you might. My suspicion is it's a fairly  
13 detailed accounting mechanism, but if you could summarize  
14 for us how that value was arrived at.

15 A I can. Maybe specifically for the jury, how does one  
16 come up with these things, how does one determine the value  
17 of something. Santa Cruz Operation was a publicly traded  
18 company. So there was a value that could be determined  
19 every day by looking in the paper and saying what is Santa  
20 Cruz Operation's stock worth. Well, it's \$10 and something  
21 a share. But a company's value in its stock -- the price  
22 per share is impacted by how many shares there are.

23 Sometimes I talk about this as a pizza or a piece of  
24 pie to people when I'm explaining it to them saying if the  
25 price of a pizza is \$10 for a large pizza, there are ten

1 slices, you could say it's a dollar a slice. Each one of  
2 those is a share. But if someone were to cut all of those  
3 pieces in half, now what is a piece worth, what's a share  
4 worth. Well, it's half. It's less.

5 So in the case of a company that had a value, it was  
6 the value in the paper every day. Let's call it \$10 a  
7 share. They were going to create new pieces. They were  
8 going to create six million new slices, new shares. So the  
9 value per share would be less.

10 So some work was done consistent with other accounting  
11 principles at the time to say how much less, and we came up  
12 with the \$8.70 as being about 15 percent less per share than  
13 the current traded value because there is a whole lot more  
14 shares showing up. They just issued pieces of paper to us.  
15 So the ownership of the company, now it was worth this much.

16 Now, you know, it hasn't changed in value, but the  
17 value of a slice or one share has decreased because now  
18 there's more shares. So we came up with the \$8.71. And it  
19 was reviewed by our auditors as a reasonable assessment, and  
20 the attorneys, and that's the numbers we used for our SEC  
21 filings.

22 Q When you say SEC filings, what do you mean?

23 A Securities and Exchange Commission, a public company  
24 periodically reporting.

25 Q Now if I could direct your attention -- this will

1 likely be on the screen for you -- to what has been admitted  
2 into evidence as Exhibit 1. It's the asset purchase  
3 agreement by and between The Santa Cruz Operation, Inc. and  
4 Novell, Inc. dated September 19th, 1995. In particular, I  
5 would like to direct your attention, Mr. Tolonen, to a  
6 provision in the asset purchase agreement, and that would  
7 be -- this will show on your screen as well -- section 1.1  
8 under the heading the acquisition. And this, so you know,  
9 Mr. Tolonen, by now is very familiar to the jury, but I  
10 would like to have you focus on this.

11 It states under 1.1(a) the following, purchase and sale  
12 of assets. On the terms and subject to the conditions set  
13 forth in this agreement, seller -- let me pause there. Did  
14 you understand under this asset purchase agreement that the  
15 seller was Novell?

16 A That's correct.

17 Q And it continues, will sell, convey, transfer, assign  
18 and deliver to buyer -- let me pause again. Did you  
19 understand the buyer to be Santa Cruz Operation?

20 A I did.

21 Q And buyer will purchase and acquire from seller on the  
22 closing date, as defined in section 1.7, all of seller's  
23 right, title and interest in and to the assets and  
24 properties of seller relating to the business, collectively  
25 live the assets, identified on schedule 1.1(a) hereto.

1 Notwithstanding the foregoing, the assets to be so purchased  
2 shall not include those assets, the excluded assets, as set  
3 forth on schedule 1.1(b).

4 My question to you is, did you have an understanding,  
5 as you reviewed the asset purchase agreement, that what  
6 Novell would be selling or transferring to Santa Cruz would  
7 be set forth in schedule 1.1(a)?

8 A Absolutely. That's the nature of an asset and purchase  
9 agreement. This is what you get and this is what you don't  
10 get.

11 Q Did you also have an understanding that assets that  
12 would be excluded, that is that would not be purchased by  
13 Santa Cruz, would be set forth in schedule 1.1(b)?

14 A Yes, correct.

15 Q Now if we might then turn to schedule 1.1(b) of the  
16 asset purchase agreement. You will see that on the screen.  
17 You will see that on page 2 of that schedule under the  
18 heading Roman numeral V, intellectual property, it  
19 references as excluded assets, quote, all copyrights and  
20 trademarks, except for the trademarks UNIX and UnixWare.  
21 And then section B -- subsection B is all patents. Do you  
22 see that?

23 A Yes, I do.

24 Q Was it your understanding at Novell that Novell  
25 purposefully was excluding from the assets to be transferred

1 under the asset purchase agreement all copyrights and  
2 trademarks except for the trademarks UNIX and UnixWare?

3 A Yes, absolutely.

4 Q Did you also understand that Novell was excluding from  
5 the asset purchase agreement all patents?

6 A Yes.

7 Q Why was it that Novell was excluding all copyrights and  
8 trademarks except for the trademarks UNIX and UnixWare?

9 A It was part of our strategy and really necessary under  
10 the nature of the transaction in light of the value in the  
11 software is in its ownership, and the ownership is often  
12 controlled by the copyrights, just like the ownership of a  
13 book would be. Software is a little more complex than that.  
14 It doesn't have an ending necessarily. New chapters keep  
15 getting added and software keeps getting written and  
16 modified. So who has rights to what becomes very important,  
17 one.

18 Two, Santa Cruz Operation was relatively small and  
19 couldn't afford the entire value of -- or a greater value  
20 than what was the list of assets acquired, so the things  
21 that were retained were part of that price negotiation, what  
22 do you get for how much can you pay. And it was important  
23 strategically to Novell. We had other customers. They were  
24 larger customers. They were important industry customers  
25 who were licensing product and technology from us, that we



1 retained the rights to the royalty flows off of those. We  
2 had to have the ownership to be able to control those  
3 relationships.

4         And I think there are probably two other reasons. One  
5 was we had intermingled at some level the operating groups.  
6 We knew exactly what we were selling, but we didn't want to  
7 have any ownership questions on the code we retained, our  
8 NetWare operating system, who owns that. So we wanted to be  
9 clear we still owned the copyrights and the UNIX code from  
10 Bell Labs.

11         And we had some concerns over the long-term viability  
12 of Santa Cruz Operation. There's lots of mergers and  
13 acquisitions in software, what if they were going to be  
14 acquired by another company, one that would be a competitor  
15 to Novell, so we didn't want to have any rights brought into  
16 question or any of our own ownership rights of the software  
17 brought into question in such a situation. So it was a  
18 critical part of the agreement.

19 Q       Were you aware that all copyrights and trademarks,  
20 except for the trademarks UNIX and UnixWare, and all patents  
21 were going to be excluded from the transaction before the  
22 asset purchase agreement was signed?

23 A       Does anyone know how an agreement ends until it ends.  
24 It's not done until it's done. Were there negotiations  
25 about what goes, what doesn't go, what's on each list? Of

1 course.

2 Q Were you surprised by the inclusion of this language in  
3 the asset purchase agreement?

4 A No. It was an important element to the strategy from  
5 Novell's point of view.

6 Q Did you consider this to be a lawyer's error or a  
7 scrivener's error or a mistake?

8 A Absolutely not. In fact, it was expressly called out  
9 in the board of directors resolution that that was one of  
10 the things we were keeping.

11 Q Did you consider Novell's outside counsel, Tor Braham  
12 at the Wilson Sonsini firm, to be operating out of control  
13 or out of his authority in preparing the asset purchase  
14 agreement which included the excluded asset schedule that  
15 we've been looking at?

16 A No. A very smart guy doing a very quality job.

17 Q Did you understand Mr. Braham and the other attorneys  
18 at Wilson Sonsini to be acting at the direction of Novell  
19 management, including yourself, in the preparation of the  
20 asset purchase agreement?

21 A Yes.

22 Q After the asset purchase agreement was signed on  
23 September 19th, 1995, did you have any further involvement  
24 with the asset purchase agreement or the transaction prior  
25 to the date that it closed later in December?

1 A I would say casual involvement. It's my recollection  
2 that I was assigned to another project. This one,  
3 essentially the asset purchase agreement part, was  
4 concluded. There was some tidying up to do in the contract.  
5 There was an amendment that I kept abreast of but was not as  
6 actively involved in those, called clean up points.

7 Q Between the time that the initial asset purchase  
8 agreement was signed in September 19th, 1995 and the actual  
9 close of the transaction in December 1995, did you ever have  
10 occasion to make any presentations to the Novell board of  
11 directors regarding what was going on between Santa Cruz and  
12 Novell pursuant to the asset purchase agreement?

13 A Yes.

14 Q Could you generally describe that for the jury?

15 A As a chief financial officer, I was not a member of the  
16 board of directors. Generally that is the case. But like  
17 the general counsel, the chief financial officer is often  
18 called on to go to board meetings to make presentations, and  
19 I was present at many of those board meetings. I made  
20 several presentations to the board about the status of the  
21 contract and about the ongoing business relationship. As I  
22 said, the contract itself was part of it, but then there's  
23 also the integrations and how is it going, and what are the  
24 accounting aspects of the transaction and how it gets  
25 reported.

1 Q At any time during any of the interim Novell board of  
2 directors meetings from the date that the asset purchase  
3 agreement was signed in September until the asset purchase  
4 agreement closed in September, were there ever any  
5 discussions that you were a party to at the board level or  
6 any member of the board or any other invited executive  
7 questioned or wondered whether copyrights and trademarks  
8 other than the trademarks UNIX and UnixWare were being in  
9 fact sold to Santa Cruz?

10 A Not that I'm aware of, no.

11 Q You mentioned there had been an Amendment No. 1.

12 MR. BRENNAN: If we could place on the screen a  
13 portion of Exhibit 1.

14 This is actually T-5. Your Honor, I believe T-5  
15 is in evidence already. Just for Your Honor's benefit, this  
16 also is a replication of part of Exhibit 1 in evidence.

17 BY MR. BRENNAN:

18 Q Mr. Tolonen, if I could direct your attention to  
19 Exhibit T-5. Does this appear to be Amendment No. 1 to the  
20 asset purchase agreement?

21 A It does. Appears to be.

22 Q To your understanding, did Amendment No. 1 change or  
23 modify the exclusion in the initial asset purchase agreement  
24 so that the initial asset purchase agreement was changed and  
25 copyrights or trademarks other than UNIX or UnixWare would

1 then be sold or transferred to Santa Cruz Operation?

2 A No, I do not believe it made that change.

3 Q You mentioned earlier that, to your understanding,  
4 there had been a resolution by the Novell board of directors  
5 approving the asset purchase agreement; is that correct?

6 A That is correct.

7 Q And did you have an understanding as to whether the  
8 Novell board of directors actually included a resolution  
9 that specifically approved of the exclusion of copyrights  
10 and trademarks?

11 A That's correct as well.

12 Q To your understanding, was the initial asset purchase  
13 agreement signed by Mr. Robert Frankenberg?

14 A Yes, it was.

15 Q To your understanding, who was Mr. Frankenberg?

16 A He was the chief executive officer, CEO that replaced  
17 Ray Noorda when Ray Noorda retired.

18 Q To your observation, who was more involved from a  
19 senior management level in the asset purchase agreement,  
20 yourself or Mr. Frankenberg?

21 A Myself. There was a team of executives on the outside  
22 counsel who were working on it day after day after day.  
23 Bob, as the CEO, was the ultimate signator, but we all had  
24 to give our review and approval that says yes, our work is  
25 done and you are okay to go here and sign this.

1 Q Now did there come a time while you still were the  
2 Novell chief financial officer that there was Amendment No.  
3 2 to the asset purchase agreement that was discussed?

4 A Yes. That was about maybe a year later.

5 Q And I would like to have you focus your attention on  
6 what became ultimately Amendment No. 2. Did you have any  
7 role or involvement in what became Amendment No. 2?

8 A Yes. I was the signer of that amendment.

9 MR. BRENNAN: Your Honor, I believe we have in  
10 evidence Exhibit N-8. Maybe we can just confirm that. If  
11 not, I'll move it. It also is a part of Exhibit 1 in  
12 evidence.

13 THE COURT: N-8 has not yet been admitted.

14 BY MR. BRENNAN:

15 Q Mr. Tolonen, if you will look at what's on the screen.  
16 It's titled Amendment No. 2 to the asset purchase agreement.  
17 If we could scroll down, for your benefit, to the second  
18 page, I believe you'll see a signature. Is that your  
19 signature?

20 A Yes, it is.

21 MR. BRENNAN: Your Honor, for ease of reference, I  
22 do wish to move into evidence Novell Exhibit N-8, Amendment  
23 No. 2.

24 THE COURT: Any objection?

25 MR. HATCH: It's already in as Exhibit 1, Your

1 Honor.

2 MR. BRENNAN: I do recognize it is part of the  
3 larger Exhibit 1, but just for ease of reference for this  
4 examination it would help to have this separately.

5 THE COURT: It will be admitted.

6 (Defendant's Exhibit N-8 was received into  
7 evidence.)

8 MR. BRENNAN: Thank you, Your Honor.

9 BY MR. BRENNAN:

10 Q Mr. Tolonen, looking at the top of Amendment No. 2, if  
11 we could just highlight that first provision, it states,  
12 quote -- if I'm reading correctly -- as of the 16th day of  
13 October, 1996. Did I read that date correctly?

14 A It looks correct to me, yes.

15 Q The September 19, 1995 asset purchase agreement, the  
16 agreement, between Novell, Inc. and The Santa Cruz Operation  
17 is amended in the following respects. And then if I could  
18 have you focus on paragraph A. I will highlight that. That  
19 continues, quote, with respect to schedule 1.1(b) of the  
20 agreement titled Excluded Assets, section V, subsection A  
21 shall be revised to read, colon, all copyrights and  
22 trademarks, except for the copyrights and trademarks owned  
23 by Novell as of the date of the agreement required for SCO  
24 to exercise its rights with respect to the acquisition of  
25 UNIX and UnixWare technologies. However, in no event shall

1 Novell be liable to SCO for any claim brought by any third  
2 party pertaining to said copyrights and trademarks.

3 Now with that particular language in mind, my question  
4 is did you approve of this Amendment No. 2?

5 A I signed it.

6 Q So I would like to step back in time and talk about  
7 with you how Amendment No. 2 came to be. First of all, did  
8 you work with anyone else at Novell in terms of the legal  
9 draftsmanship of Amendment No. 2?

10 A There was a young attorney, Allison, that worked for  
11 David Bradford that was involved. I think David also  
12 reviewed it.

13 Q Do you remember this young attorney, her name would be  
14 Allison Lisbon?

15 A Yes, that's correct.

16 Q Did you have any interaction with Ms. Lisbon regarding  
17 Amendment No. 2?

18 A Yes, I did.

19 Q Now before Amendment No. 2 was approved and entered  
20 into, were you aware that there had been a previous draft  
21 that had been proposed by Santa Cruz Operation?

22 A Yes, I was.

23 Q If I could direct your attention to Novell Exhibit  
24 T-34.

25 MR. BRENNAN: Your Honor, this is not yet in



1 evidence.

2 BY MR. BRENNAN:

3 Q It will either be on the screen or there is also a  
4 binder in front of if you if you would like a hard copy of  
5 this document.

6 Are you able to see it on the screen?

7 A Yes, I can see that.

8 Q For your benefit, if we could display the whole  
9 document, you will see that what is before you doesn't have  
10 any signatures on it, correct?

11 A Correct.

12 Q To your understanding is T-34 a draft of Amendment No.  
13 2 that was proposed by Santa Cruz Operation?

14 A I'll take your word that that was the draft. It's a  
15 little hard to read on the screen without the full size  
16 here.

17 Q Perhaps what we could do is highlight, so you can see a  
18 little more clearly, paragraph A of the proposed Amendment  
19 No. 2. And looking at that language, does this appear  
20 clear?

21 A Yes, that helps. There was some language here that was  
22 in an early draft, and I'm presuming it was the one proposed  
23 by SCO, that was unacceptable to us and we deleted certain  
24 parts of that.

25 MR. BRENNAN: Your Honor, I wish to move into

1 evidence Novell Exhibit T-34.

2 MR. HATCH: Your Honor, I don't think he has  
3 established foundation with this witness.

4 THE COURT: I'll overrule the objection. It will  
5 be admitted.

6 (Defendant's Exhibit T-34 was received into  
7 evidence.)

8 MR. BRENNAN: Thank you, Your Honor.

9 Now if we could then have displayed to the jury  
10 what is highlighted.

11 BY MR. BRENNAN:

12 Q Let's look at the language that was proposed by Santa  
13 Cruz Operation. The proposed language for Amendment No. 2  
14 was, quote, with respect to schedule 1.1(b) of the  
15 agreement, titled Excluded Assets, section V, subsection A  
16 shall be revised to read: All copyrights and trademarks,  
17 except for the copyrights and trademarks owned by Novell as  
18 of the date of this Amendment No. 2, which pertain to the  
19 UNIX and UnixWare technologies and which SCO has acquired  
20 hereunder. However, in no event shall Novell be liable to  
21 SCO for any claim brought by any third party pertaining to  
22 said copyrights and trademarks.

23 Do you see that language?

24 A Yes, I do.

25 Q Was the language that was selected for this subpart A

1 unacceptable to Novell?

2 A Yes, it was.

3 Q Why was that?

4 A Because SCO had not acquired all of the copyrights  
5 under the -- as of the purchase agreement.

6 Q So was your understanding, then, the reason for  
7 rejecting the proposed language that Santa Cruz offered was  
8 because it suggested that SCO would have acquired all the  
9 copyrights?

10 A Yes.

11 Q I would like to ask you for just a minute about those  
12 who might have or might not have been involved with  
13 Amendment No. 2. You are familiar with an individual by the  
14 name of Ed Chatlos?

15 A Yes.

16 Q Was Mr. Chatlos involved in any way in the negotiation  
17 or preparation or approval of Amendment No. 2?

18 A No, not to my knowledge. He was involved with the SCO  
19 Operation and was part of the UNIX system sale, the UNIX and  
20 UnixWare sale. But no, he was not a negotiator.

21 Q And you are familiar with an individual by the name of  
22 Duff Thompson?

23 A Yes.

24 Q Who was Duff Thompson?

25 A He was a Novell employee who came to Novell through

1 another acquisition. He was an attorney by training and was  
2 working in the Novell business development group. In fact,  
3 was involved in between the two parts of the contract.  
4 Where I was involved, I was involved in the main asset  
5 purchase agreement and this amendment, and he was involved  
6 in helping clean up the contract in Amendment No. 1.

7 Q To your observation, was Mr. Thompson involved at all  
8 in the negotiation, drafting or ultimate approval of  
9 Amendment No. 2?

10 A At all is a little -- I don't recall his involvement,  
11 no, in any significant way.

12 Q Are you familiar with an individual by the name of Ty  
13 Mattingly?

14 A Yes.

15 Q Who do you understand Mr. Mattingly to be?

16 A He was an assistant to Ray and a mid level manager who  
17 was also working in the business development group.

18 Q To your observation, was Mr. Mattingly involved in any  
19 way with Amendment No. 2?

20 A Probably not directly or specifically, no.

21 Q If we might, I would like to turn back to Trial Exhibit  
22 N-8 in evidence. This is the Amendment No. 2 that was  
23 signed and approved by both parties. To your understanding,  
24 what was the purpose of Amendment No. 2?

25 MR. BRENNAN: In particular, go back and highlight

1 section A of Amendment No. 2.

2 THE WITNESS: Sure. I would describe Amendment 2  
3 as similar to Amendment 1 in that it was generally a clean  
4 up type of amendment, not deemed a material or significant  
5 amendment in terms of changing of the asset purchase  
6 agreement, but improving clarity.

7 The primary discussion was around how -- it was  
8 both in Amendment No. 1 and 2, how do the two companies deal  
9 with third parties who are other licensees of UNIX. So how  
10 does SCO and Novell deal with IBM or with Sun or with other  
11 companies in developing process and procedures around how  
12 would we make that work smoothly and best for all parties  
13 concerned. That's what the latter half is.

14 In this particular case, it was proposed by SCO  
15 that there should be some changes to make clear that they  
16 had rights they would need. Copyright laws -- I'm not a  
17 lawyer, so this may not be perfect, but there is the  
18 ownership of the copyright and then use licenses. You could  
19 say there are also lots of nuance of that. There can be a  
20 use license for a territory or a use license for a  
21 particular operating system or a computer system. So you  
22 can carve up the licenses in lots of ways, often done by the  
23 owner as licensing to multiple different parties for  
24 different uses.

25 One might think of that as like in a book or a

1 movie, you have the rights to distribute this movie in  
2 Chinese, or in Europe, or whatever, but you don't own the  
3 movie. You get -- for a certain amount of money, you get  
4 the rights to use this in some fashion.

5           There was a concern that was raised that was it  
6 clear that SCO had the right use rights they needed with  
7 regard to the acquisition of UNIX and UnixWare, and we  
8 wanted to be clear that, of course, they should have the  
9 right use rights. It's not an ownership question. It's a  
10 use question. This was designed to try and address that.  
11 Clearly, they weren't excluded the use part. They were  
12 allowed the use that they needed for the acquisition of UNIX  
13 and UnixWare.

14 BY MR. BRENNAN:

15 Q   Now under Amendment No. 2 did Novell intend to transfer  
16 actual ownership of UNIX copyrights to Santa Cruz?

17 A   No, absolutely not.

18 Q   Did you ever tell anyone that Novell intended to  
19 transfer ownership of the UNIX copyrights to Santa Cruz by  
20 or under Amendment No. 2?

21 A   No. In fact, that language was taken out of the  
22 earlier draft.

23 Q   In any of your dealings with the Novell board of  
24 directors, did you ever suggest to the board or make any  
25 reports to the board suggesting that under Amendment No. 2

1 Novell was transferring ownership of the UNIX copyrights?

2 A No. That would have been contrary to the resolution  
3 which excluded them.

4 Q Now with what you just said in mind, that is that the  
5 initial resolution relative to the asset purchase agreement  
6 was by resolution of the board?

7 A Yes.

8 Q And, in particular, there was a resolution regarding  
9 exclusion of copyrights, correct?

10 A That's correct.

11 Q When you signed Amendment No. 2, did you go back to the  
12 board of directors and get approval to sign Amendment No. 2?

13 A No, I did not.

14 Q Why is that?

15 A It was not any change in the original asset purchase  
16 agreement exclusion, it was a clarification of the terms of  
17 that agreement.

18 Q If under Amendment No. 2 there had been an actual  
19 transfer of ownership of the UNIX copyrights to Santa Cruz,  
20 do you believe that that would have been a material change  
21 that would have required board of director approval by  
22 Novell?

23 A Yes. There would have been an easy way to do that, put  
24 it on the schedule of included assets, which we clearly did  
25 not do.

1 Q Why is it that you think Amendment No. 2 did not  
2 transfer ownership of the UNIX copyrights to Santa Cruz?

3 A It was not its intent.

4 Q Now we've talked about the schedule 1.1(b) of the asset  
5 purchase agreement, which is the excluded assets. Under  
6 Amendment No. 2, did Amendment No. 2 also change the  
7 schedule of included assets?

8 A No, it did not.

9 Q Do you know when Novell closed the deal with Santa Cruz  
10 in December of 1995, whether there was a bill of sale for  
11 the assets being transferred?

12 A Yes, there was.

13 Q And in connection with Amendment No. 2, was there a  
14 revision of that bill of sale to include any UNIX related  
15 copyrights?

16 A No, there was not.

17 Q Do you have a financial interest in the outcome of this  
18 litigation?

19 A No, I do not.

20 MR. BRENNAN: Mr. Tolonen, thank you. I have no  
21 further questions at this time.

22 THE COURT: Mr. Hatch.

23 CROSS-EXAMINATION

24 BY MR. HATCH:

25 Q Good morning, Mr. Tolonen.



1 A Good morning.

2 Q Now you indicated I think in your testimony that you  
3 were one of two or three key executives at Novell who were  
4 handling the transaction, the APA, correct?

5 A Yes, that's correct.

6 Q Do you know what the name of the -- the code name that  
7 was given internally to Novell for this project?

8 A I don't recall the code name. We had lots of acronyms  
9 and code names.

10 Q You were the key executive and you didn't know what the  
11 actual code name was?

12 A I probably did 20 different code names, mergers and  
13 acquisitions while I was at Novell.

14 Q Is it possible that you've overstated your role in this  
15 deal?

16 A No, I do not believe I have.

17 MR. HATCH: Let me have -- let's go to Exhibit 86.

18 BY MR. HATCH:

19 Q Do you see this document, Mr. Tolonen?

20 A Yes, I can see it.

21 Q Do you know who Ed Chatlos is?

22 A I do.

23 Q Have you ever heard of the term sleigh ride team?

24 A That was the business development team's code name for  
25 this project.

1 Q And the people on here are people that you understood  
2 were involved in this transaction, correct?

3 A On the business development side, yes. Not so much on  
4 the contract side.

5 Q Have you seen this document before?

6 A I don't see that I'm on the to list. I may have seen  
7 it. I don't recall.

8 Q You understand that this is Mr. Chatlos talking to the  
9 entire sleigh ride team, correct?

10 A The business development team, yes.

11 Q From people from both sides, correct?

12 A I see this is a memo from Ed Chatlos, yes.

13 MR. HATCH: Your Honor, I would move Exhibit 86  
14 into evidence.

15 MR. BRENNAN: Your Honor, I don't think they have  
16 laid a foundation for this.

17 THE COURT: I would have to agree. He says he's  
18 never seen it, he's never seen it.

19 MR. HATCH: All right. I would agree, too. If  
20 he's not part of the team, he's not here.

21 MR. BRENNAN: Your Honor, that's just argument. I  
22 move to strike.

23 BY MR. HATCH:

24 Q Well, let me ask you, sir --

25 THE COURT: Just a second. The Court will agree

1 with Mr. Brennan, that Mr. Hatch's comment was testifying  
2 and ask the jury to disregard his comment.

3 BY MR. HATCH:

4 Q This memo from Ed Chatlos, you understood him to be  
5 who?

6 A Certainly this was a large transaction that probably  
7 had dozens and dozens and dozens of people involved trying  
8 to keep up with its status, which were people had different  
9 roles. I was the key executive assigned by the company to  
10 be the business executive on the APA. It doesn't say there  
11 weren't other e-mails going around about trying to keep up.

12 Q Mr. Duff Thompson is on this document, correct?

13 A Yes.

14 MR. HATCH: Your Honor, I would represent that  
15 we've left open Mr. Thompson coming back, if necessary, for  
16 things just like this. We'll bring him back if we have to  
17 verify this document, and I would proffer that. I don't  
18 know if that would change the objection of Mr. Brennan or  
19 not.

20 MR. BRENNAN: I assume it's up to them as to who  
21 they would like to bring back, Your Honor. We'll have to  
22 wait and see if they make that presentation.

23 MR. HATCH: I would like to use the document with  
24 that proffer.

25 THE COURT: Mr. Brennan, I recall on one occasion

1 I allowed you to use a document based upon your  
2 representation that the foundation for it would be  
3 subsequent. I think I have to extend the same courtesy.

4 MR. BRENNAN: Certainly. We would like to extend  
5 every courtesy, Your Honor.

6 THE COURT: Mr. Hatch --

7 MR. BRENNAN: Your Honor, I'm sorry. On that  
8 point, given the representation, we're assuming that  
9 Mr. Thompson will, in fact, be brought back.

10 THE COURT: That's what I'm going to verify.

11 MR. HATCH: Your Honor, I'm trying to make sure  
12 that somebody from my team knows whether he's available or  
13 not, so let me see.

14 MR. BRENNAN: So, Your Honor, I suppose -- I do  
15 want to extend every courtesy, but I think we need to have a  
16 firm commitment.

17 THE COURT: I would agree with you, Mr. Brennan.

18 MR. HATCH: Let me do it this way, Your Honor.

19 BY MR. HATCH:

20 Q Do you know who Robert Shimp is?

21 A I recall the name.

22 Q Do you know who he is?

23 A I don't know him personally. I have met him. He was a  
24 another employee at the time.

25 Q Do you know who Ty Mattingly is?

- 1 A Yes, absolutely.
- 2 Q He's part of the sleigh ride team?
- 3 A Business development team.
- 4 Q Do you know who Art Sabsevitz is?
- 5 A I don't recall that name.
- 6 Q Do you know who Jim Machi is?
- 7 A I do recall him being involved in the project.
- 8 Q From which side? Who does he work for?
- 9 A I don't recall.
- 10 Q You don't recall?
- 11 A I don't recall.
- 12 Q You don't know whether he worked for Santa Cruz or for  
13 Novell?
- 14 A I believe it was on Novell's side.
- 15 Q You are not sure?
- 16 A I believe it was on the Novell side.
- 17 Q How about Lisa Ozimek?
- 18 A I don't recall her.
- 19 Q Don't know which side?
- 20 A Nope.
- 21 Q Do you know who Geoff Seabrook is?
- 22 A Nope.
- 23 Q Don't know which side, Novell or Santa Cruz?
- 24 A No.
- 25 Q Tor Braham you know?

1 A Absolutely. I worked with him on pretty much a daily  
2 basis on the APA. He was a senior attorney at Wilson, as we  
3 mentioned.

4 Q He didn't tell you about any of these people?

5 A There were dozens and dozens of people on the project.  
6 There were key people and less key people in different parts  
7 of the project, technology team, business development team,  
8 contract team, and senior executives reviewing the work.

9 Q How about Bill Traber -- excuse me, Biff Traber?

10 A Yes. These were also people I knew. This whole list  
11 of people, people on the technology or business development.

12 Q But do you know who Biff Traber is?

13 A I've met him, but I didn't have a lot of dealing or  
14 interaction with him.

15 Q Do you know if he worked for Novell or Santa Cruz?

16 A I believe this was Novell as well.

17 Q How about Ron Palmeri?

18 A Yes, Novell.

19 Q Do you know David Black?

20 A I don't recall.

21 Q You don't know whether he worked for Novell or Santa  
22 Cruz?

23 A I believe this whole list was Novell.

24 Q You believe the whole list is Novell?

25 A Ted Smith was, Duff Thompson was, Jeff Turner was.

1 Q Geoff Seabrook wasn't, was he?

2 A I don't recall.

3 Q Ted Smith you know.

4 Burt Levine?

5 A I don't recall. I think he might have been on the UNIX

6 system lab side.

7 Q You think Burt Levine was from where?

8 A I don't recall.

9 Q You didn't know that he was the lawyer for Novell?

10 A He was a more junior lawyer. I worked with a higher

11 level, his boss, and our outside counsel.

12 Q Your name doesn't appear on here anywhere, does it?

13 MR. BRENNAN: Objection. That's been asked and

14 answered, Your Honor.

15 THE COURT: Sustained.

16 MR. HATCH: Thank you, Your Honor. I just wanted

17 to make sure.

18 BY MR. HATCH:

19 Q There is one other name on here, Gary Daniels. Do you

20 know Gary Daniels?

21 A I don't see that name. Where's that?

22 I don't recall.

23 Q What is the date on this document?

24 A September 2nd.

25 Q 1995?

1 A Yes.

2 Q This deal closed -- I mean this deal was originally  
3 presented to the board on the 18th of September, correct?

4 A Correct.

5 Q The packet was given to the board on the 15th of  
6 September, correct?

7 A I believe that's correct, to review.

8 Q So you are not appearing on a document that's less than  
9 two weeks before the board is being presented with the deal;  
10 is that right?

11 A I am not appearing on this document. I was getting  
12 copies of the drafts to review.

13 Q You are not able to identify a significant number of  
14 these people, are you?

15 MR. BRENNAN: Objection, Your Honor. That  
16 mischaracterizes the witness's prior testimony.

17 MR. HATCH: I'll move on.

18 THE COURT: All right.

19 BY MR. HATCH:

20 Q When did the face-to-face negotiating with Santa Cruz  
21 start?

22 A In the spring of '95. We had been talking to them for  
23 quite a while, so it was maybe late spring, late June, July,  
24 early summer where the intensity increased.

25 Q Somewhere between spring and late July?



1 A Yes.

2 Q Did you go to California as part of those negotiations?

3 A I'm sorry? I was living in California and, yes, I was  
4 at the Santa Cruz Operation site on occasion, yes.

5 Q How often did you go?

6 MR. BRENNAN: Is the question, just so we're  
7 clear, how often did he go to California?

8 BY MR. HATCH:

9 Q Well, you understood Mr. Chatlos went to have  
10 face-to-face negotiations with Santa Cruz Operation,  
11 correct?

12 A I went on occasion because I was more of the senior  
13 review level of the entire strategy and contract, not so  
14 much the day-to-day. I was working with David Bradford, Tor  
15 Braham, Mike DeFazio, the senior executives on the project,  
16 not all the other dozens of people involved on a daily  
17 basis.

18 Q David Bradford and Tor Braham. But I'm talking -- you  
19 are aware that Mr. Chatlos went to have face-to-face  
20 negotiations with the Santa Cruz Operation?

21 A Of course.

22 Q And were you aware that Mr. Thompson -- Duff Thompson  
23 went as well?

24 A Yes. He later became one of the Novell representatives  
25 on the board for Santa Cruz. He certainly was involved in

1 the ongoing relationship. He was relatively new to Novell,  
2 so he was -- he was technically an attorney, so he was moved  
3 into the business development group. And they had a lot of  
4 daily interaction with trying to move this project forward,  
5 but not so much with the strategy and the legal contract  
6 review that the general counsel and the CFO must have  
7 representing a company. We were the ultimate approvers for  
8 Frankenberg.

9 Q Now are you saying that you went with Mr. Chatlos and  
10 Mr. Thompson with these face-to-face meetings that they  
11 conducted over a course of three months in California?

12 A I said on several occasions I was on-site at Santa Cruz  
13 Operation. Do I recall who was there at each meeting? I do  
14 not.

15 Q That wasn't quite my question.

16 You say you were on-site, you were there looking at  
17 financial documents, then, I guess on a couple of occasions?

18 A Documents associated with the purchase agreement, yes.

19 Q I'm asking you a different question. I'm asking you  
20 during the three months that Mr. Chatlos was negotiating  
21 face-to-face with representatives of the Santa Cruz  
22 Operation, ultimately to culminate in the APA, were you part  
23 of those negotiations with Mr. Chatlos?

24 A I don't recall all of them. Was I part of the  
25 negotiations? Absolutely. Was I on-site during all of

1 those negotiations? No, of course not.

2 Q He testified he was there literally daily for three  
3 months?

4 A They were. It was a very complicated transaction, lots  
5 of things. I think to liken it maybe to a field operation  
6 versus the general that has got all the strategy pieces on  
7 the strategist side.

8 Q Let's talk about that for just a second. You talked  
9 about the field workers and the general. Who is the general  
10 in this whole deal?

11 A The general of the whole deal was probably Ray Noorda.  
12 Initially Bob Frankenberg in terms of saying we want to do  
13 this deal. Now how does it get executed relies on all the  
14 parts to execute it. Complicated transaction, taking  
15 months.

16 Q Ray Noorda, how was Mr. Noorda --

17 A It was originally part of his strategy to diversify the  
18 UNIX. So the start of the strategy was even before  
19 Frankenberg came on.

20 Q That's long before Santa Cruz Operation --

21 A They were a licensee at the time.

22 Q Mr. Noorda didn't have anything to do with --

23 A With the APA, that's correct, but the strategy.

24 Q Why did you raise his name?

25 MR. BRENNAN: Objection. We're just arguing with

1 the witness at this juncture.

2 MR. HATCH: No, we're not.

3 MR. BRENNAN: I move to strike.

4 THE COURT: Overruled.

5 THE WITNESS: I was mentioning it because of the  
6 overall strategy -- the corporate strategy, which I was  
7 involved with before UNIX System Labs, before Duff was a  
8 part of the company, before the entire process.

9 BY MR. HATCH:

10 Q So you are moving back years before?

11 A And through this process and after the process. In  
12 '92, I was back on the process in signing it.

13 Q Let's be real clear with the jury here. Mr. Noorda  
14 wasn't there when Amendment 2 was involved?

15 A That's correct.

16 Q Mr. Noorda wasn't there when the APA was signed?

17 A That is absolutely correct.

18 Q So you are saying Mr. Noorda was involved years before?

19 A Embarking on the strategy of which I was a part, yes,  
20 correct.

21 Q Would it surprise you that Mr. Frankenberg, who was the  
22 number one guy at Novell, never mentioned you as part of the  
23 team when he testified here?

24 A Yeah, that would surprise me.

25 Q Would it surprise you that Mr. Thompson, the person

1 Mr. Frankenberg tasked with the sleigh ride project, never  
2 mentioned you as part of the team?

3 A That might not surprise me so much. I didn't work with  
4 him on a regular and daily basis. As I said, he was in the  
5 business development group and I was working with the legal  
6 and the contract and the finance groups.

7 Q Mr. Chatlos was here too, would it surprise you that he  
8 didn't mention you as part of the negotiating team?

9 A That would surprise me as well.

10 Q I believe Mr. Mattingly didn't mention you either.  
11 Would that surprise you?

12 A That would surprise me.

13 We may be talking definitions. Specific negotiating  
14 team was a group of people out in the field. The people  
15 that had the signature authority and the review authority  
16 and the board of directors and the shareholders' interests  
17 were the senior executives, DeFazio, David Bradford and  
18 myself, the senior executives in the company on these  
19 projects.

20 Q Let's talk about Mr. Bradford. Mr. Bradford, you  
21 indicated, oversaw some of the legal aspect of this,  
22 correct?

23 A He did.

24 Q Eventually Mr. Bradford -- well, let's do this.

25 I'm going to give you what has been marked as Exhibit

1 G-4.

2 MR. HATCH: Your Honor, I believe this has already  
3 been admitted into evidence.

4 THE COURT: It has.

5 BY MR. HATCH:

6 Q Mr. Tolonen, this is Exhibit G-4. It's already been  
7 marked into evidence. You see that first two pages are the  
8 same document, just one of them has what I call a sticky --  
9 one of those sticky pads that was over the top of the actual  
10 document. Do you see that?

11 A Okay.

12 Q Can you see that --

13 MR. HATCH: Can we go to the first page.

14 BY MR. HATCH:

15 Q Do you see the part up here. Let me try that again. I  
16 never get this. It says, see final sleigh ride agreement  
17 for complete set. Do you see that?

18 A Uh-huh. (Affirmative)

19 Q Now this is a document from who?

20 It says David Bradford, right?

21 A It says it's from David Bradford, correct.

22 Q So Mr. Bradford apparently knew it was called sleigh  
23 ride. We got that?

24 A Uh-huh. (Affirmative)

25 Q He's writing a memo here to Mr. Chatlos, correct?

1 A Correct.

2 Q So it's clear, let's go to the next page. We don't  
3 have the sticky there. And the subject here is the asset  
4 purchase agreement between Novell and Santa Cruz Operation,  
5 Inc., right?

6 A That's the subject.

7 Q And just to be clear, it doesn't say the license  
8 agreement, correct?

9 A Asset purchase agreement, the APA, yes.

10 Q That's what you understood it was right, right? It's  
11 not a license agreement, right?

12 A Asset purchase agreement.

13 Q Thank you.

14 And if we go down, Mr. Bradford is -- he's passing on  
15 the final asset purchase agreement for signature, correct?

16 A Correct.

17 Q And who is this addressed to?

18 A To Ed Chatlos.

19 Q Not to you, right?

20 A He is sending him an agreement, yes, that's correct.

21 MR. HATCH: And let's go down to the paragraph  
22 that starts let me also. Mr. Calvin, if you would highlight  
23 that.

24 BY MR. HATCH:

25 Q It says, let me also congratulate you for the efforts

1 you expended in putting this deal together. Do you see  
2 that?

3 A Uh-huh. (Affirmative)

4 Q Now he's congratulating three groups of people here in  
5 a sense, isn't he? He's congratulating Mr. Chatlos  
6 directly, right?

7 A He is.

8 Q And then you notice on the cc line, he includes two  
9 people here?

10 A Uh-huh. (Affirmative)

11 Q He included Ty Mattingly, right?

12 A Yes.

13 Q And did you understand that he was a key player in the  
14 negotiation of this deal?

15 A He was involved in the process.

16 Q Well --

17 A I was receiving my drafts directly. I didn't have to  
18 get them from Bradford. I was getting them directly, the  
19 same time David did.

20 Q All right. Well, this is -- I mean this letter is  
21 Mr. Bradford sending the final signature page to Mr.  
22 Chatlos so he can give it to Santa Cruz, correct?

23 MR. BRENNAN: Objection, Your Honor, the document  
24 speaks for itself.

25 MR. HATCH: Let's read it.



1 BY MR. HATCH:

2 Q Paragraph 2, he says, the purpose of this memorandum is  
3 to let you know that I have reviewed the final document --  
4 and let Mr. Chatlos know, right?

5 A Uh-huh. (Affirmative)

6 Q -- and find the same to be an accurate reflection of  
7 the business and legal terms and conditions negotiated  
8 between the parties. Okay.

9 A Uh-huh. (Affirmative)

10 Q I therefore approve this asset purchase agreement for  
11 final signature by Bob Frankenberg. He is the head of the  
12 company, right?

13 A He is the CEO, and David is approving the agreement.  
14 Sending them copies they didn't even have.

15 Q You have indicated that you will let him know of my  
16 approval.

17 A That David is giving his approval.

18 Q In other words, Mr. Bradford is going to Mr. Chatlos to  
19 tell Mr. Frankenberg -- excuse me, you have indicated you  
20 will let him know of my approval. In other words, he's  
21 asking Mr. Chatlos to tell the number one guy in the company  
22 that this can go forward?

23 A David is giving his approval and telling someone else  
24 to make sure of that information, correct.

25 Q Then he thanks Mr. Chatlos, on the cc line is Mr.

1 Mattingly, who was part of the deal, and then Ed Smith. Who  
2 is Ed Smith?

3 A He's thanking other members of the business development  
4 team.

5 Q Didn't Ed Smith work for Duff Thompson?

6 A Yes, he did, in the business development team.

7 Q Doesn't this memo cover the three key players,  
8 Mr. Frankenberg, Mr. Chatlos -- excuse me, four -- Mr.  
9 Mattingly, Mr. Thompson through one of his staff?

10 A No, I think it's quite the contrary. It shows none of  
11 them had approval power. That David was approving it.

12 Q David is saying he's given a legal review of it?

13 A I therefore approve this asset purchase agreement.

14 Q Does Mr. Bradford have authority over Mr. Frankenberg?  
15 You're not saying that, are you?

16 A No. I'm saying he's approving it. He's giving his  
17 approval for his review. None of the others, I don't  
18 think -- I don't recall if they were doing that or not.

19 Q Let me ask you this, Mr. Tolonen. We had here in the  
20 first week of trial Mr. Frankenberg, Mr. Chatlos,  
21 Mr. Thompson and Mr. Mattingly. I'll represent to you that  
22 all of them testified in no uncertain terms that the intent  
23 of this deal was to transfer all the assets, including the  
24 copyrights.

25 Is your purpose here to tell this jury that all of

1 those people -- the people who are mentioned here, either  
2 directly or by proxy, were not truthful with the jury when  
3 they testified the first week of this trial?

4 A I'm saying perhaps they didn't understand it or hadn't  
5 read the agreement. It's very clear, as was the board  
6 decision. Those are the things I know about.

7 Q Are you aware of Mr. Bradford attending any of the  
8 negotiation meetings in California?

9 A I don't know whether he did or not. I don't recall. I  
10 suspect he did, although he may have been working on other  
11 projects and delegated some of that.

12 Q Would it be fair to say Mr. Bradford's and the legal  
13 department's role in this was to document the intent of the  
14 parties through a legal document?

15 A Fundamentally, yes. The legal review of the contract  
16 was through David Bradford's approval and the outside Wilson  
17 Sonsini attorneys, absolutely.

18 Q Now I think you indicated you had read a final version  
19 of the APA prior to going to the board, correct?

20 A I believe that's correct, yes. I would have received a  
21 final copy, absolutely.

22 Q Did you typically receive copies of materials that were  
23 going to be sent -- that were sent to the board prior to the  
24 board meetings?

25 A If I was going to be in attendance in the meeting, I

1 would generally receive materials.

2 THE COURT: Please, do not speak over each other.

3 MR. HATCH: I'm trying very hard, Your Honor.

4 BY MR. HATCH:

5 Q Were you in attendance at the board meeting where the  
6 APA was approved?

7 A I don't believe I was at the particular meeting where  
8 it was approved.

9 Q So you can't speak to what happened at that board  
10 meeting?

11 A Correct.

12 Q But did you receive the materials that the board got  
13 prior to that meeting?

14 A Yes. I received a final copy of the agreements to  
15 review.

16 THE COURT: Mr. Hatch, would you find an  
17 appropriate time for us to break for the first break today?

18 You've got flexibility. It doesn't have to be  
19 now, just keep it in mind.

20 MR. HATCH: They are all staring me down now, we  
21 want a break.

22 THE COURT: You don't like having that  
23 responsibility.

24 MR. HATCH: I will bring some exciting background.

25 This will be fine.

1 THE COURT: You're sure?

2 MR. HATCH: I'm not going to incur the wrath of  
3 the jury, Your Honor.

4 THE COURT: We'll take 15 minutes then.

5 (Jury excused)

6 THE COURT: We'll take 15 minutes.

7 (Recess)

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