

2060

1 (Recess)

2 THE COURT: Are we ready, counsel?

3 MR. HATCH: As ready as we can be.

4 MR. BRENNAN: Yes, Your Honor.

5 THE COURT: All right.

6 (WHEREUPON, the jury enters the proceedings.)

7 THE COURT: Go ahead, Mr. Hatch.

8 MR. HATCH: Thank you.

9 BY MR. HATCH

10 Q. Mr. Tolonen, during the break did you have a long
11 discussion about your testimony with your counsel?

12 A. No, a short conversation. He gave me the pep talk and
13 said you're doing fine. Keep up the good work.

14 Q. When we left off we were talking about the preparation
15 for the board meeting on September the 18th. Let me give
16 you what has been marked as Exhibit 754.

17 Do you see that document, sir?

18 A. Yes, I can see that.

19 Q. This is, again, from Mr. Bradford. You worked with him
20 to preparing the board, correct?

21 A. I worked with David Bradford, and he is obviously
22 sending something to me directly from himself and to the
23 board on this transaction.

24 Q. Have you seen this document before?

25 A. I don't know if I did or not. I don't recall. I

1 probably helped prepare it. I probably printed out some of
2 the attachments and prepared some of the -- someone in my
3 group, in the finance group might have done some work for
4 him, for David.

5 Q. We talked about the attachments --

6 A. There is a stock trading chart, and that would have
7 been something that probably came out of one of my groups.
8 There is historical financial performance and analysis,
9 which is something I did or someone from my group did.

10 Q. Then on page 5, if you turn the sheet, there appears to
11 be some financial dealings as well in paragraph three.

12 Do you see that?

13 A. I'm sorry. Paragraph three?

14 Yes.

15 Q. Okay. That would have come from your shop as well?

16 A. It was a mathematical computation and we would have
17 been involved in looking at that to make sure that the
18 numbers were correct and accurate, and that the percentages
19 were under 20 and those things that were important to
20 finance.

21 Q. You were part of the team that tried to help portray
22 accurately things to the board so that they could make
23 decisions accurately and appropriately, correct?

24 A. Yes.

25 MR. HATCH: Your Honor, I would move the admission

1 of Exhibit 754.

2 MR. BRENNAN: Your Honor, no objection. I thought
3 this was already in evidence. Maybe I am mistaken.

4 MR. HATCH: Not in this form.

5 THE COURT: 754 is not. It may be a different
6 number, but --

7 MR. BRENNAN: No objection.

8 THE COURT: It will be admitted.

9 (Plaintiff's Exhibit 754 was
10 received into evidence.)

11 BY MR. HATCH

12 Q. So that the jury can see it, let's go back to the first
13 page, Mr. Tolonen.

14 As we indicated, this is a memorandum from Mr. Bradford
15 to the Novell board of directors?

16 A. Yes.

17 Q. September 15th, correct?

18 A. That is what it says, yes.

19 Q. To your understanding that is just a couple of days
20 before the board of directors meeting, correct?

21 A. Yes.

22 Q. Just so we're clear, the board of directors meeting
23 wherein the A.P.A. was approved?

24 A. Correct.

25 Q. Then page 3, this is the market trading performance

1 chart that you indicated someone on your staff likely made,
2 correct?

3 A. Yes.

4 MR. HATCH: The next page, Mr. Calvin.

5 BY MR. HATCH

6 Q. This is the historical performance analysis that you
7 were talking about as well?

8 A. This could have been my group or it could have been the
9 business development group.

10 Q. Let's go to the next page.

11 In paragraph three, and we will highlight that, it
12 talks about what Novell was receiving from SCO, correct?

13 A. In board of directors terms, correct. It is a summary,
14 not --

15 Q. I understand. It is interesting that you put it that
16 way, in board of directors terms. Is it fair to say that
17 that is not legalese, it is more English?

18 A. It is a letter, it is not the contract, yes, English.

19 Q. You do that for the board because no one expects the
20 board to be able to read and parse a lengthy agreement, so
21 you're trying to give them an executive summary, correct?

22 A. It is an executive summary. Or maybe as an analogy,
23 and when I was talking to the jury I used the pizza analogy,
24 and that was maybe an extreme case, and you wouldn't do that
25 with the board, but maybe looser language than a contract,

1 and it is English not as legal. That's all.

2 Q. But you're trying to put in the important points and
3 not leave anything out?

4 A. Absolutely.

5 Q. You wouldn't want to mislead the board?

6 A. We certainly didn't want to do that.

7 Q. Here you are actually setting forth, at least
8 financially, what Novell is going to get from SCO from
9 entering into the A.P.A., correct?

10 MR. BRENNAN: Objection, Your Honor. That
11 mischaracterizes the witness's testimony. He did not say
12 that he prepared this or that he --

13 MR. HATCH: I think he indicated that he or
14 someone in his group --

15 THE WITNESS: May have contributed to it or the
16 business development group. I was not a board member. I
17 wasn't a director. I was a recipient of this.

18 BY MR. HATCH

19 Q. You're familiar with this language, right?

20 A. I have not seen this document. I don't recall it
21 specifically. I wasn't at that board meeting.

22 Q. Let's do it the way Mr. Brennan wants us to do it and
23 let's walk through it.

24 MR. BRENNAN: Objection, Your Honor. That is just
25 argument and not necessary. I move to strike.

1 MR. HATCH: I'll rephrase, Your Honor.

2 BY MR. HATCH

3 Q. Paragraph 3-A says that Novell is going to get 16
4 percent, stock equal to 16.6 percent of SCO after the
5 transaction. It says 19.9 percent of shares outstanding
6 before the transaction.

7 Do you see that?

8 A. That is correct. I think I mentioned under 20 percent
9 was important.

10 Q. That was important why?

11 A. For accounting reasons, technical accounting reasons
12 and how the transaction is recorded as an asset purchase not
13 as a company -- SCO was not becoming a consolidated entity
14 with Novell.

15 Q. If I understand your prior testimony, and let me make
16 sure, this is how you understood the deal, right?

17 A. I'm sorry? This is how --

18 Q. This part of it --

19 A. That we were receiving this compensation as the payment
20 from SCO of approximately seven and a half percent, 6
21 million shares of their stock, yes.

22 Q. I think you had told the jury when Mr. Brennan was
23 questioning you that that was somewhere between 50 and \$60
24 million of value in your mind?

25 A. Correct.

1 Q. B says 95 percent of all royalties. We are under the
2 heading Novell receives from SCO. The company was putting a
3 value of close to \$50 million on that, correct?

4 A. But it technically wasn't consideration because we
5 owned it 100 percent and they were administering those under
6 the contract.

7 Q. Sir, I think my question was what is the value of that
8 that was put on it by the company?

9 A. The royalties would be retained from the other SVRX
10 royalties, so \$47 million.

11 Q. Just so we are clear it is under the section called
12 Novell receives from SCO, correct?

13 A. That they would collect it and then remit it back to us
14 as the administrator, correct.

15 Q. Then in C it says, a third item says if SCO hits our
16 business forecasts, which admittedly is aggressive,
17 royalties on future UnixWare shipments by SCO through the
18 year 2002, which royalties have a net present value of 50 to
19 \$60 million.

20 Do you see that?

21 A. Uh-huh.

22 Q. Explain to the jury what net present value is.

23 A. It is a calculation to try and bring forward the value
24 of something to be received in the future. A simple case
25 would be would you rather have \$100 today or \$100 three

1 years from now? I will take the \$100 today. What is the
2 \$100 three years from now worth? Something less. That is
3 the present value.

4 Q. So the board is being told here that the value to us
5 today, we're saying it is probably 50 to \$60 million,
6 although the total amount will be greater over the course of
7 the year or in the forecast, correct?

8 A. I believe in my earlier testimony I said one of the
9 elements of the A.P.A. was a royalty transaction that had a
10 minimum floor below which SCO would pay nothing, and a range
11 where if they were able to penetrate the market we would
12 share in that royalty, and then a cap. There were three
13 elements to the royalties, the potential royalties. It
14 could be zero. It could be a lot or it could be something
15 in between.

16 Q. If my math is right and I add those up, this appears to
17 come between 150 and \$170 million. Does that square with
18 your recollection?

19 A. If you mathematically add them up and you get that, and
20 it is sort of a funny characterization because some of them
21 were already ours. The middle one was already ours and we
22 owned that. We retained that.

23 MR. HATCH: Mr. Calvin, go up and highlight for me
24 paragraphs one and two on that same page.

25 BY MR. HATCH

1 Q. Now, again, this is the high level summary for the
2 board, correct?

3 A. Yes.

4 Q. It says under one that Novell is giving SCO -- A says
5 the UNIX technology assets, right?

6 A. Yes.

7 Q. And B is the UnixWare technology assets?

8 A. Correct.

9 Q. Paragraph two says Novell retains, I think, all
10 patents, right?

11 A. Yes.

12 Q. It says a license back, and we have heard reference in
13 this case to a T.L.A. or a transfer of license agreement,
14 and you have heard of that, correct?

15 A. Yes.

16 Q. What did you understand the T.L.A. to be?

17 A. That we kept the rights to internal use of UNIX and
18 UnixWare, even though the products were part of the assets
19 sold.

20 Q. The NetWare? NetWare?

21 A. A license back to UNIX and UnixWare for internal use
22 and --

23 Q. So SCO was licensing it back to Novell was your
24 understanding, right?

25 A. Okay.

1 Q. And C is Tuxedo and other miscellaneous and unrelated
2 technology?

3 A. Assets that were part of the UNIX system that we did
4 not sell, yes.

5 Q. I think you mentioned Tuxedo earlier and I think
6 NetWare as well, correct?

7 A. NetWare was a Novell product, yes.

8 Q. Those were things that you retained.

9 Okay. So in this high level summary for the board it
10 does not say that Novell is retaining the copyrights, does
11 it?

12 A. I don't see it there.

13 Q. Now, let's go for a second to the A.P.A.

14 MR. HATCH: Exhibit 1, Mr. Calvin.

15 BY MR. HATCH

16 Q. Again, it says it is an asset purchase agreement,
17 correct?

18 A. Yes, it does.

19 Q. It does not say it is a license agreement, right?

20 A. It says asset purchase agreement.

21 Q. Let's go to Section 1.1-A.

22 MR. HATCH: Let's go, if you would, Mr. Calvin --
23 let me get my copy out. If you would, go to
24 Section 1.3-A-1. Highlight the little i and one so that we
25 can read that, so that I can see that.

1 BY MR. HATCH

2 Q. Do you see it says intent?

3 A. Yes.

4 Q. It says the intent of the parties hereto is that all of
5 the business and all of the seller's backlog, if any,
6 relating to the business be transferred to the buyer.

7 Do you see that?

8 A. Okay.

9 Q. Do you believe that is the intent of the parties to the
10 A.P.A.?

11 A. Okay. I believe it is in the A.P.A. as terms, yes.

12 Q. It says the intent, right?

13 A. Yes.

14 Q. It says all of the business, right?

15 A. It is a capital B, and so it is a defined term, so the
16 assets sold --

17 Q. That is a good point.

18 A. I don't know --

19 Q. Explain to the jury what you mean when you have it
20 capitalized.

21 A. Oftentimes in agreements you use a definition in a
22 contract so that it can be reused later as saying when I use
23 this word it means that definition rather than having to
24 repeat the whole schedule again.

25 Q. Let's go to recital A.

1 MR. HATCH: Highlight that for me.

2 Blow it up. I have bad eyes. That is why I have
3 these.

4 There we go.

5 BY MR. HATCH

6 Q. Can you read that?

7 A. Yes, I can.

8 Q. Is this where you're talking about where it defines
9 business?

10 A. It looks like it is where it says, paren, collectively
11 the business, quote, unquote, capitalized, and that would
12 mean it is reusing the term and to refer back to the
13 definition.

14 Q. That is the point of putting in the quotes under it --

15 A. It is a defined term.

16 Q. It means what it says here, right?

17 A. Right.

18 Q. Let's read what the business is here.

19 A. Sure.

20 Q. It says seller is engaged in the business of developing
21 a line of software products currently known as UNIX and
22 UnixWare, and the sale of binary source code licenses to
23 various versions of UNIX and UnixWare, the support of such
24 products, and the sale of other products which are directly
25 related to UNIX and UnixWare. Collectively, the business.

1 Right?

2 A. Correct.

3 Q. Is that an accurate description of Novell's business?

4 A. We were developing and selling binary source and
5 supporting those products.

6 Q. Okay. That is an accurate description of Novell's
7 business, the UNIX and UnixWare business, correct?

8 A. The developing and sale and support, okay, and that is
9 what it means when we use the term business here.

10 Q. That is the whole business?

11 A. That is what this definition in this contract is
12 referring to, the development and sale and support, yes.

13 Q. Let's go down to Section 1.1-A.

14 MR. HATCH: Highlight it starting with all of it.

15 BY MR. HATCH

16 Q. It says purchase of assets, and it says all of
17 seller's -- it uses the word all, do you see that?

18 A. It says all and all is identified on the schedule, yes.

19 MR. HATCH: Highlight that, Mr. Calvin, starting
20 with all.

21 BY MR. HATCH

22 Q. All of seller's right, title and interest.

23 What does right mean?

24 A. Well, I don't know that -- there is not a capital so it
25 is not defined.

1 Q. Is a copyright a right?

2 A. It could be a right, but I would say that is one that
3 was not sold because it was not on the schedule identified
4 here in this paragraph.

5 Q. Well, that is why we are here, sir.

6 A. Okay.

7 Q. All of seller's right, title and interest in and to the
8 assets and property of the seller relating to the business.
9 It is again capitalized, right, the business?

10 A. Right. Okay.

11 Q. Then it says collectively the assets and it says
12 identified on the next page, Schedule 1.1-A?

13 A. The list of assets sold, correct.

14 Q. Right?

15 A. Uh-huh.

16 Q. Let's go to Schedule 1.1-A.

17 Number one, again, it says all, and it uses the word
18 all and it uses rights again, all rights and ownership of
19 UNIX and UnixWare, including but not limited to all versions
20 of UNIX and UnixWare and all copies of UNIX and UnixWare
21 including revisions, updates in process and all technical
22 design, development, installation, operation and maintenance
23 information concerning UNIX and UnixWare, including source
24 code, source documentation, source listings, and annotations
25 and appropriate engineering notebooks, test data, test

1 results, as well as all reference manuals and support
2 materials normally distributed to seller and to end users,
3 and potential end users in connection with the distribution
4 of UNIX and UnixWare, such assets to include without
5 limitation the following.

6 Then it continues to go through a rather lengthy
7 listing of all of these things, correct?

8 A. Yes, a complete list of what was and what wasn't.

9 Q. Now, shortly after this transaction occurred wasn't
10 there a transition between the transfer of this business
11 from Novell to SCO?

12 A. You can't just flip a light switch. There were
13 hundreds of employees and thousands of customers and, yes,
14 there was a process of moving it across the line, if you
15 will.

16 Q. Were you involved in that process?

17 A. Not very much, no. Yes on some elements, but it did
18 not take a lot of my time.

19 Q. Do you know what involvement you had?

20 A. I don't recall specifically. I stayed involved in some
21 form because of being an executive on the project and
22 wanting to make sure that it went smoothly, and there were
23 some facilities issues and some human resource issues. I
24 mean, some of the contracting issues I mentioned earlier, I
25 got later involved in an amendment on the A.P.A. a year

1 later. I stayed involved but not --

2 Q. Were you involved in any of the announcements to
3 customers or the press as to what had happened in the
4 transaction?

5 A. No. Well, to the analyst community, yes, absolutely,
6 but not so much to the customers or the press.

7 Q. The analyst community you indicated to them that Novell
8 had sold the business to SCO, correct?

9 A. We explained it similar as I did here, what was sold
10 and what we retained and the relationship that we still had
11 with UNIX and UnixWare and the industry.

12 Q. Now, eventually you indicated, I believe, that you said
13 that you signed amendment number two, correct?

14 A. Yes. That is correct.

15 MR. HATCH: Let's put up amendment number two.

16 BY MR. HATCH

17 Q. You talked about Section A of amendment number two, and
18 if we can pull that up, it said with respect to Schedule
19 1.1-B of the agreement entitled excluded assets, Section 5,
20 subsection A shall be revised to read -- do you see that?

21 A. Yes.

22 Q. When you say revised to read, what does that mean?

23 A. It was an amendment to change the language of that one
24 paragraph of the A.P.A., the asset purchase agreement.

25 Q. And it replaces the language, correct?

1 A. Correct.

2 Q. So the old language is of no effect?

3 A. From this day forward I would presume that this would
4 be the correct language when the parties agreed to an
5 amendment.

6 MR. HATCH: Mr. Calvin, put up Schedule 1.1-B, the
7 old language that has been revised.

8 BY MR. HATCH

9 Q. Let's go to Section 5. Well, go back to the first
10 page.

11 Now, you understood that Section 1.1-B was the excluded
12 assets, correct?

13 A. Correct.

14 Q. I think as we can see here, and Mr. Calvin will
15 highlight it, it says any asset not listed on 1.1-A
16 including without limitation any assets which pertain to
17 NetWare.

18 Do you see that, NetWare?

19 A. Certainly.

20 Q. Section two again says NetWare.

21 Do you see that?

22 A. Yes.

23 Q. And you indicated that NetWare was Novell software that
24 you wanted to make sure SCO was not getting, correct?

25 A. One of many things, yes.

1 Q. That was not part of the deal, NetWare?

2 A. Correct.

3 Q. So with excluded assets we're talking about NetWare,
4 and Tuxedo was another one that you mentioned, I believe,
5 right?

6 A. Yes.

7 Q. Then Section 4 again talks about NetWare, right?

8 A. Okay. Yes.

9 Q. Section 4-B is NetWare, right?

10 A. Okay.

11 Q. Section C is NetWare, right?

12 A. Yes.

13 Q. So all the intellectual property we have been talking
14 about so far has been NetWare, correct?

15 A. Yes.

16 Q. If we go to Section 5, which is what amendment two
17 meant, right?

18 A. Okay. Yes.

19 Q. It says intellectual property and it says all
20 copyrights and trademarks except for the trademarks UNIX and
21 UnixWare.

22 Do you see that?

23 A. Yes.

24 Q. Now, when we read the term sheet to the board, the only
25 thing that was mentioned in that was patents, right?

1 A. Not on the board's resolution, but in the letter --

2 Q. The term sheet?

3 A. Correct. I remember that.

4 Q. We're talking over each other.

5 MR. HATCH: I will try not to.

6 BY MR. HATCH

7 Q. Okay. So this language in A, all copyrights and
8 trademarks excepts for the trademarks in UNIX and UnixWare,
9 that is the part that was revised and replaced, so this
10 language does not exist in the agreement anymore, correct?

11 A. It was revised.

12 Q. Let's go back to amendment two.

13 MR. HATCH: Blow up A again, please.

14 BY MR. HATCH

15 Q. Again, here is Section 5, where we just were, and
16 subsection A, that is the part that is copyrights, will be
17 revised to read, and it is replacing it with the language
18 below here, correct?

19 A. Okay.

20 Q. It says all copyrights and trademarks, and then it says
21 except for the copyrights and trademarks owned by Novell as
22 of the date of the agreement required for SCO to exercise
23 its rights with respect to the acquisition of UNIX and
24 UnixWare technologies, right?

25 A. Correct.

1 Q. So no longer does it say you don't get any copyrights
2 at all, right?

3 A. I believe this was the discussion that we had earlier
4 that says that they get -- it is a limiting -- we have taken
5 out the language that says you get all of the copyrights,
6 and instead it says you will get the rights you need for the
7 acquisition of the technologies.

8 Q. Okay.

9 A. It is a very narrow definition.

10 Q. It says the copyrights you are getting are the ones
11 that require you to exercise the rights --

12 A. Or the use of those.

13 Q. Okay.

14 A. My recollection, and I said this clearly, was this was
15 not a change in the transaction to release copyrights.

16 Q. Well, you indicated that you didn't go back to the
17 board for approval because at the time no one felt that this
18 changed the agreement materially, right?

19 A. It was not against the board's resolution, correct.

20 Q. Well, it wasn't what Mr. Frankenberg who was the head
21 of the company -- was he chairman of the board as well?

22 A. I don't recall if there was an independent chairman or
23 not. He may well have been chairman at the time.

24 Q. Mr. Frankenberg testified that this agreement
25 transferred all of the copyrights.

1 MR. BRENNAN: Objection, Your Honor. Two points.
2 First of all, there has been an exclusion order and now we
3 are introducing prior testimony. Second of all, it is
4 improper, and Mr. Hatch did it earlier, to ask a witness to
5 vouch for prior testimony of another witness that this
6 witness didn't hear. I would object and move to strike the
7 reference to the prior witness's testimony that Mr. Tolonen
8 has not had the benefit of listening to.

9 THE COURT: As long as the testimony is accurately
10 reflected --

11 MR. HATCH: I think it is for the jury to
12 understand, but if I couch it and put myself on the line
13 here saying that Mr. Frankenberg testified to the jury that
14 the intent was to transfer the copyrights, all of the
15 business --

16 MR. BRENNAN: Your Honor, Mr. Frankenberg offered
17 no testimony regarding amendment number two. What he did
18 testify to was that he left the company before amendment two
19 was negotiated and executed. That is a mischaracterization,
20 to the extent that Mr. Hatch is suggesting that Mr.
21 Frankenberg testified that the intent of amendment number
22 two was to transfer copyrights.

23 THE COURT: I don't believe that is what Mr. Hatch
24 said. He said the intent of the original A.P.A. and that is
25 all that he was representing.

1 MR. HATCH: I think he is trying to get me and us
2 confused here.

3 THE WITNESS: Mr. Frankenberg was wrong about the
4 A.P.A. as well.

5 BY MR. HATCH

6 Q. That is your position?

7 A. The A.P.A. thoroughly excluded it. I don't know that
8 he --

9 Q. My question was slightly different. The jury is going
10 to be asked to determine who owns the copyrights. One of
11 the things is the intent of the parties. Do you believe
12 that Mr. Frankenberg is not telling this jury the truth when
13 he says the intent of this agreement was to transfer the
14 copyrights?

15 MR. BRENNAN: Your Honor, I object. It is
16 inappropriate to ask the witness to vouch for the
17 truthfulness of another witness's testimony.

18 THE COURT: I will sustain that objection.

19 MR. HATCH: I did misword that.

20 Let's move on, because I don't think it is worth
21 going over.

22 BY MR. HATCH

23 Q. At the very least we do know that the portion of the
24 A.P.A. that said none of the copyrights were transferred has
25 been replaced by this language and that is no longer in

1 effect, right?

2 A. That is what the amendment did, yes.

3 Q. Just so we are clear, it says that what SCO is getting
4 is the copyrights and trademarks owned by Novell as of the
5 date of the agreement requiring SCO to exercise its rights
6 with respect to the acquisition of UNIX and UnixWare, right?

7 A. That is the reading of the agreement, yes.

8 Q. Now, two things here. I want to go back.

9 MR. HATCH: Mr. Calvin, if you will, go back to
10 the A.P.A., Exhibit 1, Section 1.1-A. Blow that up. It is
11 on the bottom.

12 BY MR. HATCH

13 Q. It says everything necessary to exercise its rights.
14 What rights did it get? What rights did SCO get? We just
15 read it. It is the fourth line down. It says all of
16 seller's right, title and interest, right?

17 MR. BRENNAN: Objection, Your Honor. This is not
18 a complete presentation, and the question of what Section
19 1.1-A suggests or states --

20 THE COURT: He is asking what it says. He is
21 asking the witness what it says. I think it is an
22 appropriate question.

23 THE WITNESS: I think the question is appropriate
24 in its context. You can't read a part of a sentence. It
25 says all of the interests as identified in the schedule and

1 as excluded by the other schedule and that is the sentence.

2 You can't just read the first five words.

3 BY MR. HATCH

4 Q. Let me make sure that I am clear here.

5 Are you telling the jury that they didn't get all of
6 the rights because the excluded assets schedule, which has
7 now been amended away, that somehow you're going to
8 piggyback that back in now saying that they don't get the
9 copyrights?

10 A. No, I am saying there is a list of purchased assets on
11 1.1 and the copyrights are not there.

12 Q. Sir, let's go back to amendment two.

13 Do you remember when Mr. Brennan was talking to you he
14 put in front of you a prior draft of amendment two?

15 A. I do.

16 Q. And I think you indicated that that was not accepted
17 and that it was changed and we then got this final amendment
18 two.

19 A. Right. The draft was a version that SCO had proposed
20 and we said no, not acceptable, and took out some language.

21 Q. Go to T-34.

22 MR. HATCH: Highlight the A language.

23 BY MR. HATCH

24 Q. One of the changes here in addition to getting all of
25 the rights required, you'll notice it says except for the

1 copyrights and trademarks owned by Novell as of the date of
2 this amendment number two.

3 Do you see that?

4 MR. BRENNAN: Your Honor, I object. I assume it
5 is inadvertent, but there was a reference to all of the
6 rights required in the question, and that language does not
7 appear in what Mr. Hatch is showing the witness, thus it
8 mischaracterizes matters.

9 MR. HATCH: I think I even started my question by
10 saying that, Your Honor.

11 THE COURT: Go ahead.

12 THE WITNESS: Excuse me. Am I looking at
13 something new?

14 BY MR. HATCH

15 Q. This is on the draft, correct?

16 A. This is the existing draft that I looked at a while
17 ago.

18 Q. That Mr. Brennan showed you.

19 A. Owe.

20 Q. It said for copyrights and trademarks owned by Novell
21 as of the date of this amendment.

22 Do you see that?

23 A. Okay.

24 Q. The amendment was about a year after the A.P.A.,
25 correct?

1 A. Correct.

2 MR. HATCH: Let's go back down, Mr. Calvin, to
3 amendment number two signed by Mr. Tolonen. Let's blow up
4 A, if you would.

5 BY MR. HATCH

6 Q. Now it says as of the date of the agreement.

7 Do you see that?

8 A. Okay.

9 Q. Wasn't one of the issues that the parties had was they
10 wanted to make sure that the rights, the copyrights that
11 were being transferred were those that were in existence as
12 of the date of the agreement not a year later?

13 A. I'll say yes. In context it was as a cleanup point and
14 this was an amendment to the agreement. There had been lots
15 of code written by both parties in the mean time, so as not
16 to bring that into question about what are we talking about
17 here.

18 Q. Isn't it true that the reason that change was important
19 is because Santa Cruz and senior Novell officials believed
20 that as of the date of the amendment that in their mind the
21 copyrights had already transferred?

22 A. No. I do not believe that is correct.

23 Q. Isn't it true that like you said this didn't have to go
24 to the board, because this was just a clarification of what
25 had transferred at the date of the A.P.A.?

- 1 A. No. The agreement was clear what transferred and what
2 didn't transfer.
- 3 Q. Now, you gave a declaration in this case, didn't you?
- 4 A. Yes. Several years ago I gave a declaration.
- 5 Q. At the request of Novell's lawyers?
- 6 A. I don't know who made the request, but I did give a
7 declaration. I believe it was Novell's attorneys.
- 8 Q. Let me give you a copy of that. It is Exhibit 640.
9 Is that a copy of your declaration?
- 10 A. Yes, it is.
- 11 Q. What is the date on that?
- 12 A. I don't know where the date is shown. The 20th day of
13 April of 2007.
- 14 Q. Now, when you provided that declaration to Novell, you
15 were not employed at Novell at the time?
- 16 A. Correct. I was not an employee.
- 17 Q. And you had not been employed there for almost nine
18 years?
- 19 A. Correct.
- 20 Q. At that time you were the chief financial officer at a
21 company called Business Objects S.A., right?
- 22 A. Correct.
- 23 Q. I think you talked about --
- 24 A. As one of the --
- 25 Q. Now, Business Objects S.A. from time to time has to

1 make filings with the United States Securities and Exchange
2 Commission, correct?

3 A. Correct.

4 Q. And you signed those on behalf of the company, correct?

5 A. Correct.

6 Q. Back then when you --

7 A. When I was the C.F.O.

8 Q. Let me give you a copy.

9 Do you recall filing a form 8-K and --

10 MR. BRENNAN: The document put before the witness
11 is not on any exhibit list. There is nothing to impeach
12 and --

13 MR. HATCH: I am going to use it to refresh his
14 recollection, Your Honor.

15 MR. BRENNAN: There has been no demonstration that
16 he does not remember anything.

17 MR. HATCH: I will do that.

18 THE COURT: It will only be used if the witness
19 cannot remember and for refreshing purposes and not for
20 submission to the jury.

21 MR. BRENNAN: Thank you.

22 BY MR. HATCH

23 Q. Do you recall making a submission to the United States
24 Securities and Exchange Commission form 8-K on February 6,
25 2007?

1 A. I don't recall it, but I was there and we did it, yes.

2 Q. If you don't recall it, when you look at this does this
3 refresh your recollection?

4 THE COURT: Mr. Hatch, why don't you ask him
5 questions that may justify him referring to the document,
6 and until it is necessary for him to refresh his memory it
7 is not necessary for him to focus on the document.

8 MR. HATCH: Okay.

9 BY MR. HATCH

10 Q. Do you recall that shortly before you signed your
11 declaration that your business then, Business Objects S.A.,
12 entering into a large strategic alliance with I.B.M.?

13 A. Okay. This refers to that. I mean, this talks about
14 that. I am just scanning it quickly.

15 Q. Without --

16 A. It is a press release and it talks about other business
17 highlights and --

18 THE COURT: Let's not focus on the document, just
19 ask him questions.

20 MR. HATCH: I am trying to.

21 It is my fault.

22 BY MR. HATCH

23 Q. Without looking at the document, do you recall that
24 shortly before you entered into your declaration that your
25 company, Business Objects S.A., entered into a strategic

1 alliance with I.B.M.?

2 A. I don't recall being associated -- almost every company
3 I have worked with has done business with I.B.M. They are
4 one of the largest technology companies in the industry.

5 Q. So you have done a lot of business with I.B.M.?

6 A. Off and on, I suppose I have.

7 Q. Do you specifically recall in the months before your
8 declaration your company entering into a strategic alliance
9 with I.B.M.?

10 A. I recall that Business Objects entered into a strategic
11 alliance with I.B.M., yes.

12 Q. Do you recall when?

13 A. It has to be around this date because the 8-K was filed
14 talking about it. I don't recall the exact date, no.

15 Q. Is that a coincidence? Did that have anything to do
16 with your declaration?

17 A. Nothing whatsoever.

18 Q. Let's move forward to this year.

19 You're involved, I think you said, on the board of
20 several companies still, correct?

21 A. I am on one public company board, yes.

22 Q. I think you mentioned Blue Coat?

23 A. Yes.

24 Q. You're on the board of Blue Coat?

25 A. Yes, I am.

1 Q. Didn't Blue Coat just announce in the last month that
2 Blue Coat signed a global deal with I.B.M.?

3 A. I am not sure that I recall exactly the specifics of
4 that, but they may well have.

5 Q. You're on the board, and how many meetings in the year
6 did you meet in 2009 with Blue Coat?

7 A. Probably eight or ten meetings. I had committee
8 meetings as well as board meetings. I'm a member of the
9 audit committee and on a special committee as well.

10 Q. Was the deal with I.B.M. a big deal with your company?

11 A. No bigger than other large transactions.

12 Q. That just happened, right?

13 A. If you say there was a release about it I will say that
14 it did. I don't recall the specifics of that agreement.

15 Q. Would you deny that the company announced just on
16 February the 23rd, exactly a month ago today, that they
17 signed a global agreement under which I.B.M. will provide
18 new -- serve security web gateway offerings to new and
19 existing clients?

20 A. That is true.

21 MR. HATCH: That's all that I have, Your Honor.

22 THE COURT: Mr. Brennan.

23 MR. BRENNAN: I have a few questions, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR. BRENNAN

1 Q. I would like to show you what has been marked and
2 admitted as Exhibit C-3.

3 Excuse me, wrong document. I apologize. Z-3. I
4 confused my C and Z.

5 Before you, Mr. Tolonen, is a document in evidence. It
6 is the minutes of a meeting of the board of directors of
7 Novell, Inc. on Monday, September 18th, 1995. I believe you
8 told us that you were not physically present at that
9 meeting, correct?

10 A. Correct.

11 Q. I would like to direct your attention down to the
12 second page of Exhibit Z-3. You'll see that there are a
13 series of resolutions, and I would like to in particular
14 highlight the first set of resolutions where it says
15 resolved.

16 MR. HATCH: Your Honor, I object. He has
17 indicated that he was not there and involved.

18 MR. BRENNAN: The witness was asked several times
19 by Mr. Hatch about his understanding of the board of
20 director meeting minutes, and with respect to the resolution
21 approved by the board. I am following up on Mr. Hatch's
22 questions.

23 MR. HATCH: I believe it was the term sheet and
24 the things that he signed, Your Honor.

25 THE COURT: I'm going to sustain the objection.

1 BY MR. BRENNAN

2 Q. Are you aware that the Novell board of directors
3 approved a resolution stating that Novell would retain all
4 patents, copyrights and trademarks except for the trademarks
5 UNIX and UnixWare?

6 MR. HATCH: Same thing, Your Honor. Objection.

7 MR. BRENNAN: I am entitled to ask the witness
8 whether he is aware of a resolution.

9 THE COURT: He is indeed entitled to ask that
10 question. The document itself --

11 MR. HATCH: If he could re-word it. I may have
12 misheard it. I thought he talked about in terms of what the
13 board did and --

14 BY MR. BRENNAN

15 Q. The question was are you aware that the board of
16 directors of Novell approved a resolution to the effect that
17 Novell under the asset purchase agreement would retain all
18 of its patents, copyrights and trademarks except for the
19 trademarks UNIX and UnixWare?

20 A. Yes.

21 Q. Now, in connection both with my earlier questions of
22 you and Mr. Hatch's questions, there were suggestions made
23 apparently by Mr. Hatch that you may not have had
24 involvement in the transaction. You did attend, in fact,
25 board meetings between September of 1995 and December 6th of

1 1995 where the asset purchase agreement was discussed; is
2 that correct?

3 A. Yes. That is correct.

4 Q. If I could direct your attention now to what has been
5 marked, but not yet in evidence, to Exhibit X-4. X-4 are
6 minutes of a meeting of the Novell board of directors held
7 on October 20th, 1995.

8 Do you recall being present at that meeting?

9 A. Yes.

10 Q. Do you recall making a presentation or having
11 discussions with the board at that meeting regarding the
12 asset purchase agreement?

13 A. Yes, it was discussed.

14 MR. BRENNAN: Your Honor, I would like to move
15 into evidence Exhibit X-4.

16 MR. HATCH: I am not sure what is redacted.

17 MR. BRENNAN: There are redactions of privileged
18 attorney-client matters that were discussed at the meeting.
19 Exhibit X-4 are the meeting minutes redacted to remove the
20 privileged communications. This was produced during the
21 course of discovery and is on Novell's list.

22 MR. HATCH: Your Honor, I have no objection.

23 THE COURT: It will be admitted.

24 (Defendant's Exhibit X-4 was
25 received into evidence.)

1 BY MR. BRENNAN

2 Q. If we could look at the second paragraph of Exhibit
3 X-4, it says six of the eight directors were in attendance
4 for the meeting. It names Bob Frankenberg, Alan Ashton, Ian
5 Wilson, Elaine Bond, Larry Sonsini and John Young.

6 Do you see that?

7 A. Yes, I do.

8 Q. It says also present by invitation are David R.
9 Bradford, Mary Burnside, Jeff Turner and Jim Tolonen.

10 Do you see that?

11 A. Yes, I do.

12 Q. That reference to Jim Tolonen is to you, correct?

13 A. Yes, it is.

14 Q. Then if we could go down to the lower half of the first
15 page, there is a section entitled status of the SCO
16 transaction.

17 Do you see that?

18 A. Yes, I do.

19 Q. It reads, quote, Mr. Frankenberg then asked
20 Mr. Bradford to review the current status of the company's
21 efforts to close the transaction with Santa Cruz Operation.
22 Mr. Bradford and Mr. Tolonen then outlined the status of the
23 following action items. One, H.S.R. filings.

24 Do you know what H.S.R. filings are?

25 A. Sure. That is a Hart-Scott-Rodino filing and it has to

1 do with employment law.

2 Q. Then it references, two, operating agreements; three,
3 disclosure schedules; four, benefits agreement, and; five,
4 source code licensing arrangements. It continues, it was
5 pointed out that while excellent progress had been made on
6 each of the foregoing, the company had decided to move its
7 target close date to the end of November.

8 Do you see that language?

9 A. Yes, I do.

10 Q. Do you recall being present at the board meeting and
11 discussing the items that are referenced in the board
12 meeting minutes?

13 A. Yes, I do.

14 MR. BRENNAN: I would like to have shown to the
15 witness Novell Exhibit B-6.

16 This is not yet in evidence, Your Honor.

17 BY MR. BRENNAN

18 Q. Exhibit B-6 is the minutes of the meeting of the board
19 of directors of Novell, Inc. held on Monday, December 11th,
20 1995.

21 Did you attend that meeting as well?

22 A. Yes, I did.

23 MR. BRENNAN: Your Honor, I would like to move
24 into evidence Exhibit B-6.

25 MR. HATCH: I don't have any objection, Your

1 Honor.

2 THE COURT: B-6 will be admitted.

3 (Defendant's Exhibit B-6 was
4 received into evidence.)

5 BY MR. BRENNAN

6 Q. If we look at the minutes of the board of directors
7 meeting that Novell held on Monday December 11, 1995, and
8 let's focus on the second paragraph, and it says six of the
9 eight directors were in attendance for the meeting. It
10 lists Mr. Frankenberg, Mr. Ashton, Mr. Wilson, Ms. Bond,
11 Mr. Sonsini and Mr. Young.

12 Do you see that?

13 A. Yes, I do.

14 Q. It says also present by invitation were David R.
15 Bradford, Mary Burnside, Jeff Turner and Jim Tolonen.

16 Do you see that?

17 A. Yes, I do.

18 Q. Scroll down a little lower. There is a reference at
19 the bottom of page 1 to the UnixWare sale to SCO.

20 Do you see that?

21 A. Yes.

22 Q. It states that management announced that the sale of
23 the UnixWare product line to SCO was closed on December 6,
24 1995. Mary Burnside and Jim Tolonen outlined the efforts
25 undertaken to transition employees from Novell to SCO and

1 Hewlett-Packard.

2 Do you see that?

3 A. Yes, I do.

4 Q. Did you in fact discuss with the members of the Novell
5 board of directors at the December 11, 1995 board meeting
6 the transition of employees from Novell to S-C-O and
7 Hewlett-Packard?

8 A. Yes, we did.

9 Q. If you would, turn to what has been admitted into
10 evidence as Exhibit G-4. This is a document that Mr. Hatch
11 showed you.

12 So that we can have a clear look at it, let's turn to
13 page 2 of Exhibit G-4.

14 MR. BRENNAN: Highlight the first and second full
15 paragraphs of that document.

16 BY MR. BRENNAN

17 Q. Mr. Hatch discussed this with you, but so that we are
18 all literally on the same page, the memorandum from
19 Mr. Bradford says I am now in receipt of a final asset
20 purchase agreement between Novell and SCO. Simultaneous to
21 my receipt of this contract you have been faxed an identical
22 copy.

23 Do you recall receiving on or before the date of this
24 memorandum a copy of the asset purchase agreement?

25 A. Yes.

1 Q. Then it reads the purpose of this memorandum is to let
2 you know that I have reviewed -- just so we are clear, you
3 understand the I to be David Bradford?

4 A. Absolutely.

5 Q. You understood that Mr. Bradford's role at that
6 juncture as general counsel to be what relative to this
7 transaction?

8 A. To pull all the pieces together and to agree that the
9 intent as negotiated had been met by the legal contract, the
10 terms of the legal contract, and give his agreement so that
11 Mr. Frankenberg would be comfortable signing it.

12 Q. In fact, as you have indicated, the language of
13 Mr. Bradford's memo continues, I have reviewed the final
14 document and find the same to be an accurate reflection of
15 the business and legal terms and conditions negotiated
16 between the parties. I, therefore, approve this asset
17 purchase agreement for final signature by Bob Frankenberg.

18 Do you see that?

19 A. Yes, I do.

20 Q. Did you understand that the form of the asset purchase
21 agreement that Mr. Bradford had approved as being an
22 accurate reflection of the business and legal terms and
23 conditions negotiated between the parties, that is Novell
24 and Santa Cruz Operation, was the form of the asset purchase
25 agreement that Mr. Frankenberg signed on September 19th,

1 1995?

2 A. Yes, that is my understanding.

3 Q. Just a question or two about what transpired after the
4 initial asset purchase agreement was entered into.

5 What to your observation occurred with respect to the
6 UnixWare business after it was transferred to Santa Cruz
7 Operation?

8 A. Well, there was a period of time, and I think we
9 referred to that as the overlap period, the actual transfer
10 of people and assets and technology was moving. Novell
11 stayed involved and also was a party to the contract in a
12 number of ways, so we continued to be friends of Santa Cruz,
13 not an investor but owner of 17 percent owner of the company
14 and supporter of the business, as well as to continue with
15 our other UNIX related business partnerships with the other
16 companies that we had relationships with.

17 Over a longer term our expectations for the success of
18 that were not met, frankly. One of the things we looked at
19 earlier was a proposed business plan where royalties would
20 be calculated. The parties had agreed how big the market
21 was and what kind of penetration over time would be
22 achieved, and at which point no royalties would be paid and
23 at which point royalties would be paid and a cap. I don't
24 believe any royalties were ever paid under that, so there
25 were really never -- it was not as successful as we had

1 hoped.

2 MR. BRENNAN: No further questions, Your Honor.

3 THE COURT: Mr. Hatch.

4 MR. HATCH: A short inquiry.

5 RECROSS-EXAMINATION

6 BY MR. HATCH

7 Q. To follow up on Mr. Brennan's discussion of the board
8 minutes and the sale, let me give you what has been marked
9 as Exhibit 503.

10 Do you recognize Exhibit 503 as being the 10-Q of
11 Novell dated March 12, 1996?

12 A. Okay. Yes.

13 Q. Look on pages 16 of 17. Is that your signature?

14 MR. BRENNAN: I assume the question is whether
15 this is an electronic signature?

16 THE WITNESS: It is an electronic signature of
17 mine.

18 BY MR. HATCH

19 Q. That is how you file them with the S.E.C.?

20 A. Yes. The electronic filings have a slash S to reflect
21 the signature.

22 Q. There is no doubt that you signed this on behalf of the
23 company?

24 A. That is my signature.

25 Q. What does your signature represent?

1 A. The chief financial officer and executive vice --

2 Q. No, by signing this what are you telling the S.E.C.?

3 A. That this is true and correct to my belief.

4 Q. Right.

5 MR. HATCH: Your Honor, I move Exhibit 503.

6 MR. BRENNAN: No objection, Your Honor.

7 THE COURT: It will be admitted.

8 (Plaintiff's Exhibit 503 was
9 received into evidence.)

10 BY MR. HATCH

11 Q. This is shortly after the sale of the business to SCO?

12 A. Two quarters. It would have been the second quarter.

13 Q. You have to talk about the transaction and give a
14 representation to the S.E.C. of what happened, correct?

15 A. Correct.

16 Q. I have a couple of quick questions.

17 Turn to page 9.

18 MR. HATCH: If you would put that on the screen.

19 Highlight the first line.

20 BY MR. HATCH

21 Q. It says in December?

22 A. Yes.

23 Q. In December, 1995, Novell sold its UNIX and UnixWare
24 product line to the Santa Cruz Operation.

25 Correct?

1 A. Correct.

2 Q. You understood both UNIX and UnixWare?

3 A. Yes.

4 Q. Turn to page 10.

5 MR. HATCH: Highlight the paragraph, Mr. Calvin,
6 that starts with UNIX Systems Group.

7 BY MR. HATCH

8 Q. What are you talking about here? You're talking about
9 \$19 million in royalties as a result of the sale to SCO?

10 A. That is the accounting calculation of how the royalty
11 present value shows up in our financial statements because
12 of the purchase.

13 Q. Again, you recognize the sale of the UNIX and the
14 UnixWare product line to SCO in December of 1995, correct?

15 A. Yes.

16 MR. HATCH: That's all that I have, Your Honor.

17 THE COURT: May this witness be excused, counsel?

18 MR. BRENNAN: On Novell's behalf, yes.

19 THE COURT: Mr. Hatch?

20 MR. HATCH: Yes.

21 THE COURT: Mr. Tolonen, that means that you do
22 not need to worry about being re-called. You can go back to
23 your business. I do need to caution you. Please do not
24 discuss your testimony with any other witnesses in this case
25 or potential witnesses or in the presence of any other

1 witness, and please do not communicate the content of your
2 testimony to any other witness in the case.

3 Thank you very much.

4 THE WITNESS: Thank you.

5 THE COURT: Mr. Brennan.

6 MR. BRENNAN: Yes. Novell wishes to call Ms.
7 Allison Amadia.

8 ALLISON AMADIA

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

11 THE WITNESS: Allison Amadia, A-l-l-i-s-o-n,
12 A-m-a-d-i-a.

13 DIRECT EXAMINATION

14 BY MR. BRENNAN

15 Q. Good morning, Ms. Amadia.

16 A. Good morning.

17 Q. So we're clear, have you previously been known by your
18 maiden name?

19 A. I have.

20 Q. What is that?

21 A. It is Lisben.

22 Q. Would you please tell us your occupation.

23 A. I am an independent legal consultant and my speciality
24 is technology licensing.

25 Q. In addition to your consulting work that you do, you

1 are involved in other activities such as teaching and other
2 professional pursuits?

3 A. Yes. I am a part-time lecturer at Santa Clara Law
4 School and I teach a technology licensing class there.

5 Q. Please summarize for us your educational background.

6 A. Yes. I received a bachelor of arts from the University
7 of California at Davis in political science, and a juris
8 doctorate degree from the University of Pennsylvania.

9 Q. After you completed your law degree, did you then go to
10 work for a federal district judge?

11 A. I did. I worked for Judge William B. Shubb in the
12 Eastern District of California.

13 Q. That would be a District Court judge such as the judge
14 that we have here, Judge Stewart?

15 A. Yes.

16 Q. Have you ever worked for Novell?

17 A. I did work for Novell from 1995 to 1997.

18 Q. During that span that you were employed by Novell, what
19 was your position or capacity at Novell?

20 A. I was in-house counsel.

21 Q. What were your job duties or responsibilities while you
22 worked for Novell as in-house counsel?

23 A. Basically supporting the business division and in
24 licensing contracts and other contracts that were assigned
25 to me through the legal department.

1 Q. Where was your place of business or physical location?

2 A. San Jose.

3 Q. Did Novell have an office in San Jose when you worked
4 there?

5 A. Yes.

6 Q. Are you familiar with the asset purchase agreement
7 between Novell and the Santa Cruz Operation which was
8 entered into in 1995?

9 A. I am familiar with it.

10 Q. How is it that you have become familiar with the asset
11 purchase agreement?

12 A. I became familiar with it when I was an employee at
13 Novell. I was working on a contract, a licensing agreement
14 involving I.B.M. and Novell and Santa Cruz, and reviewed the
15 asset purchase agreement back at that time when we were
16 working on that transaction and also making amendments to
17 the asset purchase agreement.

18 Q. Are you familiar as well with what is known as
19 amendment number two to the asset purchase agreement?

20 A. Yes. I was the lead negotiator and drafts person on
21 behalf of Novell with respect to amendment number two.

22 Q. So is it fair to say that you were essentially one who
23 wrote it?

24 A. Yes. Well, wrote it and also responded to drafts of it
25 from my counterpart at Santa Cruz.

1 Q. Can you tell the jury how amendment number two came
2 about?

3 A. Yes. I was working on a royalty buy-out license
4 between Novell and I.B.M. when I was employed by Novell, and
5 at the time that that royalty buy-out license was executed,
6 and Santa Cruz became aware of it, they objected to it. So
7 we began to negotiate a three party settlement, so to speak,
8 between Santa Cruz, I.B.M. and Novell with respect to
9 I.B.M.'s rights as a buy-out to the SVRX license.

10 At the time that we were negotiating that agreement,
11 which was finally executed and is referred to as amendment
12 number X, we also discussed and eventually agreed to future
13 buy-out rules. Novell and Santa Cruz were trying to
14 identify in the future if there were opportunities for
15 buy-outs how that would be conducted so that there wouldn't
16 be any future litigation on that matter. That is how we
17 started with amendment number two.

18 Q. Did you have any communications or discussions with any
19 legal representatives of the Santa Cruz Operation with
20 respect to either amendment X that you have identified or
21 with what became amendment number two to the asset purchase
22 agreement?

23 A. Yes. I had many face-to-face and phone conversations
24 with Steve Sabbath, who was the general counsel of Santa
25 Cruz at the time, and with respect to both the amendments

1 number X and two.

2 Q. This Mr. Sabbath, who you said was the general counsel
3 of Santa Cruz Operation, did he ever make any suggestion or
4 statement to you regarding the ownership of copyrights under
5 the asset purchase agreement?

6 A. Yes, he did. In the context of trying to negotiate the
7 terms for the future buy-outs, he contacted me by phone and
8 said, more or less, oh, by the way, we need to also amend
9 the asset purchase agreement because there has been a
10 clerical error in the original agreement and it did not
11 include the transfer of copyright ownership, so this is
12 another thing that we need to fix was what he said.

13 Q. So when Mr. Sabbath made reference to some clerical
14 error, did you have any understanding as to what he was
15 referencing?

16 A. Yes. I mean, I had some understanding, but I basically
17 told him at the time to let me go and review the documents
18 and do some research and I will get back to you.

19 Q. You were not involved in the actual draftsmanship of
20 the initial asset purchase agreement?

21 A. No, I was not.

22 Q. So your involvement with amendment number two began
23 after the initial asset purchase agreement was entered into.
24 Is that fair?

25 A. Correct.

1 Q. So when Mr. Sabbath indicated to you that he believed
2 there had been some sort of clerical error, what did you do
3 next in response to Mr. Sabbath's suggestion or request?

4 MR. NORMAND: Your Honor, this raises a privilege
5 issue that might be more appropriate to speak about at
6 sidebar.

7 MR. BRENNAN: If we can, Your Honor, just so the
8 record is clear, this witness has never been deposed and
9 there has never been a privilege asserted with respect to
10 her testimony.

11 MR. NORMAND: That is correct, Your Honor.

12 THE COURT: Do you still want the sidebar?

13 MR. NORMAND: Yes, I do.

14 THE COURT: All right.

15 (WHEREUPON, a sidebar was begun.)

16 MR. NORMAND: The issue is as follows, Your Honor.
17 From what I understand from the declaration, the witness is
18 about to testify that she called Tor Braham, an outside
19 attorney for Wilson Sonsini. We took a Rule 30(b)
20 deposition of Wilson Sonsini and Novell attended, and at
21 that deposition when I asked about any discussions that
22 Mr. Braham had with anyone at Novell other than David
23 Bradford, there was an across the board privilege objection.
24 Therefore, I was not permitted to cross-examine the Wilson
25 Sonsini 30(b)(6) representative about the extent of the

1 discussions with Novell.

2 Therefore, I was not given full discovery on the
3 issue of what the intent was under the A.P.A. So for this
4 witness to now link back and say that she spoke to
5 Mr. Braham and found out the, quote, intent of the A.P.A.
6 with respect to Novell would be unfair.

7 MR. JACOBS: I will handle this, Your Honor.

8 Neither Ms. Amadia nor Mr. Braham were deposed by
9 SCO. Mr. Braham had long departed Wilson Sonsini by the
10 time of this deposition. I alluded to this yesterday in our
11 conversation, and SCO took a deposition of Wilson Sonsini as
12 an entity and the Wilson Sonsini lawyer was trying to deal
13 with this very odd circumstance and he is the one that
14 asserted the privilege. Novell has not asserted the
15 privilege with respect to communications between Ms. Amadia
16 and Mr. Braham and Mr. Braham and Ms. Amadia, and there is
17 no such assertion of privilege.

18 Now, because of the confusion around this
19 deposition and the nature of the deposition they were
20 taking, and the fact that Mr. Braham was gone by then, and
21 the fact that they never took Mr. Braham's deposition, and
22 the fact that they never took Ms. Amadia's deposition, they
23 may be able to point to snippets, but they have not made a
24 record asserting privilege as to communications between
25 Mr. Braham and Ms. Amadia.

1 MR. NORMAND: I would like to read a portion of
2 the transcript of this Rule 30(b)(6) because Novell's
3 counsel is there, and Mr. Jacobs is correct that in many
4 instances the Wilson Sonsini attorney would first make a
5 privilege objection, and then the pattern of the deposition
6 was Mr. Brakebill would -- Novell would decide whether they
7 wanted to waive some portion of the objection. Here
8 Mr. Brakebill says there may be some discussions between Mr.
9 Bradford and Ms. -- or Mr. Braham or Wilson Sonsini that may
10 not be privileged. The premise of the whole discussion is
11 that almost all of them are privileged, and now I will
12 decide when they are or are not.

13 Then later in the transcript there is a flat out
14 objection from the Wilson Sonsini attorney that you cannot
15 answer on grounds of privilege whether Wilson Sonsini spoke
16 with anyone other than Mr. Bradford at Novell. And
17 Mr. Brakebill did not consider it then the way he had done
18 several other times in the deposition. I don't think it is
19 accurate to say that Novell was not acting in cooperation or
20 at least in discussions with Wilson Sonsini as to the extent
21 of the privilege that was being invoked.

22 MR. JACOBS: I think it is quite clear that they
23 did not clearly make the record that Novell was asserting a
24 privilege vis-a-vis the conversation between Ms. Amadia and
25 Mr. Braham. In fact, in both the declaration -- I'm sorry,

1 in Ms. Amadia's declaration, which has been out there now
2 for three years, there has never been any argument or
3 litigation around this scope of privilege assertion or
4 around the failure to waive or anything like that. So to
5 now spring that --

6 MR. NORMAND: One last thought.

7 THE COURT: The question is whether or not a
8 privilege was exercised in regard to questions about
9 communications between anyone at the law firm and anyone at
10 Novell other than Bradford. If the privilege was then
11 invoked, then I cannot allow this witness to discuss those
12 questions or those conversations between herself and anyone
13 at the law firm.

14 MR. JACOBS: The privilege was not invoked by
15 Novell. That is the problem, Your Honor. This was a
16 30(b)(6) deposition of Wilson Sonsini as an entity.
17 Mr. Parnes representing SCO as an entity --

18 THE COURT: If in fact Mr. Normand was clearly
19 disadvantage by the exercise of the privilege, and whether
20 it be by Novell or whether it be by the law firm, then --

21 MR. JACOBS: No, Your Honor. He chose for some
22 strategic reason, unbeknownst to us, Mr. Normand and SCO
23 chose to handle the inquiry into Wilson Sonsini's
24 communications, that is the specific lawyers at Wilson
25 Sonsini, by not deposing those attorneys and --

1 THE COURT: Tor Braham?

2 MR. JACOBS: Or Ms. Amadia. They specifically
3 chose to depose the entity and to try to position the
4 entity, as to whether the law firm as an institution had a
5 position on whether the copyrights transferred. It was a
6 very peculiar deposition and a very peculiar approach to
7 deciding the question of what the testimony would determine.

8 Again, Ms. Amadia's declaration was out there and
9 this issue could have been ventilated and raised before we
10 got to this trial, and so the complexity of this I think is
11 unfair to us now that she can't testify to what she did.

12 MR. NORMAND: I want to make sure we are all on
13 the same page. No one has taken issue with this in the last
14 several days when this issue came up with whether the
15 privilege was invoked properly. He presupposes that I
16 should have filed a motion to compel that the privilege was
17 invoked. More properly, I am arguing that it is incongruous
18 now for Ms. Amadia to tell the jury that I spoke with Tor
19 Braham and he is the end all as to the intent of Novell
20 under the A.P.A., when I was not permitted by Novell's
21 attorney, that was present and free to waive the privilege
22 on behalf of Novell, as he did many other times, and where
23 he chose not to waive the privilege, and it is not fair for
24 her to suggest to the jury now that Mr. Braham spoke to
25 Novell and the intent under the A.P.A. is --

1 THE COURT: Is it true that during the course of
2 the deposition that Novell on occasion waived the privilege?

3 MR. JACOBS: Your Honor, in candor I have not
4 reviewed that deposition with this specific testimony in
5 mind. So I cannot speak to the representations
6 Mr. Brakebill is making, but what I can speak to is the fact
7 that Wilson Sonsini was stuck in the situation where Mr.
8 Braham is no longer at the firm, and so the Wilson Sonsini
9 lawyer cannot go back and investigate what questions were
10 being asked and he is stuck here in this situation --

11 THE COURT: I think this turns on the question of
12 whether or not Novell had opportunities to waive the
13 privilege and refused to do so or failed to do so, and now
14 because the deposition did not get into this area I cannot,
15 therefore, allow it at trial to now proceed with questions
16 about her communication with Tor Braham.

17 MR. JACOBS: Then you would have to find, Your
18 Honor, that SCO's counsel asked the 30(b)(6) representative
19 of Wilson Sonsini whether she could testify as to the
20 communications that Mr. Braham had with Ms. Amadia, and
21 whether they have any institutional recollection of those,
22 and whether had the privilege not been asserted there would
23 have been such testimony, and whether the witness was
24 following his counsel's and Novell's attorney's direction.

25 If there is no instruction and an actual following

1 of the instruction, then the record is incomplete. What I
2 will represent to Your Honor is that Mr. Braham himself
3 actually does not have a recollection of the conversation
4 Ms. Amadia is going to report. So had they asked the
5 question there would be testimony as to Mr. Braham's
6 communications with Ms. Amadia, but absent the assertion of
7 the privilege the answer would have been no.

8 However, she was never deposed. She has a very
9 clear recollection of it being brought up, about the asset
10 purchase agreement by Mr. Braham.

11 MR. BRENNAN: Just one other thing. In the
12 declaration which Ms. Amadia did submit, and which SCO's
13 attorneys had for some time and was never objected to, and
14 it was relied upon by Judge Kimball in prior rulings, and
15 this was never raised as grounds for not allowing the
16 testimony on this point. Mr. Normand is very intelligent
17 and he has had the declaration all this time, for several
18 years, and what has apparently occurred here --

19 THE COURT: Did he have the declaration before the
20 law firm was deposed?

21 MR. BRENNAN: I didn't know the answer to that.

22 MR. JACOBS: He did not.

23 MR. BRENNAN: Just one other comment, Your Honor.

24 As far as the process, you will remember that when
25 we have had privilege issues that have come up before, I on

1 behalf of Novell raise them in advance with the Court so
2 that there would be a ruling made before the witness was
3 called. Apparently this is premised on this declaration and
4 Mr. Normand did not give us or Your Honor the advance
5 benefit that I gave before.

6 MR. NORMAND: We gave points and authorities on
7 the issue of privilege and this issue was flagged and
8 Mr. Jacobs -- it was going to create an issue from witness
9 to witness, and I thought that is where we were, and it was
10 not a blanket ruling that --

11 THE COURT: I believe that is the proper
12 representation. I don't think it was improper. We are
13 going to have a lot of sidebars during the course of the
14 trial on the same basis, the issue of privilege.

15 Again, my dilemma is whether or not at the
16 deposition the attorney for SCO apparently -- the fact is is
17 that the testimony was not permitted because privilege was
18 invoked, and there was no waiver by Novell and the questions
19 were not asked, and I think it would be unfair to allow the
20 questions now to be asked of the witness about her
21 conversation with Mr. Braham since they were not permitted
22 in the deposition.

23 MR. JACOBS: If that is your ruling, I have to at
24 the break closely look at the transcript and -- I will do
25 that now.

1 THE COURT: Yes.

2 MR. JACOBS: Could the question be asked did you
3 have a conversation with Mr. Braham? Because, again, there
4 is no record that that was foreclosed, and then the witness
5 can answer yes and then we can move on.

6 MR. BRENNAN: And the third point is that we need
7 to have a brief break to inform the witness that she is not
8 permitted to testify as to her discussion with Mr. Braham,
9 if it turns out --

10 THE COURT: That is the Court's ruling.

11 You may revisit it, if and when you have had a
12 chance to look at the deposition. I think you ought to go
13 right now while the noise is still on and tell her that, if
14 you would, please.

15 MR. BRENNAN: Okay.

16 THE COURT: You will be permitted to ask the
17 question did you or did you not have a conversation with --

18 MR. BRENNAN: Thank you, Your Honor.

19 MR. NORMAND: Thank you, Your Honor.

20 (WHEREUPON, the bench conference was concluded.)

21 MR. BRENNAN: Thank you, Your Honor.

22 THE COURT: Go ahead, Mr. Brennan.

23 BY MR. BRENNAN

24 Q. Before our sidebar, Ms. Amadia, we were talking about
25 communications that you had had with Mr. Sabbath, the

1 general counsel at Santa Cruz Operation and his request that
2 this clerical error be fixed. Did you do anything to look
3 into that or to follow up on Mr. Sabbath's request?

4 A. Yes.

5 The first thing that I did was review the actual asset
6 purchase agreement and note the schedules, both the asset
7 schedule and the excluded asset schedule, which clearly
8 showed that the copyrights were excluded. They were on the
9 excluded asset schedule and they were not in the included
10 asset schedule.

11 Q. Let's pause just for a moment, and if we could briefly
12 look at Exhibit 1 in evidence. We will look at Section 1.1
13 of the asset purchase agreement. 1.1-A in particular.

14 Do you recognize this to be language from the initial
15 asset purchase agreement?

16 A. Yes.

17 Q. Following up on Mr. Sabbath's request, did you look at
18 this language that is before you from Section 1.1 of the
19 asset purchase agreement?

20 A. Yes.

21 Q. You'll notice that there is reference to a Schedule
22 1.1-A, which is the schedule of included assets. Did you
23 look at Schedule 1.1-A to see if there was reference to the
24 UNIX copyrights in that schedule?

25 A. Yes, I did.

1 Q. Did you see a reference to the UNIX copyrights in that
2 schedule?

3 A. No.

4 Q. Still then on Section 1.1 of the asset purchase
5 agreement, it continues notwithstanding the foregoing the
6 assets to be so purchased shall not include those assets,
7 the excluded assets set forth in Schedule 1.1-B.

8 Do you see that?

9 A. Yes.

10 Q. Did you also look at that language with respect to
11 assets that were excluded from the transaction?

12 A. I did.

13 Q. Did you look at the actual Schedule 1.1-B?

14 A. I did.

15 Q. Let's then turn to Schedule 1.1-B.

16 Is this the portion of the schedule of excluded assets
17 that you looked at in following up on Mr. Sabbath's request?

18 A. Yes.

19 MR. BRENNAN: Let's highlight Roman numeral five,
20 intellectual property.

21 BY MR. BRENNAN

22 Q. Did you review these words in the list of excluded
23 assets?

24 A. I did.

25 Q. Based upon your review of that, did you form any

1 conclusion as to whether or not the asset purchase agreement
2 transferred UNIX copyrights?

3 A. I did. I formed the conclusion that the asset purchase
4 agreement did not transfer copyrights.

5 Q. Now, in addition to your own reading of the asset
6 purchase agreement, did you do anything else to ascertain
7 the intent of the initial asset purchase agreement?

8 A. I did. I contacted Novell's internal legal department
9 and was given the name of the attorney who negotiated the
10 original asset purchase agreement and I contacted that
11 attorney. I --

12 Q. Let me interrupt you just for a moment.

13 What was the name of that attorney that you contacted?

14 A. The outside counsel?

15 Q. Yes.

16 A. Tor Braham.

17 Q. Who did you understand Mr. Braham to be?

18 A. I understood Mr. Braham to be counsel with Wilson
19 Sonsini, and the lead drafts person and negotiator of the
20 original asset purchase agreement.

21 Q. Now, after you yourself had reviewed the initial asset
22 purchase agreement, and after you had communicated with Mr.
23 Braham, what happened next in terms of Mr. Sabbath's request
24 to modify or change or correct the asset purchase agreement?

25 A. Well, after my communication with Tor Braham and my

1 review, I basically was directed by Novell legal and
2 business not to alter the original A.P.A. with respect to
3 copyright ownership. So I received a draft from
4 Mr. Sabbath, and I reviewed it and modified it in a way that
5 I intended that it not effect the original copyright
6 exclusion in the A.P.A.

7 Q. Let me show to you what is in evidence, Exhibit T-34.
8 It is entitled amendment number two to the asset purchase
9 agreement. So that you can get your bearings, I will ask
10 Mr. Lee to highlight the introduction and paragraph A. I'm
11 going to ask you to take a look at that.

12 Is this what Mr. Sabbath sent to you as a proposed
13 draft of amendment number two?

14 A. Yes.

15 Q. After you received this proposed draft by Mr. Sabbath,
16 what did you do next?

17 A. We had conversations about this language, Steve and I,
18 and I basically told him that we were not going to alter the
19 original A.P.A. in terms of the transfer of copyrights. He
20 indicated that, you know, he felt that Santa Cruz's business
21 was going to be hampered if they didn't have certain rights
22 to that which they had acquired.

23 That is when I said, well, we can modify this language
24 to affirm the rights that you have acquired in terms of
25 license grants and rights to use the technology. Then I

1 would mark up the paragraph and send him my proposed
2 language to that effect.

3 Q. Did you, in fact, prepare such a revision?

4 A. I did.

5 Q. I would like to show you what is in evidence as Exhibit
6 N-8. First, let's turn to page number 2 of Exhibit N-8.

7 There appears to be a signature under the heading Novell.

8 Do you see that?

9 A. I do.

10 Q. Do you have any understanding as to whose signature
11 that is?

12 A. Yes, I do. That is James Tolonen.

13 Q. Who did you understand Mr. Tolonen to be?

14 A. He was the executive vice president and C.F.O. of
15 Novell at the time.

16 Q. Did you have any involvement with Mr. Tolonen relative
17 to amendment number two?

18 A. I did. Mr. Tolonen was named the executive basically
19 in charge of the amendment number X and the amendment number
20 two, and in brokering a settlement with respect to amendment
21 number X and any changes that were going to be made on
22 amendment number two. I had business discussions with him
23 about what we were to do with amendment number two.

24 Q. In any of your communications with Mr. Tolonen, did he
25 suggest to you that Novell ought to agree to transfer

1 ownership of the UNIX copyrights to Santa Cruz Operation?

2 A. No, he did not.

3 Q. Did anyone at Novell ever suggest to you that in
4 connection with amendment number two that Novell ought to
5 transfer ownership of UNIX copyrights to Santa Cruz
6 Operation?

7 A. No, no one did.

8 Q. If we could go back now to the first page of the
9 exhibit. Let's highlight the language in Section A.

10 Just so you know, the jury has had the benefit of
11 seeing this several times, but this is the first time we
12 have had a chance to talk together in this trial, Ms.
13 Amadia.

14 Section A reads as follows: With respect to Schedule
15 1.1-B of the agreement, titled excluded assets, Section 5,
16 subsection A shall be revised to read all copyrights and
17 trademarks, except for the copyrights and trademarks owned
18 by Novell as of the date of the agreement required by SCO to
19 exercise its rights with respect to the acquisition of UNIX
20 and UnixWare technologies. However, in no event shall
21 Novell be liable to SCO for any claim brought by any third
22 party pertaining to said copyrights and trademarks.

23 Now, did you understand that this was the final
24 language agreed to between Novell and Santa Cruz Operation?

25 Correct?

1 A. Correct.

2 Q. Under this language was it your intent as commenter or
3 drafts person to effect the transfer of UNIX copyrights by
4 Novell to Santa Cruz Operation?

5 A. No, that was not my intent.

6 Q. Why is it that you had no intent by virtue of amendment
7 number two to transfer ownership of the UNIX copyrights to
8 Santa Cruz Operation?

9 A. Well, there was no business decision to make that
10 transfer. So as the legal negotiator I am going to follow
11 the business decision and the business decision was not to
12 transfer copyright as to the original A.P.A., and from my
13 research, and certainly as to amendment number two.

14 Q. Now, with respect to the initial asset purchase
15 agreement, including amendment number one and amendment
16 number two, which you participated in drafting, were you
17 aware of any business reasons why Novell would want to
18 retain actual ownership of the copyrights particularly in
19 the context of a potential insolvency or transfer or --

20 A. Well, there is language in the asset purchase agreement
21 that I reviewed that explains that Novell retained a royalty
22 stream from the existing code. There is reference to Novell
23 retaining an equitable interest in those SVRX licenses. So
24 there is some indication from the language of the A.P.A.
25 that Novell had a very strong interest in retaining the

1 copyright ownership to protect that royalty stream.

2 Q. Based upon your understanding of the language of the
3 initial asset purchase agreement and your conclusion that it
4 did not transfer the copyright ownership by Novell to Santa
5 Cruz Operation, did you believe that you would have had to
6 obtain approval or authorization from someone senior at
7 Novell before you could change the asset purchase agreement
8 to transfer copyright ownership?

9 A. Absolutely.

10 Q. Why did you hold that understanding?

11 A. Well, that is just, you know, standard business
12 practice. I mean, something that significant would need to
13 be agreed to on a business level and a very high level
14 business level before anyone would make that change.

15 Q. Were you ever authorized by anyone at Novell to modify
16 the asset purchase agreement so that it would transfer
17 ownership of the copyrights to Santa Cruz Operation?

18 A. No, I was not.

19 Q. Did you ever ask for such authorization?

20 A. No, I did not.

21 Q. So when you prepared the language that actually was
22 approved by Novell and signed by Mr. Tolonen, was your
23 understanding that it was also approved by Mr. Sabbath at
24 Santa Cruz Operation?

25 A. Yes. The language that we were just looking at was

1 actually signed by both parties.

2 MR. BRENNAN: Just so we can be clear on that
3 point, perhaps I can ask Mr. Lee if he could pull up
4 amendment number two, just the very last portion of Exhibit
5 1. I have thrown him a monkey wrench. We'll see how quick
6 he is.

7 I want to simply show the signature page by Mr.
8 Sabbath to amendment number two.

9 My apologies for the delay.

10 Your Honor, with your indulgence, it will just
11 take a few more seconds.

12 THE COURT: All right.

13 MR. BRENNAN: Thank you. I appreciate everyone's
14 patience with me.

15 BY MR. BRENNAN

16 Q. What is before you is the counter signature by Santa
17 Cruz Operation to amendment number two. You'll see that it
18 references as the signer Steve Sabbath. That is the
19 individual who you understood to be in essence the general
20 counsel for Santa Cruz Operation, correct?

21 A. Correct.

22 Q. Now, let me back up. When Mr. Sabbath sent over his
23 first version, Exhibit T-34, and let's pull that up, T-34.
24 Highlight the proposed language that Mr. Sabbath initiated.

25 In the version that Mr. Sabbath proposed it reads,

1 quote, all copyrights and trademarks except for copyrights
2 and trademarks owned by Novell as of the date of this
3 amendment number two which pertain to the UNIX and UnixWare
4 technologies and which SCO has acquired hereunder.

5 Now, that language was not accepted, was it?

6 A. No.

7 Q. Why is it that that language was rejected by Novell?

8 A. Well, again, Novell was not interested in transferring
9 copyright ownership, and this language seems to have that
10 effect, or at least go some way toward that effect.

11 Q. Then if we could turn back to amendment numbers two and
12 eight, which is the version that was approved and signed,
13 and let's highlight the language so that we can compare
14 them.

15 Did Mr. Sabbath protest, after you sent to him the
16 revised language that removed the provisions that he wanted,
17 and say words to the effect that this is not acceptable to
18 Santa Cruz because we wanted to get an amendment that said
19 that we acquired the ownership of the copyrights?

20 A. Steve Sabbath was a bit of a screamer in general, to
21 give you some context, and having negotiated the amendment
22 number X with him, and that was a lengthy settlement
23 negotiation, and he didn't accept any language readily.
24 When I explained to him that, you know, if your concern is
25 that you can't move forward in your business and develop

1 this technology and exploit it then, you know, the license
2 grants that are in the underlying asset purchase agreement
3 really should meet that concern.

4 What we are willing to do in amendment number two is
5 affirm those license grants and make it clear that Novell is
6 not going to come back later and sue you for copyright
7 infringement for the assets and for your continued
8 development of the assets.

9 I don't recall if he continued to scream or if he
10 accepted it at first explanation, but he did sign it, so I
11 did know or feel that at the end of the transaction he had
12 accepted the language.

13 Q. During the discussions that culminated in Mr. Sabbath
14 cosigning on amendment number two, did you express to him
15 Novell's position that it was not transferring ownership of
16 the copyrights to Santa Cruz Operation under amendment
17 number two?

18 A. Yes.

19 THE COURT: Mr. Brennan, how much more do you
20 have?

21 MR. BRENNAN: I just have three questions.

22 THE COURT: All right.

23 MR. BRENNAN: I hope I have calculated that right.
24 I only get three questions now, having made that statement.

25 BY MR. BRENNAN

1 Q. If I could have you focus on the second sentence of
2 what is on the screen, and it begins however in no event --

3 A. Yes.

4 Q. Let's highlight that.

5 However, in no event shall Novell be liable to SCO for
6 any claim brought by any third party pertaining to said
7 copyrights and trademarks.

8 What was the intent and purpose of that language?

9 A. The intent of that language was to say, okay, so here
10 we are with amendment number two and we are affirming that
11 you have certain licenses to the technology, to the right to
12 use it, to manufacture it, to make modifications to it. In
13 that original A.P.A. there are representations and
14 warranties, there are indemnities, and we are not trying to
15 alter any of that. We are not saying that somehow we're
16 giving you something additional in amendment number two that
17 you can now seek some kind of suit against Novell. The
18 license grants themselves were actually in the asset
19 purchase agreement.

20 Q. I have two questions left.

21 Question two, in your mind are you positive that Novell
22 did not intend to transfer copyrights with respect to UNIX
23 to Santa Cruz Operation under the language of amendment
24 number two that you prepared?

25 A. I am.

1 Q. Last question.

2 How can you be so sure?

3 A. Because I negotiated it and I drafted it. That wasn't
4 my intent. I didn't have the authority to do otherwise.

5 MR. BRENNAN: Thank you, Your Honor.

6 THE COURT: We'll take our recess now.

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

8 (WHEREUPON, the jury leaves the proceedings.)

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

10 MR. BRENNAN: Thank you, Your Honor.

11 (Recess)

12

13

14

15

16

17

18

19

20

21

22

23

24

25