

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 25, 2010
18 Jury Trial

19
20
21
22
23
24 REPORTED BY: Patti Walker, CSR, RPR, CP
25 350 South Main Street, #146, Salt Lake City, Utah 84101

A P P E A R A N C E S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

For Plaintiff:

Brent Hatch
HATCH JAMES & DODGE
10 West Broadway, #400
Salt Lake City, Utah 84010

Stuart Singer
BOIES SCHILLER & FLEXNER
401 East Las Olas Blvd., #1200
Fort Lauderdale, Florida 33301

Edward Normand
BOIES SCHILLER & FLEXNER
33 Main Street
Armonk, New York 10504

For Defendant:

Sterling Brennan
WORKMAN NYDEGGER
60 East South Temple, #1000
Salt Lake City, Utah 84111

Eric Acker
Michael Jacobs
MORRISON & FOERSTER
425 Market Street
San Francisco, California 94105

	I N D E X		
	Examination By		PAGE
1			
2	Witness		
3	Tor Braham	Mr. Singer Cross (Cont)	2395
4		Mr. Jacobs (Redirect)	2414
5		Mr. Singer (Recross)	2427
6	David Bradford	Mr. Brennan (Direct)	2433
7		Mr. Singer (Cross)	2446
8		Mr. Brennan (Redirect)	2466
9		Mr. Singer (Recross)	2468
10	Terry Musika	Mr. Brennan (Direct)	2473
11		Mr. Hatch (Cross)	2511
12		Mr. Brennan (Redirect)	2533
13		Mr. Hatch (Recross)	2536
14	Robert Frankenberg	Mr. Singer (Direct)	2540
15		Mr. Brennan (Cross)	2547
16		Mr. Singer (Redirect)	2556
17		Mr. Brennan (Recross)	2559
18	Christine Botosan	Mr. Hatch (Direct)	2560
19		Mr. Brennan (Cross)	2577
20		Mr. Hatch (Redirect)	2586
21			
22			
23			
24			
25			

1 EXHIBITS RECEIVED INTO EVIDENCE:

2 Plaintiff's:

3 9 to SCO 639, pages 39783 through 39801 2400

4 89 2411

5 88 2412

6 123 2545

7

8

9

10

11

12

13 Defendant's:

14 C-33 2478

15

16

17

18

19

20

21

22

23

24

25

1 SALT LAKE CITY, UTAH; THURSDAY, MARCH 25, 2010; 8:30 A.M.

2 PROCEEDINGS

3 THE COURT: Good morning.

4 Counsel, let me make you aware that rulings on the
5 Rule 50 motion and the motion to strike have been issued,
6 meaning whatever we do with them in the system. Copies will
7 be available at the break.

8 You have been given a copy of a packet that shows
9 the latest changes based upon your filings yesterday to the
10 jury instructions with a list of those changes that have
11 been made, those that were not made. Perhaps of greatest
12 significance is the fact that as of this point the Court is
13 not going to issue an instruction to the jury on privileges.
14 A brief explanation as to why was given to you as well. The
15 reason we did that was so that those who were working on the
16 jury instructions independently from those of you at the
17 table might be able to take a look at that so we can have
18 that addressed thoroughly at the three o'clock jury
19 instruction conference.

20 As to that conference, counsel, understand that
21 the Court believes you have been able to make a proper
22 record by all of your filings. I don't expect you to come
23 in here at three o'clock and to restate everything that you
24 have argued in those written memorandum to the Court.
25 Rather, I would ask you to please focus just on the changes

1 that have been made or not made, and those that you believe
2 you have not yet been able to make a record, please plan to
3 state your objections.

4 Before the day is up, I would presume by the first
5 break, we will be able to give you a complete packet of the
6 jury instructions as the Court intends to give them as of
7 this morning.

8 Are there any questions about the jury instruction
9 conference or the instructions?

10 MR. JACOBS: Your Honor, I think it would be
11 useful if both parties would state on the record their
12 assent to the Court's understanding of whether that proper
13 record has been made, and assuming that SCO would do so, we
14 would assent as well.

15 THE COURT: All right. Thank you, Mr. Jacobs.

16 MR. SINGER: We would do so.

17 THE COURT: Thank you, Mr. Singer.

18 Is there anything else, counsel, before we bring
19 the jury in?

20 MR. BRENNAN: Your Honor, just a couple of
21 housekeeping matters, several pertain to the closing
22 argument tomorrow and one pertains to an issue that arose
23 yesterday. First of all, I do want to report to the Court
24 that based on my consultation with Mr. Singer, we've agreed
25 that each side would have one hour and 15 minutes on closing

1 and we anticipate that we would be held to that time.

2 THE COURT: You will. If that's what you agreed
3 to, I will keep track of that time. Okay.

4 MR. BRENNAN: Yes. Thank you.

5 The second item, Your Honor, has to do with the
6 use of the video clip segments of deposition testimony that
7 was presented during the course of the trial. Novell's view
8 is that to allow the use of video clip testimony during the
9 course of closing would unfairly accentuate testimony over
10 that which was live testimony in court, it would give it a
11 disproportionate weight and it shouldn't be given that
12 weight. Instead, we recommend the use of trial testimony,
13 whether presented through live witnesses or through
14 videotapes, should be presented in closing argument by use
15 of the transcript rather than videotaping.

16 THE COURT: Mr. Singer.

17 MR. SINGER: Your Honor, on that point, we
18 disagree. Obviously now we know what's in evidence, so
19 obviously the only thing that we would use would be
20 videotape that's been admitted into evidence. The jury is
21 supposed to give that equal weight to what live witnesses
22 said in court. They have had a chance to see the live
23 witnesses, spend time in their presence, which the videotape
24 just appears on the monitor and then it's gone. We don't
25 think it elevates the video testimony above the live

1 testimony by playing a few seconds really, which is all we
2 could do, of a witness's videotaped deposition testimony.
3 It allows us to give it a more proper -- not even probably
4 up to the weight of live testimony, but at least where the
5 jury can recall, yes, that was a videotape, I remember who
6 that was, this is what Jim Wilt looks like or Doug Michels
7 looks like, and relate back to that testimony they heard for
8 only a few minutes. We don't think it is unfair and we
9 don't think it elevates that testimony above the witnesses
10 who they spent a great deal of time listening to in court.

11 THE COURT: I agree with Mr. Brennan on this one.
12 I will not allow the use of videotape portions of the
13 deposition. You may read the depositions, but you will be
14 permitted -- both sides -- to show pictures -- a picture,
15 not moving pictures, but a picture of the witness as they
16 are being referred to. I think that would be helpful, but
17 not anything more beyond that.

18 MR. BRENNAN: Thank you, Your Honor.

19 The third item is just a practical matter. When
20 we left court yesterday, Mr. Tor Braham was on the stand. I
21 understand that his cross-examination will continue and then
22 likely redirect. Because we're on a tight clock today, I
23 would ask for just this one indulgence. Before we call our
24 next witness, who we anticipate being David Bradford, I
25 would like to step out of the room for 30 seconds because I

1 need to make a very quick calculation about time. I don't
2 think the jury -- maybe it will be at a break, but I just
3 need that indulgence.

4 THE COURT: That should be no problem at all. If
5 I should forget, don't hesitate to remind me.

6 MR. BRENNAN: The last item I have, Your Honor, is
7 this is really in the nature of a report to the Court. Just
8 so we can be clear, there was a discussion yesterday about
9 reference during Mr. Jones' cross-examination to trial
10 testimony. We do have the transcript. And if I could just
11 make the Court aware of what the transcript states.

12 THE COURT: Go ahead.

13 MR. BRENNAN: I think we can have it before, Your
14 Honor, if you would like. This is taken from page 2245.
15 And this is the cross-examination being conducted by
16 Mr. Normand. And at line 13, Mr. Normand says, Mr. Jones,
17 while counsel looks at this, I wanted to show you, and read
18 to yourself lines 16 through 20. That is from the 2008
19 trial testimony. Answer yes.

20 THE COURT: So your point is he was the one who
21 raised it?

22 MR. BRENNAN: He was the one who raised it.

23 THE COURT: In that respect, I was in error.

24 MR. BRENNAN: I didn't mean to point out any
25 error.

1 THE COURT: No, that's fine. But, Mr. Brennan,
2 even with that, I don't believe that the instruction beyond
3 that which the Court gave the jury yesterday is necessary.

4 Are you requesting something more?

5 MR. BRENNAN: Here's the reason I raise it, and
6 perhaps the proper way to handle this is at the charging
7 conference we might at least make some suggestion to Your
8 Honor, if we feel appropriate, about an instruction that
9 might pertain to that.

10 THE COURT: You certainly may.

11 MR. BRENNAN: That's all I have, Your Honor.
12 Thank you.

13 THE COURT: Go ahead, Mr. Singer.

14 MR. SINGER: I want to note for the Court that our
15 understanding, I think we're in agreement with Novell, is
16 that Novell has an hour and 45 minutes to use today and SCO
17 has an hour and 55.

18 MR. JACOBS: That is ours as well.

19 THE COURT: All right.

20 Counsel, one other thing. As of right now my
21 assumption is that as far as an alternate juror, it will be
22 juror number 13. Unless one of you wants to argue
23 otherwise, and if I don't hear something from one of you
24 between now and the time we finish tomorrow, that will be my
25 intention, to dismiss juror number 13.

1 MR. BRENNAN: That had been our understanding from
2 the start, Your Honor, that's the Court's intention.

3 MR. SINGER: Can we address that later if we have
4 any issues raised?

5 THE COURT: You may. Again, what this is giving
6 you the opportunity to do is if there is a juror that you
7 think has not been observant, has not paid attention or
8 something else, that I would require both of you to agree to
9 it before I would do it. But it will be juror 13, unless
10 both of you agree for some other legitimate reason, should
11 be the alternate.

12 MR. SINGER: We understand.

13 THE COURT: Are we now ready, then?

14 MR. JACOBS: Yes. Thank you.

15 THE COURT: Mr. Singer.

16 MR. SINGER: Yes, we're ready.

17 THE COURT: Will someone be getting Mr. Braham.

18 (Jury present)

19 THE COURT: Good morning, ladies and gentlemen.

20 For your information, it is clear that the parties
21 will be able to finish the presentation of witnesses today.
22 I anticipate that it will take the full day, meaning through
23 1:30. But that means that tomorrow we then will begin with
24 you being instructed by the Court on the law that you will
25 apply and then you will hear closing arguments. So I just

1 thought you may be interested to know we are at that point.

2 You probably didn't believe that the end is near.

3 Mr. Braham, if you would please come forward, and

4 I will remind you that you are still under oath.

5 Mr. Singer, if you would, please, as well.

6 CROSS-EXAMINATION (Cont.)

7 BY MR. SINGER:

8 Q Good morning, Mr. Braham.

9 A Good morning.

10 Q Am I correct that while you were at Wilson Sonsini,

11 Novell was your major client?

12 A Not my only -- I had several large clients. It was one

13 of the two that I did the most work with.

14 Q Would you say it's your largest client?

15 A No. I think my -- I had another one that was a little

16 bit larger.

17 Q Novell was also a principal client of the firm?

18 A Yes, it was.

19 Q Now several years after that you left Wilson Sonsini to

20 become an investment banker, correct?

21 A That's correct.

22 Q You currently work with Deutsche Bank; is that right?

23 A Yes.

24 Q And you work in the technology sector of Deutsche

25 Bank's practice?

1 A Yes.

2 Q Thus, you do business deals with companies that are in
3 the technology business?

4 A I do.

5 Q And IBM is one of your clients at Deutsche Bank?

6 A It is.

7 Q Now I would like to turn back to the time in 1995 when
8 you were brought into this transaction. Am I correct that
9 you and others who were working with you at the firm did the
10 legal drafting of the asset purchase agreement during the
11 last two weeks before the September 19th, 1995 signing of
12 that agreement?

13 A Yes.

14 Q And the business people negotiated the essential
15 business terms of that transaction beforehand and your job
16 was to document it, correct?

17 A That is not correct.

18 Q You believed that you could disregard what the business
19 people had negotiated beforehand?

20 A No. I had to listen to the feedback coming from my
21 client. But the deal that was done, as in every
22 transaction, is embodied in the contract. There are
23 discussions before a transaction, but the deal is done when
24 you have lawyers on both sides in the contract.

25 Q Are there any business terms that you regarded as

1 inviolate that you couldn't revisit during these last two
2 weeks while you were working with documents?

3 A If instructed by my client and negotiated, the terms
4 are not inviolate until you negotiate the deal. There's the
5 talk and then there's the walk. The contract and the
6 negotiation of the contract is the walk.

7 Q So in this particular case your approach was in those
8 last two weeks you could try to change any term that you
9 might be able to get into the document and the other side
10 wouldn't object?

11 A I had to listen to my client and the directions that
12 were given by the authorized people in my client to advance
13 their interests. But there were a lot of people with a lot
14 of feedback many of whom were not properly speaking and
15 looking after the interests of the client, and I had to look
16 at the right people and watch the ball, not the crap.

17 Q Well, before beginning the drafting process, did you
18 have any conversations with Ed Chatlos?

19 A Yes.

20 Q Did you understand that he was out there negotiating on
21 a day-to-day basis with representatives from Santa Cruz?

22 A I understood that he was in discussions about a
23 potential transaction. Ed was part of the UNIX business
24 within Novell and I needed to listen to him for information.
25 But in terms of actually protecting Novell, I was looking

1 primarily to people who were not part of the business unit
2 that were going to be moving over. So yes, I had
3 discussions with him, but listening to him for direction,
4 that's where I quibble with what you're asking.

5 Q You just regard what Mr. Chatlos was doing out there
6 for weeks if not months was just having discussions, not
7 negotiating the deal?

8 A Preliminary negotiations, but the negotiations changed
9 all the way to the end. And I think a lot of what he was
10 doing was negotiating for himself and for the business unit
11 that was moving over. I mean, he participated in
12 preliminary discussions and negotiations, but the
13 fundamental negotiations of the deal, like every
14 transaction, happen when you get to the contract.

15 Q Did you ever speak to Mr. Chatlos about withholding the
16 copyrights?

17 A I don't recall.

18 Q With respect to Mr. Ty Mattingly, did you ever speak to
19 Mr. Mattingly about withholding the copyrights?

20 A I don't believe so, but I don't recall.

21 Q Prior to your work and prior to the board meeting
22 considering the asset purchase agreement, did you have any
23 discussion with Robert Frankenberg with respect to
24 withholding the copyrights?

25 A I may have been on prior board meetings where this was

1 discussed, but I don't recall specifically. I don't believe
2 I had any direct one-on-one discussions with
3 Mr. Frankenberg.

4 Q I would like you to look at your declaration, which is
5 put before you as Exhibit 639, and in particular look at
6 Exhibit 9 to your declaration.

7 Is this a term sheet which was generated in connection
8 with this transaction?

9 A I believe it's a draft of an unsigned term sheet.
10 Whether it was done in connection with the transaction -- it
11 was done as part of communications prior to the transaction,
12 but in connection with the transaction, it's a little
13 confusing to me. I don't know --

14 Q This is part of the file that you attached to your
15 declaration that was submitted to the Court as coming from
16 Wilson Sonsini on the case, correct?

17 A Yes.

18 MR. SINGER: I move the admission of what is
19 Exhibit 9 to SCO Exhibit 639.

20 THE COURT: Can you help me by giving me the Bates
21 number, please?

22 MR. SINGER: Yes. This is Bates number 39783
23 through 39801.

24 MR. JACOBS: No objection, Your Honor.

25 MR. SINGER: Let's take a look at this.

1 THE COURT: All right. Just a second.

2 The number again is what?

3 MR. SINGER: Your Honor, it is 39783 through
4 39801.

5 THE COURT: All right. That is to exhibit --

6 MR. SINGER: To SCO Exhibit 639.

7 THE COURT: It will be admitted, those specific
8 Bates number pages.

9 (Plaintiff's Exhibit 9 to SCO Exhibit 639, pages
10 39783 through 39801, were received into evidence.)

11 BY MR. SINGER:

12 Q Mr. Braham, did you understand that this was generated
13 somewhere around September 10th, 1995, if you see the date
14 which appears on the bottom of the page?

15 A I can presume that's true based on -- I don't remember
16 what the date of this document was based on my independent
17 recollection.

18 Q Did you understand that this represented terms which
19 the parties had been negotiating prior to the draft of an
20 actual asset purchase agreement?

21 A I understand that this reflected somebody's viewpoint
22 of terms that they were discussing, maybe that they wanted.
23 But when a term sheet is drafted, a particular document is
24 drafted by an individual person. So to talk about it
25 referring to something that people on both sides are even

1 discussing, put aside agreeing, you then have to say, well,
2 did they discuss this. And the document might reflect one
3 person's proposal or idea. What actually happened in terms
4 of discussing or the state it played in a negotiation, I
5 can't tell from looking at just the one page.

6 Q Did you make any reliance on this during your work on
7 the APA?

8 A Not that I recall.

9 Q Just so we're clear about the business negotiations, if
10 businessmen out in the period before you got involved,
11 before the last two weeks, had sat across the table and said
12 to each other, in this case Novell to Santa Cruz, you're
13 buying the whole business lock, stock and barrel, and then
14 got to a point of bringing in the lawyers to document the
15 deal, you felt yourself free to revisit buying the business
16 lock, stock and barrel?

17 A With input from my client. It happens all the time in
18 deals, and even varying material points of deals are
19 revisited at the end once you're in final negotiations.
20 Price changes sometimes in the last possible minutes. Deals
21 I do, fundamental terms move at the end.

22 Q Was the answer yes or no?

23 A I was not free to revisit independent of direction from
24 my client.

25 Q With respect to the copyright exclusion, when did the

1 copyright exclusion first appear in the draft schedule?

2 A I don't recall specifically, but sometime in the last
3 ten days or week of the negotiation.

4 Q You don't recall more specifically than that?

5 A I saw a document that I think you showed me yesterday
6 that had the copyrights in the transferred assets. Then I
7 saw -- we have the exhibits that had it taken out. If I
8 looked at those two documents, I could probably look at
9 those dates and make a judgment as to when it occurred.

10 Q Do you recall it was sometime after September 12th,
11 1995 the schedules were even prepared?

12 A I have trouble picking particular dates of something 15
13 years ago. It was during this period of negotiation, but
14 exactly whether it was the 12th or the 11th or the 9th, I
15 really have trouble with.

16 Q Is it fair to say you don't recall drafting that
17 schedule of excluded assets yourself?

18 A That's correct.

19 Q And you do recall sending it to Burt Levine, an
20 in-house lawyer at Novell, correct?

21 A I had seen a transmittal from me -- or from my team
22 showing that that happened. Do I have an independent
23 recollection of sending it to him? No. It's in the chain
24 of documents that I looked at. You look at a document and
25 you see what's happened, and it's hard to figure out exactly

1 do I remember that happening or do I just look at that and
2 see that that happened. It's somewhere in there.

3 Q You don't recall any conversation with Mr. Levine about
4 it; is that right?

5 A I do not.

6 Q With respect to presenting this to Santa Cruz, it's
7 your testimony that somewhere in the last week before the
8 agreement was signed, this schedule was presented to Santa
9 Cruz, correct?

10 A Yes.

11 Q They didn't push back hard, right?

12 A We had a discussion about it that I remember. Whether
13 you call it pushing back hard or pushing back a little, I
14 remember a discussion about the topic.

15 Q Well, the discussion which you remember is at one point
16 Mr. Higgins, who was a lawyer for Santa Cruz, asked you
17 about the entire schedule of excluded assets and asked is
18 this a requirement of Novell? That's what you recall?

19 A Yes.

20 Q And you don't know whether he was referring
21 specifically to copyrights as opposed to the schedule as a
22 whole?

23 A I remember that it was my belief that what he was
24 talking about is is it really required that we're not going
25 to transfer the copyrights. So he didn't use those words.

1 He said the schedule, is this really required, but I
2 understood the issue -- I mean, the issue of the copyrights
3 was the biggest issue on that schedule, and I understood his
4 question about that as referring to the copyrights, but his
5 words, I don't believe, said copyrights.

6 Q Now I would like to ask you a few things about the
7 agreement. You discussed yesterday Santa Cruz being an
8 agent. Under section 1.2 of the asset purchase agreement,
9 didn't Santa Cruz obtain legal title to the UNIX licenses?

10 I think that's a yes or no question, sir.

11 A That language refers to legal title passing to the
12 licenses, not to the IP, but to the licenses.

13 Q When you hire an agent to sell your house, do they get
14 legal title to your house?

15 A Normally not in a real estate transaction. In other
16 agencies, they do, they can.

17 Q Now you indicated you were concerned about protecting
18 these royalties in the event that Santa Cruz were to wind up
19 in a bankruptcy proceeding in the future, correct?

20 A One of the reasons, yes.

21 Q And you did so by including language that protected
22 Novell's royalties by providing that Novell would be the
23 equitable owner of the SVRX royalties, correct?

24 A Yes.

25 Q So you could still transfer the copyrights to Santa

1 Cruz and still protect the royalties in that way, right?

2 A Hypothetically could we have transferred the copyrights
3 instead along with the licenses if we had chose --

4 Q My question is simple. You already had separately from
5 anything involving the copyrights protected your interest in
6 the royalties by saying you are the equitable owner of those
7 royalties and reference to whatever appropriate sections to
8 the bankruptcy code were necessary right in the agreement,
9 correct?

10 A We wouldn't have had the same flexibility we got by
11 virtue of owning the copyrights. Royalties are just simply
12 a financial cash flow item. So we would have had a whole
13 set of different issues if we had transferred copyrights as
14 opposed to simply transferring royalty rights.

15 Q But you would have protected your financial interest in
16 the royalties, correct?

17 A I'm confused.

18 Q Well, if you had did as you in fact did do and say that
19 the equitable interest in the royalties belongs to Novell
20 under that provision of the bankruptcy code, you viewed that
21 as protecting the royalties?

22 A In the case of the royalties, it was an acceptable
23 methodology. In the case of copyrights, it would have
24 created a can of worms.

25 Q What kind of -- just so we're clear about this point,

1 the rights to the revenue would follow the specific language
2 on ownership of the SVRX royalties, correct?

3 A The rights to the revenue --

4 Q Yes, the revenue stream.

5 A Well, the fundamentals of the deal and reflected in
6 many places is that we were -- Novell was retaining the
7 rights to the revenue other than the five-percent collection
8 fee, if you will, that we were allowing.

9 Q Maybe my question wasn't clear, Mr. Braham. I'm
10 talking specifically about the language which says that you
11 have equitable ownership of the royalties. The rights to
12 the revenue would follow, in the event of some bankruptcy or
13 any other proceeding, that specific language on the
14 ownership of the equitable interest in the royalties,
15 correct?

16 A Hopefully.

17 Q Now yesterday you discussed these waiver rights that
18 you wrote into the agreement that had all sorts of
19 handwriting, section 4.16 of the agreement?

20 A Yes.

21 Q Now that was in reference to a term called SVRX
22 licenses.

23 MR. SINGER: Mr. Calvin, put 4.16 of SCO Exhibit 1
24 on the screen.

25 //

1 BY MR. SINGER:

2 Q We turn to 4.16, it has capitalized SVRX license. That
3 means it is a defined term, correct?

4 A I do not agree. When we do a defined term, we
5 typically -- in fact, in my experience we've always put a
6 quotation mark around it and then defined the term. There
7 is no -- while it's capitalized, you can have multiple
8 different reasons why you might capitalize a term in an
9 agreement. So without it actually being defined with
10 quotation marks -- I mean, we can look at other places in
11 the document that does that. I don't agree that it is a
12 defined term.

13 Q Let's see if I understand what you're saying. Up above
14 in 4.16(a) it uses the same term SVRX licenses as listed in
15 detail under item VI of schedule 1.1(a) hereof and referred
16 to herein as SVRX royalties. Are you saying -- let me
17 finish my question, please. Are you saying when it says
18 SVRX license in 4.16(b), are you saying that doesn't mean
19 what you said SVRX licenses were in 4.16(a)?

20 A It's not a defined term. If you look at the quotation
21 on SVRX royalties, that is a defined term, because you can
22 see the quotations. That's what lawyers do to define a
23 term. When something is capitalized, it may or may not be a
24 defined term.

25 Q In your view, any decision by SCO regarding a UNIX

1 transaction could be countermanded by Novell in its
2 discretion, correct?

3 A I think there is some constraints on what it could
4 countermand within its own discretion under 4.16.

5 Q Well, if Novell wanted to allow a company as party to a
6 source code development license to release intellectual
7 property that would otherwise be protected by those
8 agreements, is that something under, in your view, 4.16(b)
9 that Novell could do?

10 A It could if it was part of the -- it certainly could if
11 it was part of the UNIX business, but not the specific
12 UnixWare flavor of UNIX.

13 Q Are you aware of Amendment 2 a year later restricting
14 the rights of Novell to act unilaterally even in a buyout of
15 these royalties?

16 A I'm aware of Amendment No. 2. I would have to look at
17 it to talk to you about what it actually does.

18 Q Let's look at the manner in September 15th to 18th that
19 this transaction is presented to the Novell board. Let's
20 look at Exhibit 754. This is a memorandum that Mr. Bradford
21 presented to the board. Did you have any involvement in
22 this preparation?

23 A Not that I recall.

24 Q If we look at the term sheet that's attached to this
25 document, you agree that under the heading Novell retains

1 there is no reference to copyrights?

2 A On this document, that's correct.

3 Q Now this was the Friday before the board vote on
4 September 18th, 1995, correct?

5 A I would need to get a calendar and look at these dates
6 and match them up. If you've done that, I'll accept that.

7 Q The board call was a teleconference?

8 A That's what I remember.

9 Q I think you have before you Exhibit V-3, which is one
10 of the documents which you were shown by Novell's counsel
11 yesterday, Mr. Jacobs. Can you take a look at that?

12 A Yes.

13 Q And I think you testified this was your handwriting?

14 A Yes.

15 Q Are these comments where it says board call that you
16 were writing on this draft of the APA during the board call
17 on September 18th, 1995?

18 A Yes, I believe so.

19 Q And refers to Mr. Frankenberg, correct?

20 A Yes.

21 Q Up on the upper right-hand corner, is that your
22 handwriting that says license back?

23 A Yes.

24 Q Now you are using a draft agreement that was before you
25 at the time of this call, correct?

1 A Yeah, it would be --

2 Q I just asked a simple question.

3 A Yes. This document was before me. That's how I got my
4 handwriting on it.

5 Q Would you look at the back of the agreement that's been
6 marked as B-3 and tell me if there are any schedules at all
7 on this draft of the agreement that you used to write down
8 comments during the board call?

9 A This is the first time that we're flipping through
10 this. I can tell you about my practice --

11 Q I'm not asking about your practice.

12 THE COURT: Why don't you let him look at a hard
13 copy.

14 BY MR. SINGER:

15 Q There is a hard copy before you that's marked as
16 Exhibit V-3. It's one of the documents that is on your
17 desk.

18 Do you see any schedules attached to that draft of the
19 APA?

20 A No.

21 Q Now after the board meeting, did you file a
22 Hart-Scott-Rodino filing with the United States government?

23 A I did not.

24 Q Novell did, correct?

25 A I don't recall specifically, but I would certainly

1 expect that they did.

2 Q Let's take a look at Exhibit 89. This has your name on
3 it, Tor Braham, correct?

4 A Yes.

5 Q You understand this to be a draft of a submission to
6 the United States government under the Hart-Scott-Rodino
7 Antitrust Improvements Act?

8 A Looking at it now, I think that makes sense.

9 Q This was an act which requires big companies to file
10 certain papers in connection with the sale or disposition of
11 parts or whole of the business, correct, in general terms?

12 A If they meet certain thresholds, yes.

13 MR. SINGER: I would like to move at this time
14 admission of 89.

15 MR. JACOBS: No objection, Your Honor.

16 THE COURT: It will be admitted.

17 (Plaintiff's Exhibit 89 was received into
18 evidence.)

19 BY MR. SINGER:

20 Q This was a draft that you prepared -- you were involved
21 in the preparation of this draft, correct?

22 A I don't recall.

23 Q But it has your name on it, correct?

24 A It's not my handwriting. I don't remember.

25 Q Let's turn to Exhibit 88 for a moment. Do you see this

1 is a final version which was submitted?

2 A I don't know what the final version was. If you tell
3 me it was, I have no reason to doubt that, but I really
4 don't remember.

5 Q Do you see Mr. Bradford's signature on the second page?

6 A Yes.

7 Q Do you have any reason to doubt that this is the actual
8 Hart-Scott-Rodino filing that was submitted?

9 A No reason. Without going and looking at the filing,
10 no.

11 MR. SINGER: I move admission of Exhibit 88.

12 MR. JACOBS: Do you have a copy, sir?

13 MR. SINGER: Yes, we do.

14 BY MR. SINGER:

15 Q Mr. Braham --

16 THE COURT: Just one second.

17 MR. JACOBS: No objection, Your Honor.

18 THE COURT: Exhibit 88 will be admitted.

19 (Plaintiff's Exhibit 88 was received into
20 evidence.)

21 BY MR. SINGER:

22 Q Mr. Braham, looking at Exhibit 88, you understand this
23 is an important document, something being submitted to the
24 federal government, right?

25 A Documents to the federal government are important.

1 Q And if you turn to page 5, Bates stamp 41355 of SCO
2 Exhibit 88, this identifies the assets to be acquired by
3 Santa Cruz in this transaction, correct? It says the assets
4 to be acquired by SCO are described with particularity in
5 schedule 1.1(a) of the agreement. The general categories
6 described therein are. Do you see that?

7 A Yes.

8 Q Item one is all rights and ownership of UNIX and
9 UnixWare, correct?

10 A Yes.

11 Q If we turn back to schedule -- to Exhibit 89 for a
12 moment, the draft that has your name on it, you see the same
13 thing appears on page 5 of that version, the assets to be
14 acquired, all rights and ownership of UNIX and UnixWare. Do
15 you see that?

16 A Yes.

17 Q So you didn't tell the United States government in this
18 filing that what was being transferred to Santa Cruz was all
19 rights and ownership except for the copyrights?

20 A As far as I know the agreement would have been publicly
21 filed.

22 Q Do you see anything on what was the actual form which
23 says in the list here, the categories of assets, it says,
24 all rights and ownership of UNIX and UnixWare, comma, except
25 Novell retained the copyrights? You don't see that, do you?

1 A Not on this particular piece of paper, but you have to
2 look at the whole filing. If you want me to look at the
3 whole filing, I could tell you what was submitted.

4 Q I'm asking you about what was presented in the summary
5 as to the assets to be acquired and how it was characterized
6 to the government?

7 A If you're asking me whether the copyrights exclusion is
8 on this page, I agree that it isn't expressly called out on
9 this page. But when you submit a document to the
10 government, you incorporate by reference the whole document.
11 Any individual page doesn't speak for the entire submission.

12 MR. SINGER: I have nothing further. Thank you.

13 THE COURT: Mr. Jacobs.

14 REDIRECT EXAMINATION

15 BY MR. JACOBS:

16 Q Let's rewind, Mr. Braham, with where Mr. Singer left
17 off.

18 MR. JACOBS: Could we have SCO Exhibit 88 on the
19 screen, please. Then could we turn to page 4.

20 BY MR. JACOBS:

21 Q Do you have that in front of you, Mr. Braham, also?

22 A I have it on the screen. If you want me to find it.

23 MR. JACOBS: Mr. Lee, could we blow up the first
24 full paragraph, Novell, Inc., a Delaware corporation.

25 //

1 BY MR. JACOBS:

2 Q Mr. Braham, what is this paragraph of this
3 Hart-Scott-Rodino filing doing?

4 A This is referencing that the entire agreement has been
5 submitted and incorporated by reference that full sum
6 agreement.

7 Q When Mr. Singer was asking you whether the
8 Hart-Scott-Rodino filing revealed to the government the
9 exclusion of copyrights, did he point you to this provision
10 where the asset purchase agreement is attached as a
11 documentary attachment?

12 A No, he didn't.

13 Q What is this reference to the documentary attachment
14 here? What is that referencing?

15 A The document is the definitive agreement, the APA.

16 Q Now when Mr. Singer was asking you about actual
17 negotiations and you're referring to the client, direction
18 from the client, Mr. Singer was distinguishing various
19 individuals of the client and you were referring to the
20 client. Can you explain to the jury again how this works in
21 terms of your representation of Novell in this transaction?

22 A In all deals, but certainly in this, you have different
23 constituencies within a corporation. People have different
24 interests, different agendas, different motivations,
25 different incentives. As a business adviser, whether it be

1 an investment banker or a corporate lawyer, you have to
2 figure out who is really speaking for the company, in the
3 best interest of the company as opposed to maybe being
4 important to a transaction and having important information
5 that they are funneling through but might not be in the line
6 of fire as to who was actually most empowered to look after
7 the company and to give you direction.

8 In the case of Novell, it was David Bradford and the
9 board of directors of Novell who were speaking for Novell.
10 In the negotiation of this transaction, there were numerous
11 people who were involved in preliminary discussions and were
12 important to those discussions. But at the end of the day
13 and when the transaction was really negotiated, I had to
14 listen to David Bradford, who was communicating with the
15 board of directors and communicating to me the interests of
16 the company, which is similar to all the other transactions
17 I worked on with Novell and in other deals, you have to find
18 who -- figure out who the mouthpiece is as opposed to people
19 who are around it but not speaking for the company.

20 Q During the negotiations of the asset purchase
21 agreement, did you get specific direction from Mr. Bradford
22 as to individuals that he was concerned about that might be
23 providing you input and that he felt you should be careful
24 about listening to?

25 A Yes.

1 Q Who?

2 A Well, one in particular was Duff Thompson.

3 MR. SINGER: This is outside the scope of cross.

4 MR. JACOBS: It can't be, Your Honor.

5 THE COURT: Overruled.

6 THE WITNESS: One in particular was Duff Thompson.

7 BY MR. JACOBS:

8 Q What was the concern that Mr. Bradford expressed to you
9 about Mr. Thompson?

10 A David told me that Duff had -- that the tentative
11 plan --

12 MR. SINGER: It's also hearsay.

13 THE COURT: I will sustain the hearsay objection.

14 BY MR. JACOBS:

15 Q Did you gain an understanding in the course of your
16 interactions with Mr. Bradford as to particular individuals
17 who you should be cautious about in taking input from?

18 A Yes.

19 Q Who was that individual?

20 A Duff Thompson.

21 MR. SINGER: He's just calling for hearsay in a
22 different fashion, Your Honor.

23 MR. JACOBS: Asking for his understanding as the
24 representative of Novell.

25 MR. SINGER: His understanding of something like

1 that is not relevant.

2 MR. JACOBS: Mr. Singer made it relevant by asking
3 him if he spoke with the business people.

4 THE COURT: I will overrule the objection, but do
5 not elicit hearsay.

6 BY MR. JACOBS:

7 Q Did you form an understanding as to whether
8 Mr. Thompson might, in particular, have some conflicts that
9 might render his input of less weight than the input of
10 other executives?

11 A Yes.

12 Q What was the concern that underlay the understanding
13 you formed?

14 A The concern was that Duff Thompson was expected to go
15 on the board of directors of SCO.

16 Q And therefore?

17 A Was looking after the interests of SCO, at least in
18 part, as compared to the interests of Novell.

19 Q So ultimately this transaction was presented to the
20 board of directors of Novell for approval?

21 A Yes, it was.

22 Q And in a public company like this are there typically
23 rules governing what kind of transactions can be approved by
24 executives without the board and what kind of transactions
25 require board approval?

1 A Typically companies have thresholds that certainly
2 enable day-to-day transactions to occur without the board.
3 No company can operate with having the board involved in all
4 the day-to-day matters. When it comes to mergers and
5 acquisitions and dispositions, many companies require all of
6 those to go to the board, and other companies have
7 thresholds where very small mergers and acquisitions could
8 be done, immaterial deals done without board approval. But
9 above a certain threshold or in transactions that would be
10 visible and might be interesting to the investing public,
11 those transactions require board approval.

12 Q So if we're trying to understand the process by which
13 board approval was actually given for this transaction, what
14 document would one look to?

15 A The minutes.

16 MR. JACOBS: Let's take another look at Z-3, Mr.
17 Lee.

18 BY MR. JACOBS:

19 Q Z-3 is the minutes of the board meeting -- the minutes
20 of the meeting of the board of directors of Novell, Monday
21 September 18th, 1995.

22 MR. JACOBS: If we go to the second page, Mr. Lee,
23 and the resolution where copyrights are mentioned.

24 BY MR. JACOBS:

25 Q So, Mr. Braham, in terms of whether the negotiating

1 team representing Novell had authority to exclude the
2 copyrights from the asset purchase agreement transaction,
3 what does this board of directors resolution signify to you
4 as someone experienced in representing Novell in
5 transactions?

6 A Well, it expressly states that the company would retain
7 the patents, copyrights and trademarks, other than the
8 trademark UNIX and UnixWare, which combined with the fact
9 that the asset purchase agreement is incorporated by
10 reference into the minutes makes it completely clear that
11 the board approved and directed that the transaction be done
12 with these terms.

13 Q What about all the input from somebody like Ed Chatlos
14 or Ty Mattingly, how would that relate as a matter of
15 corporate governance to the board approval that was
16 obtained?

17 A It would not be relevant.

18 Q Even the CEO, Mr. Braham, let's assume that Mr.
19 Frankenberg had it in his head at some point that the
20 copyrights would transfer, would what was in his head be
21 superior or inferior to what the board actually approved?

22 A It would be inferior. It would not matter. The board
23 approval speaks for the company in actions where a
24 transaction that is submitted, required to be submitted and
25 evaluated by a board.

1 Q At the beginning of your cross-examination yesterday
2 Mr. Singer asked you about Amendment No. 2. Do you recall
3 that?

4 A Yes.

5 MR. JACOBS: Could we have N-8 up, please.

6 BY MR. JACOBS:

7 Q Now he asked you whether you understood that Amendment
8 No. 2 -- I forget his exact words -- replaced the language
9 in the excluded assets at subsection A. Do you recall that
10 question and answer?

11 A Yes.

12 Q If you look at the as of date in the first paragraph of
13 Amendment No. 2, do you see that?

14 A Yes.

15 Q It reads, as of the 16th day of October, 1996. Do you
16 see that?

17 A Yes.

18 Q So what does that signify to you in terms of the
19 effective date of the replacing effect of Amendment No. 2
20 and the language of the asset purchase agreement?

21 A This would be effective as of the 16th of October,
22 1996.

23 Q Now as a transactional lawyer, if one wanted to draft
24 an amendment like this --

25 THE COURT: Mr. Singer.

1 MR. SINGER: There is no foundation. They
2 objected yesterday and, in fact, this witness wasn't
3 involved in this amendment.

4 THE COURT: I am going to sustain the objection.
5 You are, in effect, eliciting expert testimony from this
6 witness.

7 MR. SINGER: I move to strike the testimony that
8 he just elicited on that.

9 MR. JACOBS: Your Honor, Mr. Singer asked the
10 witness whether he understood that this language replaced
11 the language of the asset purchase agreement.

12 THE COURT: Mr. Jacobs, I have been quite
13 concerned about two or three of your questions now because,
14 again, you are having Mr. Braham act as an expert, in
15 effect. I would discourage you from doing that again.

16 BY MR. JACOBS:

17 Q Mr. Braham, in the asset purchase agreement that was
18 negotiated in September 19th and signed September 19th,
19 1995, did it anticipate that the actual assets would
20 transfer on execution of that agreement on September 19th,
21 1995?

22 MR. SINGER: Those are issues of law that the
23 Court can direct the jury on to the extent it's relevant.

24 MR. JACOBS: He's the negotiator of the agreement.

25 THE COURT: I'll allow you to answer the question.

1 THE WITNESS: It anticipated that the assets would
2 transfer upon the close and the execution of closing
3 documents.

4 BY MR. JACOBS:

5 Q What kind of closing documents did you contemplate in
6 negotiating the asset purchase agreement?

7 A A bill of sale.

8 Q What did you contemplate by way of a bill of sale?
9 What would that document look like.

10 A It would be a piece of paper --

11 MR. SINGER: Outside the scope of my cross. This
12 is just more direct that he wishes he had done yesterday.

13 MR. JACOBS: As you wish, Your Honor.

14 THE COURT: I will sustain that objection.

15 BY MR. JACOBS:

16 Q Mr. Singer asked you some questions about the back and
17 forth with Santa Cruz about the copyright exclusion. Do you
18 recall that?

19 A Yeah. With Mr. Higgins, yes.

20 Q And as you were exchanging the drafts with Mr. Higgins
21 and with the Brobeck team, the Santa Cruz team, what was
22 your understanding of the copyrights that would be retained
23 pursuant to the excluded asset schedule?

24 A All of them.

25 Q All of them then extant, all of them into the future?

1 A All of them that existed at the time of the signing and
2 the closing of the transaction. In the future, they would
3 build on -- the expectation is that SCO would build on top
4 of that base of technology and build their own substantial
5 improvements and develop a very successful commercial
6 product with their own R and D investments and innovations
7 and they would own the copyrights exclusively to those.

8 Q Let's explain that to the jury because it seems
9 intuitive to a transactional lawyer, but let's explain how
10 that works.

11 So your anticipation when you proposed that language
12 was that Novell would retain the then existing copyrights to
13 the then existing code; is that right?

14 A Yes.

15 Q Then what would happen?

16 A Then SCO would go off and improve it, add to it, build
17 a better mousetrap out of the base mousetrap, would have the
18 ownership all of those improvements, which would give it a
19 competitive advantage in the marketplace. And they were
20 expected -- they were allowed to and under the agreement
21 expected to go off and market and succeed with that flavor.

22 Q Mr. Singer asked you whether under 4.16(b) if Novell
23 could waive licensees' rights as to the old UNIX licenses,
24 whether you had a concern that that might somehow allow
25 Novell to destroy Santa Cruz's business.

1 A I was not concerned that it would allow them to because
2 if they did a good enough job as they were expected to, to
3 build a -- to take vanilla ice cream and make a strawberry
4 sundae out of it, they could succeed with it.

5 Q If they succeeded with that and they build a sundae,
6 what ownership rights would they have in the sundae?

7 A They would own the sundae and they would own the cherry
8 on top and the strawberry sundae, and all the elements that
9 made it attractive for people to go in and buy the
10 strawberry sundae other than the basic vanilla ice cream,
11 which the other licensees could go make a banana split out
12 of.

13 Q To use your analogy, who would own the vanilla ice
14 cream in the asset purchase agreement?

15 A Novell.

16 Q Now you seem to have a recollection of this copyright
17 back and forth -- or the copyright exclusion. It is a long
18 time ago. Why do you remember it so well?

19 A You have periods in your life that are important and
20 that you recognize at the time are important. And from a
21 business standpoint, this was one of those for me.

22 Q Why was that, Mr. Braham?

23 A Because I knew I was dealing with fundamental industry,
24 important technology. Sometimes you do a lot of deals where
25 you are dealing with very small pieces of technology,

1 semiconductor software, what have you, but I was dealing
2 with the fundamental UNIX operating system, which was
3 critically important to the balance of power in the
4 technology industry. And at the time the concerns that
5 Microsoft was monopolizing -- had the chance to
6 monopolize -- essentially monopolize the whole IT
7 infrastructure stack. And UNIX was extremely valuable. We
8 paid \$300 million for it.

9 But from a strategic standpoint, it was even more
10 important. And I knew that then, this was not something
11 that was -- I think it was well known that UNIX was a
12 fundamental underpinning, and I was dealing with the rights
13 to UNIX, and I knew that this was something that, you know,
14 I might not have that many times in my career that I was
15 going to be touching something as significant.

16 Q How about the copyright exclusion, why do you remember
17 that so well?

18 A Because it was critically important to having
19 flexibility not only for Novell but for the industry to
20 continue to grow in ways that might not have been completely
21 predictable at the time, and it was important that not one
22 company could clamp down on it, and Novell had the ability
23 to retain that. We negotiated for it and I was proud of the
24 defense that we did, David and I, that was supported by the
25 board of defending Novell's interest. It was work that I

1 thought was important. You know, this was important work in
2 my career.

3 Q Mr. Singer asked you about your role at Deutsche Bank.
4 You joined Deutsche Bank in what year?

5 A 2004.

6 Q At this time have you had any involvement in any report
7 that Deutsche Bank has released relating to SCO or the SCO
8 litigation?

9 A No.

10 Q The people who write those reports with projections,
11 are you involved with them on a day-to-day basis, in
12 general?

13 A Not involved with them at all. In fact, I'm not
14 allowed to speak with them without a chaperon lawyer in
15 between, the way the information barriers that are enforced
16 in an investment bank.

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

19 A I do not.

20 MR. JACOBS: Thank you, Mr. Braham.

21 THE COURT: Mr. Singer.

22 RECROSS-EXAMINATION

23 BY MR. SINGER:

24 Q The business is dealing with technology companies like
25 Novell, correct?

1 A It is.

2 Q One of your clients is IBM, correct?

3 A It is.

4 Q Now you had testified near the end of the redirect
5 examination that this was critical intellectual property to
6 the industry, the copyrights and the UNIX operating system,
7 and that's why this is vivid in your mind, correct?

8 A At the time I perceived it to be very important
9 technology. Primarily it was technology owned by Novell and
10 I'm defending a client. Yes, I knew this was important
11 technology.

12 Q So it's your testimony that this critical element, the
13 copyrights controlling UNIX technology that is so important
14 to the computer industry, is something which was dealt with
15 in this transaction on the last week of the transaction by
16 simply putting it into a schedule of excluded assets, there
17 was not substantial discussion about it across the
18 negotiating table? That is your position?

19 A I do not agree there was not substantial discussion
20 about it over the negotiating table. We discussed it, and
21 on both sides I think both parties must have spent a
22 tremendous amount of time absorbing the implications.

23 Q I think if we recall from a few minutes ago what you
24 recall, the actual discussion was a reference to the
25 excluded asset schedule and you thought the other side was

1 talking about the copyright solution, but you don't even
2 recall Mr. Higgins mentioning that specifically, correct?

3 A In terms of my actual discussion in the room with the
4 other side, that's correct.

5 Q And this is such an important part of the transaction
6 that the United States government, if they wanted to learn
7 that Novell had withheld the copyrights while otherwise
8 selling all the UNIX and UnixWare business, would have to go
9 look at a schedule to an attachment rather than seeing it in
10 your summary of what the key elements of the deal were,
11 correct?

12 A It's four pages that define what assets were
13 transferred and what assets were withheld. Those are the
14 key elements of the agreement. And, yeah, if the government
15 wanted to evaluate it, it would need to look at the core
16 document that defined what moved and what didn't as opposed
17 to a summary that may have been put in by a paralegal, for
18 all I know, what the agreement was.

19 Q A paralegal decided what was submitted by Novell to the
20 United States government?

21 A The definitive agreement is what they would need to
22 look at, and particularly the specific schedules, which are
23 only four pages, of what moved and what didn't. So I don't
24 think the government would be confused. That would be very
25 common.

1 Q When we talk about the board and you are talking in
2 response to Mr. Jacobs' questions about board resolutions --
3 you are a transactional lawyer, correct?

4 A Correct.

5 Q You know that what we're dealing with here is the
6 interpretation of a contract, right, not a board resolution,
7 the interpretation of a contract?

8 A Yes, the contract controls.

9 Q There are two parties to the contract, right?

10 A Maybe more.

11 Q That's not a difficult question. There are two or more
12 parties to the contract?

13 A There may be more than two parties. I think you have
14 subsidiaries. That's why I'm tripping up on it a little
15 bit.

16 Q In this deal there were two parties?

17 A I think there are parents and subsidiaries. I actually
18 would need to look at the signature page to make sure.
19 Basically, yes.

20 Q And the issue that is before the jury is determining
21 the intent of the parties in that deal where they had
22 language in the agreement and they negotiated with each
23 other. The issue isn't what a board of Novell internally
24 may have done in a corporate resolution. You know that,
25 don't you?

1 A What I know is when an agreement is clear on a point --
2 if you're asking my legal viewpoint about how a contract
3 should be interpreted, I'm prepared to do that. But when a
4 contract is clear, I don't know that you look beyond the
5 four corners of the agreement. I mean, this gets to what
6 the rules of construction are, which I could get into, but
7 --

8 Q Mr. Braham, am I right or wrong that in a contract case
9 where if it's determined by a Court that the parties' intent
10 is important, you look at what the parties said to one
11 another, how the parties acted towards one another, and you
12 don't look at what one party unilaterally did in a board
13 meeting? Is that true or not?

14 A You look at the plain language of the agreement, unless
15 it's ambiguous.

16 Q And if it's ambiguous, you look at the intent of the
17 parties as expressed to each other --

18 MR. JACOBS: Same objection Mr. Singer was
19 raising.

20 THE COURT: I will sustain the objection.

21 BY MR. SINGER:

22 Q One final area that was covered yesterday. You were
23 not involved in Amendment 2, correct?

24 A I was not involved in Amendment 2.

25 MR. SINGER: Thank you.

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

2 MR. SINGER: He may be excused by us.

3 MR. JACOBS: Yes, Your Honor.

4 THE COURT: Mr. Braham, that means you do not need
5 to worry about being re-called, but I would request that you
6 not discuss your testimony with any other witness in this
7 case or in the presence of any other witness or communicate
8 in any way your testimony.

9 Thank you, Mr. Braham.

10 THE WITNESS: Thank you.

11 THE COURT: We have to take a little recess here,
12 ladies and gentlemen. If you want to stand up and stretch
13 your legs, you may do so.

14 Ready to proceed?

15 MR. BRENNAN: Novell wishes to call as its next
16 witness Mr. David Bradford.

17 THE COURT: Mr. Bradford, if you would pause for
18 one second and raise your right hand and Ms. Malley will
19 administer the oath to you.

20 DAVID BRADFORD,

21 Having been duly sworn, was examined

22 and testified as follows:

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

25 THE WITNESS: David Bradford. D-a-v-i-d, last

1 name Bradford, B-r-a-d-f-o-r-d.

2 DIRECT EXAMINATION

3 BY MR. BRENNAN:

4 Q Good morning, Mr. Bradford.

5 Could you please tell us what your current business
6 position is?

7 A I'm chairman of the board of a company called
8 Fusion-io.

9 Q Where is that company located?

10 A Based here in Salt Lake City, Utah.

11 Q Could you summarize your educational background for us?

12 A Sure. Going back many years ago, I graduated from high
13 school in 1969 in a little town in Red Lodge, Montana. And
14 then I came down to Brigham University. Served an LDS
15 mission. After that, I came back to BYU, finished my
16 undergraduate degree in political science in 1974 at BYU.
17 They just started a new law school at BYU, so I dove into
18 that and became a graduate of the BYU law school in the
19 second class, and that was in 1977. I then went and
20 practiced law for some years in southern California. I also
21 got a master's in business administration in the early '80s
22 from Pepperdine University.

23 Q That's in Malibu, California?

24 A Yeah.

25 Q Have you ever worked for Novell?

1 A Yes.

2 Q For what period of time did you work for Novell?

3 A That was a long time, 1985 to 2000, almost 15 years.

4 Q What positions did you hold while you were at Novell?

5 A When I first joined Novell, my position was corporate
6 counsel. Shortly thereafter, probably six months in, I
7 became the general counsel for the company. And I held the
8 position of general counsel the entire rest of the period I
9 was at Novell into July of 2000 when I left. Over the
10 years, I had varying assignments and other responsibilities,
11 corporate security for the company, corporate business
12 development, government relations, those sorts of things
13 reported to me as well.

14 Q In general, what were your duties and responsibilities
15 as general counsel and corporate secretary?

16 A Well, certainly as the chief legal officer of this
17 corporation, I had a responsibility to review contracts,
18 negotiate contracts, be involved on a day-to-day basis to
19 ensure that the legal aspects of Novell were protected and
20 so forth. I was also secretary to the board of directors,
21 and in that capacity I recorded and wrote essentially the
22 board minutes and attended all the board meetings for Novell
23 for those 15 years.

24 Q I would like to have you focus your attention on a
25 period 15 years ago, 1995. Do you recall playing any role

1 in the preparation of the asset purchase agreement between
2 Novell on the one hand and Santa Cruz Operation on the other
3 hand?

4 A Yes.

5 Q Has it been necessary for you to, in essence, look at
6 some documents to try to remember what happened 15 years
7 ago?

8 A It's been a busy time, and I stay busy in my day-to-day
9 life. So yes, I have gone back and looked at the asset
10 purchase agreement and the board minutes, and so forth and
11 so on, that I prepared and was involved with at the time.

12 Q Do you think without reviewing some of those documents
13 you would have as clear a recollection without that review?

14 A No. I'm appreciative of the fact that I did document
15 things at the time.

16 Q What were your general duties with respect to this
17 asset purchase agreement we made reference to?

18 A Well, in many ways over the years whenever we would do
19 a transaction at Novell, I kind of acted as a point person
20 for the company to involve the technology people, to involve
21 the financial people, and to kind of bring the team together
22 as we would negotiate these deals. We did hundreds of deals
23 over the years at Novell. And, you know, this was, you
24 know, an important one, but certainly not as big or broad as
25 some of the other transactions that we did in terms of

1 mergers and acquisitions and so forth.

2 Q In connection with these business transactions, did
3 you, as Novell's general counsel, look to outside legal
4 firms to assist in that work?

5 A Sure.

6 Q Was there a primary outside counsel that you looked to?

7 A Yes. Wilson Sonsini Goodrich & Rosati was the primary
8 outside counsel for Novell during many of its years,
9 corporate existence, and worked closely with guys like Larry
10 Sonsini, who was on the Novell board, as well as Tor Braham
11 and others at the Wilson Sonsini firm. It's an outstanding
12 law firm and probably the best law firm that we could find.

13 Q What was your relationship with Tor Braham in the 1995
14 time period?

15 A I began working with Tor probably -- I want to say in
16 the early '90s. As we did various transactions together, I
17 looked at Tor as kind of chief outside drafter of contracts
18 assisting with negotiation of agreements. And so I deferred
19 a lot over the years to Tor and relied on him a great deal
20 to help protect our legal positions as a company.

21 Q In connection with your work with Mr. Braham, did you
22 trust him?

23 A Absolutely.

24 Q Did you find that he would follow your instructions as
25 you gave them to him?

1 A Yes. There was a trusting relationship. Whenever
2 trust exists, things accelerate and you get deals done more
3 quickly and so forth. So there was definitely a
4 relationship of trust between Tor and me.

5 Q Again, I recognize it's been 15 years ago now, but
6 thinking for a moment about the Santa Cruz Operation
7 transaction, do you recall any other Novell senior
8 executives that had any role in reviewing documents or
9 writing input on that transaction?

10 A Certainly Jim Tolonen. Jim was the chief financial
11 officer at Novell, was intimately involved in these sorts of
12 transactions. I relied on Jim's financial expertise a lot
13 as we would work through these deals.

14 You know, going back in time, gosh, Bob Frankenberg was
15 the CEO of the company at the time, so Bob would have been
16 involved to some degree.

17 Duff Thompson, when we acquired WordPerfect in July, I
18 think mid 1994, Duff was the general counsel at WordPerfect
19 corporation. And when Novell and WordPerfect corporation
20 came together, I retained the legal function for the
21 combined entity Novell-WordPerfect, and Duff did business
22 development. And Duff was with the company actively for
23 about a six-month period of time following the
24 Novell-WordPerfect acquisition. So Duff would have been
25 involved peripherally in the deal.

1 Ed Chatlos, as I've gone back and looked at some of the
2 memoranda and so forth, Ed was involved. He was based out
3 in New Jersey. So I didn't see a lot of Ed, but he
4 certainly would have been involved.

5 Q Focusing on the transaction itself and based upon your
6 recent review of some of the documents, do you recall there
7 being any particular points of issue regarding this
8 transaction in terms of special deal points that came to
9 mind?

10 A Well, certainly as you look through the documentation,
11 you look through the contract itself, you look through what
12 was stated in the board minutes that were drafted
13 contemporaneously with the close of this deal, absolutely
14 that, you know, it was very clear that Novell had retained
15 the patents, the copyrights, et cetera, associated with the
16 UNIX rating system.

17 Q You mentioned the board meeting minutes. Do you recall
18 whether the Santa Cruz transaction was approved by Novell's
19 board of directors?

20 A Yes.

21 Q How is it that you are able to remember that now 15
22 years later?

23 A Going back and looking at my board minutes.

24 Q You say your board minutes. Who actually prepared
25 those minutes?

1 A I prepared the minutes.

2 Q Was that because you were the secretary to the board of
3 directors?

4 A That's correct.

5 Q What is the purpose of minutes of meetings of the board
6 of directors? I ask this in a generic sense.

7 A Sure. It's certainly to document particular
8 transactions and so forth. And it should be emphasized
9 that, you know, not everything that happens in a board
10 meeting gets documented, you know, to the nth degree. I
11 think it's important to note that material aspects of any
12 transaction -- a large transaction get voted through the
13 board of directors, but --

14 Q Again, we're in this transaction talking about a
15 meeting that was held almost 15 years ago, what are the
16 benefits of board meetings looking back in time?

17 A Well, fortunately, I've got those things and the
18 company has those things as a corporate -- permanent
19 corporate record to accurately reflect what occurred at that
20 point in time. That's why the board minutes are kept.

21 Q What was your habit and practice, say in 1995, with
22 respect to preparing the board meeting minutes relative to
23 the actual holding of the meeting itself?

24 A Well, I would, prior to the meeting, give deep thought
25 to -- I would prepare the agenda to the meeting, outline

1 what was going on. I would typically sit down with the CEO
2 and kind of review -- at that time it would have been Bob
3 Frankenberg, to say, Bob, here's kind of what we're going
4 through, these are the things we've been working on, et
5 cetera. Here's, you know, eight things that we need to
6 cover for the board. We typically meet every two months,
7 every three months, something like that. So I would prepare
8 a draft of the minutes prior to the meeting, just for my own
9 use.

10 Then once the meeting was held, then I would again
11 memorialize those minutes and keep them and then place them
12 in a binder as a permanent record for the corporation.

13 Q Were the meeting minutes that you prepared approved by
14 the board at a subsequent meeting?

15 A Yes.

16 Q Now if I could direct your attention -- you probably
17 see this on the screen.

18 MR. BRENNAN: I would like to show the witness
19 Exhibit Z-3.

20 BY MR. BRENNAN:

21 Q And these are the minutes of the meeting of the board
22 of directors of Novell, Inc., Monday, September 18th, 1995.

23 A Okay.

24 Q Do you recognize this document?

25 A Sure. This looks like something that I would have

1 prepared at the time.

2 MR. BRENNAN: If we could go down to page 3 of
3 Exhibit Z-3 and highlight the signature.

4 BY MR. BRENNAN:

5 Q Is that your signature that you recognize?

6 A Yes.

7 Q Now that you've looked back 15 years later, do these
8 minutes appear to reflect the boards' consideration and
9 approval of the Santa Cruz Operation transaction?

10 A Sure. I've had a chance to look through those.

11 Q What I would like to do is focus for a moment on page 2
12 of Exhibit Z-3. Just by way of explanation, this jury,
13 over this three-week trial, has seen this document several
14 times. You've not been here before today, so I won't spend
15 too much time, but I do want to ask you a few questions
16 about what appears to be in the middle of the document under
17 the heading resolved, there are three paragraphs.

18 A Sure.

19 Q And in the first paragraph under resolved reads that
20 the board of directors of this corporation, Novell, hereby
21 determine that it is in the best interests of this
22 corporation and its shareholders to enter into an asset
23 purchase agreement with the Santa Cruz Operation, or SCO.
24 Do you see that?

25 A Yes.

1 Q Did you understand that what was before the board at
2 that time was the asset purchase agreement that was
3 ultimately signed by the parties?

4 A Yes.

5 Q And if we could then skip down to the third paragraph
6 that reads, quote, Novell will retain all of its patents,
7 copyrights and trademarks, except for the trademarks UNIX
8 and UnixWare, royalty-free, perpetual, worldwide license
9 back to UNIX and UnixWare for internal use and resale in
10 bundled products, Tuxedo and other miscellaneous, unrelated
11 technology. Do you see that?

12 A Yes.

13 Q Was it your understanding, based now upon your review
14 of these minutes 15 years after the actual meeting, that the
15 board of directors of Novell agreed that the asset purchase
16 agreement would be such that it would retain all of its
17 patents, copyrights and trademarks, except for the
18 trademarks UNIX and UnixWare?

19 A Absolutely.

20 Q Now there has been reference made in this case to an
21 Amendment No. 2 to the asset purchase agreement. Did you
22 have any direct involvement in Amendment No. 2 to the asset
23 purchase agreement?

24 A You know, not on a day-to-day basis. We had an
25 attorney out in California, Allison, that worked in our

1 legal department. Because she was based in California, as
2 was our CFO, Jim Tolonen, they handled that Amendment No. 2.

3 Q To your knowledge, was Amendment No. 2 ever brought
4 before the Novell board of directors?

5 A Not to my recollection.

6 Q Do you have any understanding as to why Amendment No. 2
7 was not brought to the attention of the board of directors
8 of Novell?

9 MR. SINGER: Objection, no foundation. He wasn't
10 involved in Amendment No. 2.

11 MR. BRENNAN: Your Honor, he testified that he
12 attended virtually every board meeting. He probably would
13 have a sense --

14 THE COURT: I will allow the witness to answer the
15 question.

16 THE WITNESS: I'm sorry. I didn't hear that.

17 MR. BRENNAN: I'll restate the question.

18 BY MR. BRENNAN:

19 Q Do you have any understanding as to why Amendment No. 2
20 was not brought before the board of directors of Novell?

21 A Not precisely, but, you know, typically things that are
22 of a material nature to the corporation, important aspects
23 of our day-to-day operation, those things that are material
24 get brought to the board of directors for approval.

25 Q Were you ever asked to review and approve and sign a

1 declaration that was submitted to the court in this case?

2 A Yes.

3 Q Did you do that about three years ago in 2007?

4 A Yes.

5 Q In order to prepare and approve that declaration, was
6 it necessary for you at that time to review documents to
7 help you remember what had transpired back in 1995?

8 A Sure, absolutely essential.

9 Q Did you, in fact, review documents so you could try to
10 remember what had happened before?

11 A Yes.

12 Q Have you ever told anyone that you didn't remember the
13 details about the asset purchase agreement?

14 A From time to time over the years I get asked about
15 agreements and documents and so forth, and I frequently, you
16 know, because I was involved in so many aspects of Novell's
17 business, I can't remember everything that we did and the
18 precise nature of every transaction that we did. Every deal
19 that we did had a different nuance and a different aspect to
20 it. There was not one document that was consistent across
21 the board.

22 Q I would like to have you focus, if you're able, on two
23 individuals, one by the name of Ty Mattingly and another by
24 the name of Lee Johnson. Are those associates or friends or
25 colleagues of yours?

- 1 A Yes, friends, colleagues.
- 2 Q After you submitted -- let me back up.
- 3 Do you suspect that you ever told either Mr. Mattingly
- 4 or Mr. Johnson you didn't remember all the deals about the
- 5 asset purchase agreement?
- 6 A Yeah, I suspect I did.
- 7 Q After you signed your declaration in 2007, did either
- 8 Mr. Mattingly or Mr. Johnson contact you about that
- 9 declaration?
- 10 A Yes.
- 11 Q Do you recall what they said?
- 12 A It was kind of an odd call. They joined in on a
- 13 conference call and said something to the effect, David, we
- 14 read your declaration in the case and so forth, we want to
- 15 make sure that is what you really believe.
- 16 Q Do you really believe what you put in your declaration?
- 17 A Absolutely.
- 18 Q Do you have any financial stake in the outcome of this
- 19 case?
- 20 A Absolutely not.
- 21 Q Are you being compensated in any way for appearing here
- 22 today and offering the testimony that you have offered?
- 23 A Not that I am aware of.
- 24 Q I'm going to represent to you that during the course of
- 25 this trial various witnesses have been asked questions about

1 relationships they might have with IBM. I think you told us
2 at the outset that you are the chairman of the board of
3 Fusion-io, which is a Utah-based technology company. Does
4 Fusion-io have any business relationship with IBM?

5 A Yes. They are an original equipment manufacturer.
6 They take Fusion-io technology and invent it into their
7 systems and then resell it. So they are essentially a
8 reseller of our products.

9 Q Does the fact that Fusion-io has this business
10 relationship with IBM, does that play any role in the
11 testimony you've offered today?

12 A Absolutely not. I mean, my declaration was provided
13 three years ago, and that was well before I ever heard of
14 Fusion-io and any relationship with IBM.

15 MR. BRENNAN: Thank you.

16 No further questions at this time, Your Honor.

17 THE COURT: Mr. Singer.

18 CROSS-EXAMINATION

19 BY MR. SINGER:

20 Q Good morning, Mr. Bradford.

21 A Hello.

22 Q Until you reviewed these documents, isn't it true that
23 you didn't have any recollection of the transaction's
24 details, specifically on issues, for example, if the
25 copyrights were included or not included in the transaction?

1 A Specific details of the document I wouldn't have
2 remembered. I remember certainly in great understanding
3 that we did a deal with SCO and so forth.

4 Q So what happened, then, is when you were working on
5 your declaration, you reviewed certain documents, correct?

6 A Yes.

7 Q And those you were reviewing together with Novell's
8 counsel, correct?

9 A Yes.

10 Q And as a result of that, that led to the position that
11 you set forth in a declaration at the time, correct?

12 A Yes.

13 Q And you mentioned Mr. Lee Johnson. Do you know whether
14 you ever told Mr. Johnson that you didn't remember these
15 issues, but you had gone back over the agreements and you
16 concluded from that review that this must have been what had
17 happened?

18 A Yeah, probably. Yes.

19 Q Now let's talk about what isn't in writing at the time
20 that this transaction came before the board. Can you look
21 at Exhibit 754?

22 A Okay.

23 Q Do you recognize this?

24 And why don't we -- I would like to give you a hard
25 copy of that document as well.

- 1 A Sure.
- 2 Q This is a memorandum that you presented to the board of
3 directors on September 15th, 1995, correct?
- 4 A Correct. That's my mother's birthday.
- 5 Q A day you would remember, then?
- 6 A Yeah, well --
- 7 Q And you would also remember this was then the Friday
8 before the Monday on which the board of directors of Novell
9 met to consider the transaction with Santa Cruz?
- 10 A That would be very typical.
- 11 Q This was a memorandum that you would have prepared for
12 the purpose of getting the board informed as to what was
13 going to come before them with respect to the transaction?
- 14 A Certainly.
- 15 Q And you would attach a number of items here, in this
16 case it included some historical financial information and a
17 term sheet for the proposed transaction, correct?
- 18 A Let's see, attached, two-year SCO stock trading chart,
19 historical financial, guide, SCO slide information, term
20 sheet, yeah.
- 21 Q And take a look at Exhibit 754. Is this, then, what
22 you sent to the board? This has some historical financial
23 information. It doesn't have the slides here. That would
24 have been sent along with this?
- 25 A Typically, yes.

1 Q You see the term sheet attached?

2 A I don't see it attached. Maybe I'm --

3 Q If you will look at the hard copy.

4 A Okay. Okay. So here's some, project sleigh, market
5 trading information on SCO, project sleigh ride, and
6 Novell-SCO term sheet, yeah.

7 Q This is a term sheet that would have been attached to
8 the memorandum that went to the board on September 15th,
9 1995, correct?

10 A It appears. I can't say, sitting here today, that this
11 was absolutely attached, but it appears to be one that was
12 attached.

13 Q You have no reason to believe it wasn't?

14 A Right.

15 Q You're not aware of any other term sheet, are you?

16 A No.

17 Q So if we look at the term sheet, you see that it
18 indicates under one, Novell transfers to SCO UNIX technology
19 assets, correct?

20 A Yes.

21 Q UnixWare technology assets, correct?

22 A Right. Right.

23 Q And then under two, Novell retains, there is a mention
24 of patents?

25 A Uh-huh. (Affirmative)

1 Q There's a mention of licensing back to UNIX and
2 UnixWare for internal use and resale in bundled products,
3 there is a mention of Tuxedo and other miscellaneous,
4 unrelated technology, correct?

5 A Right.

6 Q There is no mention of Novell retaining copyrights?

7 A Well, understand the rhythm of a business
8 transaction --

9 Q Well, that's not my question, sir. Discussion about
10 the rhythm of a business transaction Mr. Brennan will be
11 able to ask you about.

12 A Sure.

13 Q There is no mention of copyrights, correct?

14 A Not in this document.

15 Q This is an important document. This was sent to the
16 board of directors for their consideration of the
17 transaction that was coming before them the following
18 Monday, right?

19 A It was part of a package that was sent to them, if this
20 was, in fact, the term sheet that was sent to them.

21 Q Now I would like to show you --

22 A But, again, it says Mattingly on the bottom right-hand
23 corner here, so it doesn't look like a document I prepared.

24 Q All right. We just covered the fact, you are not aware
25 of any other term sheet?

1 A Right.

2 Q And I would like you to look at Exhibit 638, which is a
3 declaration that you submitted to the district court.

4 Mr. Bradford, do you recognize Exhibit 638? This is
5 your declaration submitted --

6 A Yes.

7 Q -- April 20th, 2007?

8 A Right.

9 Q That's your signature?

10 A Okay. Yeah.

11 Q You attached as Exhibit 2 the memorandum to the board
12 that we've seen, September 15th, 2005. You see the first
13 page, correct?

14 A Yes.

15 Q You see the second page?

16 A Right.

17 Q You see the two pages on project sleigh ride with
18 financial information?

19 A Yes.

20 Q However, we don't see the term sheet?

21 A Right.

22 Q Why is that?

23 A I don't recall.

24 Q You were counting on -- you didn't have these documents
25 in your possession, correct?

1 A The term sheet?

2 Q Right.

3 A Right. I mean, I didn't -- right.

4 Q So you didn't -- these are attached to your
5 declaration, but these are not documents that you had, when
6 your declaration was made, in your own possession?

7 A Right, that is correct.

8 Q You agree with me that the term sheet that we see here
9 as part of Exhibit 754 which talks about the terms of the
10 transaction is not attached to the copy that was part of the
11 documents you reviewed in putting together your declaration?

12 MR. JACOBS: Your Honor, we might wish to have a
13 side-bar on this issue.

14 THE COURT: All right.

15 (Side-bar conference held)

16 THE COURT: How much more do you have?

17 MR. SINGER: Ten minutes.

18 MR. BRENNAN: Your Honor, here's the issue. The
19 term sheet has been consistently put before the witnesses
20 and represented was part of this package. It is not a
21 Novell document. That was a Mattingly document. The Court
22 may recall he came to court with some documents that had not
23 previously been disclosed. We didn't have them.

24 I'll represent to the Court, because we do have
25 the official Novell book, that that term sheet that's

1 consistently being represented as part of the board package
2 is not part of the board package. That's being thrusting
3 upon the Court and the witness as if it were part of the
4 board package. It is a collection of documents that Ty
5 Mattingly brought to court.

6 MR. SINGER: First of all, we have the original of
7 that document which Mr. Mattingly testified to was the
8 actual one which was used with the board. We have the
9 original here.

10 Number two, we also have had earlier testimony
11 from Mr. Mattingly these were produced by Novell. The only
12 term sheet we have in all the production. They were
13 produced separately. Mr. Mattingly then testified they
14 really belonged together when they were first introduced in
15 evidence when bringing together those two documents.

16 If there is an issue here, the issue relates to
17 the fact that Novell didn't produce this document in this
18 form. They had an opportunity, if they wanted, to bring in
19 any other documents. There's been testimony that this is
20 what was sent to the board. Mr. Bradford said at the time
21 he's not aware of any other term sheet. I don't think there
22 is anything in the sheet that's improper about my use of the
23 document.

24 MR. BRENNAN: The representation being, I take it,
25 that this term sheet was part of the package that was sent

1 to the board. We do not have testimony that supports that.
2 I do not believe it has so been testified.

3 MR. SINGER: I think it has.

4 MR. BRENNAN: This is a production that was made
5 during the course of trial.

6 THE COURT: Let's take a recess now. If you can
7 find evidence from the transcript Mattingly testifying that
8 this was, in fact, part of the packet sent to the board,
9 then we can deal with that.

10 MR. BRENNAN: I'll stand corrected if that's the
11 case. Thank you, Your Honor.

12 (Side-bar concluded.)

13 THE COURT: Ladies and gentlemen, we're going to
14 go ahead and take a 15-minute recess now.

15 (Jury excused)

16 THE COURT: Let's go ahead and take 15 minutes.

17 Counsel, you should be able to find it in that
18 time, shouldn't you?

19 MR. SINGER: Yes.

20 MR. BRENNAN: If they could simply, if they find
21 it, let me see it. If I'm wrong, I'll stand up and say I'm
22 wrong.

23 THE COURT: Well, you won't need to do that.

24 MR. BRENNAN: It will be evident.

25 (Recess)