

2455

1 (Recess)

2 THE COURT: What did you determine?

3 MR. SINGER: Well, I think Mr. Brennan should be  
4 here, but --

5 THE COURT: Let's wait. Here he is. Okay.

6 MR. SINGER: Perhaps we should do it outside the  
7 presence of the witness, Your Honor.

8 MR. BRENNAN: I thought you asked me to go get  
9 him.

10 MR. SINGER: My apologies. Just a moment.

11 My understanding is that Mr. Brennan agrees with  
12 what we indicated about Mr. Mattingly's testimony.

13 MR. BRENNAN: I concede the point, Your Honor.

14 MR. SINGER: Just so the record is clear, I would  
15 like to take one moment just to indicate --

16 THE COURT: Go ahead.

17 MR. SINGER: -- that at page 678 of the trial  
18 transcript Mr. Mattingly was shown Exhibit 570, and he  
19 identified Exhibit 570 as a memorandum sent to the Novell  
20 board of directors from Mr. Bradford on September 15, 1995.  
21 He said he received a copy of it himself. On page 679, line  
22 18, he was asked, now, was this provided to the board on  
23 Friday, September 15th? His answer was yes.

24 On page 680 he was asked, do you see the reference  
25 on the first page to a term sheet for the proposed

1 transaction? Answer, yes. I would like to show you Exhibit  
2 83. Can you identify Exhibit 83? His answer was yes, this  
3 is a Novell-SCO term sheet that is referenced as letter E  
4 under the memo form Dave Bradford. On page 681, was this  
5 term sheet -- did you receive this term sheet along with the  
6 memorandum to the board that is marked as Exhibit 570?  
7 Answer, I did. Question, these documents were together at  
8 that time? Answer, correct.

9 Exhibit 570 is the memo to the board and Exhibit  
10 83 is the term sheet, which together form the original  
11 document which we have separately marked as SCO Exhibit 754  
12 in evidence.

13 THE COURT: The record has been made, Mr. Singer,  
14 but I do want to caution you, however, that you can ask the  
15 witness questions about the term sheet, but I want you to  
16 avoid an implication that somehow or other there was  
17 ill-will on the part of Novell in supplying Mr. Bradford the  
18 documents, because I don't think that is relevant to  
19 anything in this case.

20 All right?

21 MR. SINGER: Yes.

22 THE COURT: All right.

23 MR. BRENNAN: Your Honor, thank you, and just so  
24 that we are clear, when I say that I concede the point, I do  
25 concede that that is what the testimony says. I stand

1 corrected in that regard.

2 I do not make the concession that that particular  
3 term sheet was in fact E, the reference to E in Exhibit 754.  
4 I don't know the answer to that, frankly. I have made  
5 inquiry and there is no indication that it was, but that is  
6 for a witness to testify to.

7 THE COURT: And you'll be able to examine him  
8 again.

9 MR. BRENNAN: Thank you.

10 THE COURT: All right. Can someone please bring  
11 Mr. Bradford in.

12 Mr. Bradford, if you would retake the witness  
13 chair.

14 Ms. Malley, if you would please get the jury.

15 MR. BRENNAN: Your Honor, while we are waiting for  
16 the jury, our text witness is Terry Musika, our expert, and  
17 we're going to need to set up a couple of easels. I was  
18 hoping to do, so that I don't look like I am intruding,  
19 would the Court mind if I stood at one side and asked the  
20 questions? I think I have a loud enough voice that I can be  
21 heard.

22 THE COURT: As long as you can be heard, that will  
23 be fine.

24 MR. BRENNAN: Thank you.

25 (WHEREUPON, the jury enters the proceedings.)

1 THE COURT: Go ahead, Mr. Singer.

2 MR. SINGER: Thank you, Your Honor.

3 BY MR. SINGER

4 Q. I think, Mr. Bradford, we were looking at Exhibit 754.  
5 I would like you to turn again to the term sheet as part of  
6 Exhibit 754.

7 A. All right.

8 Q. Now, what I would like to do is basically compare this  
9 for a moment to the minutes of the board meeting which I  
10 believe are Exhibit Z-3.

11 A. Yes.

12 Q. If you turn to the first page on the proposed sale of  
13 UnixWare business and equity investment in SCO, this says  
14 Mr. Bradford and Mr. Frankenberg first confirmed that the  
15 directors were present, and Mr. Frankenberg then provided an  
16 overview of several business transactions.

17 Do you see any reference to copyrights on that first  
18 page of the minutes?

19 A. Well, if you will give me a minute -- no.

20 Q. Turn to the second page at the very top. There is then  
21 a discussion and it says the directors next discussed  
22 various competitive alternatives and concluded that the  
23 transaction as structured was justifiable. Mr. Bradford and  
24 Mr. Sonsini then reviewed the terms of the asset purchase  
25 agreement between SCO and Novell.

1           In that summary you don't see any reference to  
2 copyrights being mentioned there, correct?

3     A.   No.  That is correct.

4     Q.   The only reference, if we go down further in the  
5 resolution, and then if we compare the resolution to the  
6 term sheet we have been looking at, on the term sheet the  
7 first item was that Novell transfers UNIX technology assets  
8 and UnixWare technology assets.

9           Can you see in the resolution it says that pursuant to  
10 the asset purchase agreement Novell will transfer to SCO its  
11 UNIX and UnixWare technology assets?

12    A.   Yes.

13    Q.   Do you see that?

14    A.   Uh-huh.

15    Q.   On the term sheet then it talked about certain  
16 employees being transferred and equipment being transferred  
17 and the employee base and the equipment is referenced next.

18           Do you see that?

19    A.   Correct.

20    Q.   Then on the next paragraph it says Novell will retain  
21 all of its patents, and patents are mentioned in the term  
22 sheet, and then you have copyrights, which is not mentioned  
23 on the term sheet.

24    A.   Right.

25    Q.   And then there is a reference to a royalty free

1 perpetual worldwide license back to UNIX and UnixWare.

2 Do you see that?

3 A. Yes.

4 Q. That is what is referenced on your term sheet as item  
5 2-B, the license back to UNIX and UnixWare for internal use  
6 and resale in bundled products, correct?

7 A. I would have to go back and look at the term sheet.

8 Q. Please do so for a moment.

9 A. Okay. Yes, I see that.

10 Q. In connection with your review of the documents, did  
11 you ever review the technology licensing agreement? Do you  
12 recall that?

13 A. Are you referring to the asset purchase agreement?

14 Q. I'm referring to the documents that you reviewed in  
15 either the preparation of your declaration or for your  
16 testimony here today. Did you review the technology  
17 licensing agreement?

18 A. If it is part and parcel to the asset purchase  
19 agreement, I did.

20 Q. It is a separate document, although it is referenced in  
21 the asset purchase agreement.

22 A. I didn't review that in preparation for today's --

23 Q. I didn't hear you.

24 A. I did not review that technology licensing agreement, I  
25 think you referred to it as for today, right.

1 Q. Did you understand that as part of the asset purchase  
2 agreement that Novell through the technology licensing  
3 agreement was getting a license back from Santa Cruz for the  
4 assets and the technology that was being transferred through  
5 the A.P.A.?

6 A. To some degree I'm sure that was true, yes.

7 Q. And if Novell had retained the copyrights they wouldn't  
8 need a license back to that technology, correct?

9 A. If we had licensed, or if we had given the copyrights  
10 to the UNIX operating system to Santa Cruz Operation -- what  
11 is your question?

12 Q. Well, in fact, if you had transferred the copyrights  
13 that is when you would want a license back to make use of  
14 that technology for internal use and resale in bundled  
15 products?

16 A. I have not looked at the license back, the technology  
17 licence back, et cetera, so I can't say exactly what was in  
18 that document.

19 Q. Did you review amendment two to the asset purchase  
20 agreement?

21 A. Not for today.

22 Q. And that was not part of what you reviewed for your  
23 declaration?

24 A. I don't believe it was.

25 Q. Now, just a few more things on Exhibit 754, if we

1 could.

2 Part of 754 deals with the financial circumstances of  
3 Santa Cruz, correct?

4 A. Let's see. Document 754 is what document again?

5 Q. It is the board memo that you sent on September the  
6 15th.

7 A. Okay.

8 Q. Project Sleigh Ride.

9 A. Can they bring that up?

10 Q. Yes.

11 MR. SINGER: Mr. Calvin, I think that is the page  
12 that has the historical financial performance analysis.

13 BY MR. SINGER

14 Q. If we look at this, would you agree with me that Santa  
15 Cruz is a company which had in the last year before this,  
16 1994, \$184 million in revenue?

17 A. Boy, I would have to go back and look at it. It is a  
18 very small document and I have not looked at this document  
19 for years.

20 MR. SINGER: Well, can you expand that part of the  
21 document, Mr. Calvin?

22 MR. BRENNAN: Your Honor, if the exercise here is  
23 to ask the witness whether the document says something, the  
24 document speaks for itself, and particularly a spreadsheet.

25 THE COURT: I would agree. Let's keep this



1 simple.

2 BY MR. SINGER

3 Q. While Santa Cruz was not perhaps the size of Novell,  
4 you did understand Santa Cruz had a several million dollar  
5 business at the time of the transaction?

6 A. I don't recall the size of the revenues at this point  
7 in time --

8 Q. Do you recall --

9 A. -- 15 years ago. I remember it was an ongoing business  
10 based in California. You know, the size and their scope, I  
11 don't recall exactly.

12 Q. You don't remember any of that?

13 A. It is hard to recall.

14 Q. Fair enough.

15 If we do turn to the third part of the term sheet,  
16 though, which is I think the next page, what Novell receives  
17 from SCO, did you recall that what Novell was receiving from  
18 SCO in the transaction consisted of these four different  
19 revenue streams?

20 A. Again, in a very general recollection I recall that we  
21 were receiving a portion of the UNIX licensing revenues to  
22 Novell.

23 Q. Do you have any reason to quarrel with the accuracy of  
24 what appears on the term sheet attached to your memorandum  
25 of September 15th, 1995 as to what Novell would receive from

1 Santa Cruz in the transaction?

2 MR. BRENNAN: Objection, Your Honor. The best  
3 evidence of what Novell received is under the terms of the  
4 asset purchase agreement. The witness is being asked to  
5 confirm whether or not this term sheet coincides with the  
6 asset purchase agreement, and that is the best evidence, the  
7 asset purchase agreement.

8 MR. SINGER: This quantifies what --

9 THE COURT: I will overrule the objection.

10 BY MR. SINGER

11 Q. Mr. Bradford, do you recall my question?

12 A. Well, if you want to restate it, that is fine, but,  
13 again, just to be clear, this being attached to the board of  
14 directors -- a memorandum that went to them -- term sheets  
15 are a fluid thing. They change on a day-to-day basis and  
16 over time as negotiations move forward. So an initial term  
17 sheet you might sign two months before the transaction is  
18 done.

19 Q. Are you aware of any change from these terms that were  
20 presented to the board on September 15th, 1995 and the terms  
21 that were ultimately signed on September 19th, 1995?

22 A. Well, again, absolutely the best evidence of that is  
23 actually what was contained in the agreement. I would have  
24 to go through that point by point to kind of understand and  
25 refresh my recollection as to whether or not this

1 coincided -- I certainly see that one thing in this term  
2 sheet already does not coincide with the actual agreement.

3 Q. Mr. Bradford, are you aware as you sit here today of  
4 whether or not Novell received through the asset purchase  
5 agreement the four revenue streams which are identified on  
6 item three here of your memorandum of September 15th?

7 A. I have no specific recollection of that, right.

8 Q. Let's talk about some of what you said regarding the  
9 people who were involved in the transaction.

10 A. Sure.

11 Q. You said that Duff Thompson was involved peripherally.

12 A. Right.

13 Q. Do you know whether Mr. Frankenberg, in fact, ever told  
14 Duff Thompson that he was in charge of the transaction?

15 A. No, I don't know that.

16 Q. You don't know.

17 Mr. Chatlos you said you didn't see a lot. Do you know  
18 whether that was because Mr. Chatlos was out in Santa Cruz  
19 negotiating the transaction on a daily basis with the  
20 parties on the other side?

21 A. I don't know that.

22 Q. Do you know whether Mr. Mattingly was out there with  
23 him?

24 A. No.

25 MR. SINGER: Nothing further.

1 THE COURT: Mr. Brennan.

2 MR. BRENNAN: Just a few questions.

3 Thank you, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. BRENNAN

6 Q. Mr. Bradford, you were asked a question about term  
7 sheets and I sensed you wanted to explain what a term sheet.  
8 I am going to give you that chance now.

9 A. Well, when the parties begin to contemplate a  
10 transaction, the first written documentation is typically a  
11 draft term sheet that the parties kind of bounce back and  
12 forth one to another, this is what we would like to see,  
13 this is what they would like to see, et cetera, et cetera.  
14 So during the course of any negotiation the term sheet gets  
15 updated, you know, frequently, you know, as much as on a  
16 daily basis as you drive toward finalizing the agreement.

17 The final document that was actually signed and  
18 negotiated and executed by both parties is the final  
19 document. So while term sheets are interesting and helpful  
20 to understand what led up to the transaction, it is not the  
21 definitive document.

22 Q. Also in response or in attempting to respond to a  
23 question by Mr. Singer you mentioned the rhythm of the deal.

24 A. Yes.

25 Q. Could you explain what you were starting to explain

1 regarding what the rhythm of the deal was in connection with  
2 this transaction and working with Wilson Sonsini?

3 A. Sure. In very general terms, you know, whenever we  
4 would do a transaction such as this I would associate  
5 outside counsel to assist in the effort. In this particular  
6 case it was Wilson Sonsini, Tor Braham, and so I would give  
7 a very general overview of what we wanted to see and the  
8 protections that we would like to have in a given document,  
9 and then the legal team would go out and negotiate with the  
10 legal team at the other end. We would get daily updates,  
11 weekly updates, et cetera.

12 Q. With the asset purchase agreement that is at issue in  
13 this case, did you review it and recommend that it be  
14 approved by Mr. Frankenberg?

15 A. Yes. As I look back at my memorandum to the board, and  
16 e-mails to Bob, et cetera, yeah, I recommended that the  
17 asset purchase agreement be signed and executed.

18 Q. Just a couple more questions.

19 This has to do with decisions by the board of  
20 directors.

21 A. Uh-huh.

22 Q. If we could pull back up Exhibit Z-3, and I would like  
23 you to look at page 2. Again, as we are looking at page 2  
24 of Exhibit Z-3, the minutes that were prepared of the  
25 September 18th, 1995 board of directors meeting. There are

1 sections that are called resolved or resolved further.

2 A. Uh-huh.

3 Q. These sections are called, what, the resolutions of the  
4 board?

5 A. That is correct.

6 Q. What in essence is a resolution of the board?

7 A. Well, you can have all sorts of preparatory language or  
8 language that precedes the actual resolution, but the core  
9 of any document, the core of any set of board minutes are  
10 the specific resolutions associated with that.

11 I might add that at the time Novell was a highly  
12 visible publicly traded company, and as secretary to the  
13 board of directors it was really important for me to get it  
14 right, and to really explain and express in the meeting  
15 precisely the transaction that was entered into.

16 Q. So the resolutions themselves, is that the most  
17 important thing that the board does, that is because the  
18 resolutions capture the decision of the board?

19 A. Sure.

20 MR. BRENNAN: Thank you.

21 No further questions.

22 THE COURT: Mr. Singer.

23 RECROSS-EXAMINATION

24 MR. SINGER: I have a couple of questions.

25 BY MR. SINGER

1 Q. You're talking about term sheets in general when you're  
2 saying that you could have term sheets at the outset of the  
3 transaction, correct?

4 A. Sure.

5 Q. But the term sheet that is attached to your September  
6 15th board memo is not a term sheet at the beginning of the  
7 transaction, this is after the transaction has been  
8 negotiated and the asset purchase agreement has been drafted  
9 and it is ready for board approval, correct?

10 THE COURT: Mr. Brennan.

11 MR. BRENNAN: I have an objection that that  
12 question assumes facts not in evidence, that the term sheet  
13 that was part of Exhibit 754 is a term sheet that this  
14 witness agreed is part of what was sent to the board. I  
15 know we have had contrary testimony, but the question  
16 presupposes that and thus lacks foundation.

17 MR. SINGER: We have already covered --

18 THE COURT: I will overrule the objection.

19 Go ahead. Restate the question.

20 BY MR. SINGER

21 Q. Yes. The term sheet that we have been looking at as  
22 part of your September 15th memorandum to the board, that is  
23 not something at the beginning of the transaction, that is  
24 after the transaction has been negotiated and the asset  
25 purchase agreement exists, and it is being summarized for

1 the board of directors for their upcoming meeting?

2 A. Well, let's be clear. I don't know that this term  
3 sheet was the exact term sheet that I attached to the board  
4 of directors minutes at that meeting or was sent in advance  
5 of the meeting. It may have been a term sheet that Ty  
6 Mattingly or that some of the other people that were  
7 involved in the transaction said here are some of the data  
8 points associated with where we are at on the deal. It is  
9 not the definitive document.

10 Q. Well, sir, I think we covered earlier in your  
11 cross-examination that you're not aware of any reason that  
12 this was not the term sheet that was attached to your memo,  
13 and you're not aware of any other term sheet; is that  
14 correct?

15 A. I am not aware of any other term sheet and I have no  
16 reason to believe that it wasn't -- other than it is not  
17 accurately reflective of what was contained in the actual  
18 board minutes, neither in the asset purchase agreement.

19 Q. So if one of those is wrong, but in terms of what the  
20 board would have reviewed prior to their meeting, this is  
21 something that they would have seen prior to their meeting?

22 A. I don't know that they saw this term sheet. I keep  
23 explaining that.

24 Q. And you don't have any specific recollection one way or  
25 the other?



1 A. That is correct.

2 Q. You do identify this as a memo that you sent to the  
3 board, correct? This is your memo?

4 A. Well, the cover memo certainly references a term sheet.  
5 Whether this term sheet that you're referring to is the  
6 actual term sheet that was referenced in the cover memo,  
7 that is a different question.

8 Q. You're not aware of any other term sheet, correct?

9 A. I have nothing in my possession.

10 Q. It is reasonable for the board members to instead of  
11 reading through the schedules to a long asset purchase  
12 agreement, to rely on a memo that they would receive from  
13 you in accurately summarizing the transaction, correct?

14 A. Sure.

15 Q. Just as it would have been reasonable for Mr.  
16 Frankenberg, who received a copy of the A.P.A. that you said  
17 accurately reflected the business terms of the deal, to rely  
18 on that being the case, correct?

19 A. Right. That is what I said.

20 Q. With respect to that, you have never, as I just  
21 clarified, you have never looked at amendment number two,  
22 correct?

23 MR. BRENNAN: Your Honor, that has both been asked  
24 and answered and beyond the scope of my redirect.

25 THE COURT: Sustained.

1 MR. SINGER: Nothing further. Thank you.

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

3 MR. BRENNAN: Yes. Thank you, Your Honor.

4 THE COURT: Mr. Singer?

5 MR. SINGER: Yes.

6 THE COURT: That means that you do not need to  
7 worry about being re-called. I need to instruct you that to  
8 please not discuss your testimony with any other witness or  
9 potential witness in this case or in the presence of any  
10 other witness, nor communicate the content of your testimony  
11 to any other witness.

12 THE WITNESS: I will not, Your Honor.

13 THE COURT: Thank you.

14 Mr. Brennan, you have some things you need to take  
15 care of?

16 MR. BRENNAN: We are ready to go, if it is  
17 agreeable to Your Honor.

18 THE COURT: I thought you had to set some things  
19 up.

20 MR. BRENNAN: I do.

21 As I do that, we do wish to indicate to the Court  
22 that our next witness will be Mr. Terry Musika.

23 THE COURT: Yes.

24 MR. BRENNAN: With the Court's permission, and to  
25 aid in Mr. Musika's testimony, he is going to use a couple

1 of boards. Our hope was that we could position them in such  
2 a way that the jury could see them and hopefully Your Honor  
3 could as well. I hope we succeed in that endeavor.

4 May I ask of the witness whether we are putting  
5 them where he wants them?

6 THE COURT: Certainly.

7 MR. BRENNAN: Mr. Musika, just step to where you  
8 need to be sworn, and we want to make sure that we can do  
9 this in a way that is convenient for you. I am going to  
10 fulfil my highest and best use and move the boards.

11 TERRY MUSIKA

12 Having been duly sworn, was examined

13 and testified as follows:

14 THE WITNESS: It is Terry Musika, M-u-s-i-k-a.

15 MR. HATCH: Your Honor, may I?

16 THE COURT: Yes, you may.

17 MR. BRENNAN: With the Court's permission I will  
18 try to raise my voice, but if I could step to the side?

19 THE COURT: You may. Go ahead.

20 MR. BRENNAN: Thank you.

21 DIRECT EXAMINATION

22 BY MR. BRENNAN

23 Q. Good morning, Mr. Musika.

24 Could you please tell the jury a little bit about your  
25 background and your educational and work experience, please.

1 A. Yes.

2 Good morning, first. My background -- educationally I  
3 have an undergraduate degree and a graduate degree from  
4 Indiana University. The undergraduate degree is in history  
5 and my master's degree is in public finance. I took two  
6 years off in between undergraduate and graduate school to  
7 move to Los Angeles and attempt to make the U.S. olympic  
8 team. While I did that I was a school teacher. I taught  
9 history in the L.A. School District, junior high school. I  
10 met my wife at that time, 38 years ago.

11 Then I went directly from graduate school to work for  
12 one of the large international accounting firms. Today it  
13 is called K.P.M.G. In those days Peat Marwick & Mitchell.  
14 I spent 12 years in public accounting as an independent  
15 certified public accountant. I was recruited to go to work  
16 for what is today the largest accounting firm in the world,  
17 Price Waterhouse Coopers. I became a partner at that  
18 auditing firm, which is the highest rank that you can  
19 achieve within the accounting world. I did that and I did a  
20 lot of research and I did it for Price Waterhouse Coopers.  
21 As I mentioned, I was an audit partner. I audited public  
22 companies, some of the largest companies in the world.

23 THE COURT: Mr. Musika, I have to ask you to  
24 please slow down. The court reporter has to get everything  
25 that you say and the jury has to understand what you're

1 saying. I would request that you just speak a little bit  
2 slower in your testimony.

3 THE WITNESS: Thank you, Your Honor, and I will.

4 BY MR. BRENNAN

5 Q. In other words, don't rush past all these great nuggets  
6 about yourself.

7 A. Right. After Price Waterhouse Coopers I left and  
8 started to form a series of my own companies. I have over  
9 the last 20, 30 years formed and operated four separate  
10 companies. One company was a merger and acquisition  
11 company. Another company was a proprietary database  
12 company, where the company went into the bankruptcy courts  
13 around the country and loaded proprietary economic data  
14 concerning individual companies, and every company within 48  
15 courts that was filing for bankruptcy. The purpose of that  
16 was to try and create a picture for banks and for the court  
17 system, and the U.S. Bankruptcy Court system actually came  
18 to us and used our data at one point to determine when and  
19 where additional bankruptcy judges were needed given the  
20 volume of cases.

21 We would predict the outcome of bankruptcy cases. We  
22 would predict the state, the economic state of individual  
23 industries or individual regions. We licensed that data to  
24 banks. We licensed that data to credit bureaus. I  
25 eventually sold that company to M.I.T. for research

1 purposes. The merger and acquisition company still exists  
2 today under a different name.

3 I then formed a consulting, an economic consulting firm  
4 which I built up from literally the ground as a start-up  
5 company all the way through to where I sold that company to  
6 a New York stock exchange company called Navigant Consulting  
7 for \$28 million. The company today I no longer own, but I  
8 formed it and it is comprised of two companies. One is a  
9 company I formed called Intellectual Property -- excuse me.  
10 I have to take a drink -- Intellectual Property Management  
11 and Finance.

12 That company values intellectual property of all forms,  
13 patents, copyrights, trademarks, and it negotiates licenses  
14 for that. For example, one of our largest and best clients  
15 is the University of Utah. He have worked with the  
16 University of Utah and the medical school for the last four  
17 years and helped them generate over \$20 million in royalty  
18 fees with the medical technology that the University of Utah  
19 has developed.

20 Then we take a direct investment interest of our own.  
21 So my company that I now work for and previously owned, will  
22 actually invest in inventors and new technology and attempt  
23 to monetize that and commercialize that in one form or  
24 another.

25 In addition to those items, I have got one other side

1 of my 35, 40 years of business, and that is from time to  
2 time I do serve as an expert witness. It is not only in  
3 intellectual property cases or contract disputes. I have  
4 done a lot of work requested directly by the courts. I have  
5 served as an examiner in certain cases where the court has  
6 asked me to come in and look at complex financial  
7 transactions and figure out what has happened and help the  
8 court understand what has gone on.

9 I have served as an operating trustee, where there are  
10 actual businesses that have experienced financial  
11 difficulty, and the court has asked me to come in and take  
12 over and actually function as the C.E.O. of that company. I  
13 have run multi-state grocery store chains and sold that to a  
14 Fortune 500 company. I have run a charter bus company. I  
15 have run an educational tape company. I have run a  
16 multi-state shipyard. Actually during the first gulf war I  
17 completed the construction of four ships for the Army,  
18 landing vessels for the Army.

19 I have made a lot of payrolls, both on my own accounts  
20 and for the purpose of the courts and for creditors, et  
21 cetera, over the 35 or 40 years.

22 That is a quick summary.

23 Q. Thank you.

24 MR. BRENNAN: Your Honor, we have as Exhibit C-33,  
25 if I have that right, which is the curriculum vitae of Mr.

1 Musika. I do wish to tender that into evidence, Your Honor.

2 MR. HATCH: Your Honor, I don't have an objection,  
3 but I am not sure it is a complete resume.

4 THE COURT: If it is what they are offering --

5 MR. BRENNAN: That is what we are offering.

6 THE COURT: C-33 will be admitted.

7 (Defendant's Exhibit C-33 was  
8 received into evidence.)

9 MR. BRENNAN: Thank you.

10 BY MR. BRENNAN

11 Q. Mr. Musika, what have you been asked to do in  
12 connection with this litigation that brings us to court  
13 today?

14 A. Yes. I was contacted probably three or four years ago  
15 and asked if I would be capable and willing to serve as an  
16 objective expert witness to review the opinions and evidence  
17 that both sides put in, the Novell position that they put in  
18 and the SCO position that they put in, and evaluate both  
19 positions and assist the court in understanding that complex  
20 transaction, and reach an opinion concerning any damages  
21 that may have resulted from the claim that Novell has  
22 engaged in a slander of title.

23 Q. In that connection and with that assignment that you  
24 were given, what did you do first?

25 A. At this point, if the Court would permit me, I would



1 like to come down and use the easel as a basis for about the  
2 next ten or 15 minutes.

3 THE COURT: Go ahead.

4 One thing, Mr. Musika, is please try to keep your  
5 voice up and speak slow, and as often as possible try to  
6 direct yourself to the court reporter and to the jury so  
7 that everyone can hear you.

8 THE WITNESS: Yes, Your Honor. Thank you.

9 If I could have a marker --

10 BY MR. BRENNAN

11 Q. I think there are a number of highlighters, Mr. Musika,  
12 that you might be able to use.

13 A. That is fine.

14 At this point I think what would be helpful -- my first  
15 approach was is I considered what SCO and, as I said, Novell  
16 has presented to the Court and has presented over the course  
17 of this entire litigation. We have heard the SCO witnesses  
18 talk about a but-for scenario. I am in agreement with that,  
19 but --

20 THE COURT: Just a moment.

21 Mr. Hatch?

22 MR. HATCH: Is there a question pending?

23 MR. BRENNAN: Yes. The question is what did you  
24 do?

25 THE COURT: I believe that is correct, Mr. Hatch.

1                   MR. HATCH: Okay.

2                   THE WITNESS: What I did was I considered this  
3 but-for scenario, which I agree with, but I explained it a  
4 little bit differently. Again, my role in some ways is to  
5 explain these transactions and help the Court understand  
6 these complex transactions. I view the but-for world that  
7 the SCO experts talk about as a scenario where on the eve of  
8 what Novell is accused of doing, slandering the title, on  
9 the eve of that, roughly May 28th, 2003, the SCO witnesses  
10 come to the Court and ask you to accept that but for that  
11 one transaction or that one event, the Novell slander, take  
12 that away, and we want you to buy our investment, our  
13 investment that we would have made, we, SCO, would have made  
14 over \$200 million in revenue and we would have made over  
15 \$100 million in profits.

16                   But for that single event or that single Novell  
17 act, we, SCO, would have done this. We know in the real  
18 world that has not happened, and what SCO wants us all to  
19 understand and accept is the only reason that has not  
20 happened is because of Novell.

21                   My role that I do for banks and that I do for  
22 creditors and that I do for Fortune 100 companies, is to  
23 look at this transaction and provide to you, the buyers of  
24 this position, an explanation. Let's consider other  
25 potential events and understandings, and that is what I have

1 done. What I have done is I have looked at this, and I am  
2 going to present it to you, and you're going to make your  
3 own decision, do I buy or do I not buy?

4 THE COURT: Mr. Hatch?

5 MR. HATCH: Your Honor, I object to the narrative  
6 nature of this. He should be answering questions.

7 MR. BRENNAN: The question was broad, explain what  
8 you have done, and that is the question at this juncture.  
9 I'm asking the witness to explain what he has done.

10 THE COURT: Mr. Brennan, I think it is going to be  
11 more efficient if you were to ask questions and try to  
12 direct the testimony a little bit.

13 MR. BRENNAN: I would be happy to do that.

14 BY MR. BRENNAN

15 Q. Show the jury, in connection with trying to make a  
16 determination as to this decision, what your analysis is as  
17 to the decision.

18 A. Yes. What I do is when I advise investors I explain  
19 the entire transaction. Before we buy anything I look at  
20 the entire transaction. The first thing I did was I wanted  
21 to have a better understanding of who Novell and SCO are and  
22 what is it that is really involved here.

23 So the first thing I did was I looked at the industry  
24 as a whole. What I understood about the industry as a whole  
25 was that the industry involved a server. Excuse my drawing

1 as being somewhat crude. This is intended to represent a  
2 computer server. Connected to the computer servers are -- I  
3 will draw two laptops here that are connected via a network,  
4 a local area network or wiring network. They connect to the  
5 server.

6 As we have heard, this half of the industry down here  
7 is a computer client operating environment involving these  
8 laptops. That is not what we're about here. It is  
9 connected and Microsoft, you heard from the last witness,  
10 has actually been adjudicated as a monopolist here and  
11 controls this and the operating systems that go into here.  
12 We are up here in this server operating environment at the  
13 top half of this entire market.

14 There are two components to this. One is the hardware  
15 and one is the software. So, again, focusing just on the  
16 top here, how is the hardware sold? Is SCO claiming that  
17 they are going to make money in selling the hardware? No.  
18 The hardware is sold by hardware vendors. Who are those  
19 hardware vendors? Just as examples, I.B.M., you have heard  
20 about them, Hewlett-Packard, and you have heard a lot about  
21 them, and Sun. Those are the hardware vendors and they make  
22 the hardware. Remember that this operating system that goes  
23 in there, where does that come from? That comes from three  
24 possible choices. The total market is three possible  
25 choices. It is Windows, it is UNIX, or it is Linux. There

1 is a small other component, but it is so small just as to be  
2 really not part of this overall market.

3 How does one of the three systems that provide this  
4 software, how does it get in there? Well, Windows, which is  
5 own and controlled by, again, Microsoft, and UNIX, get into  
6 the hardware not directly through a sale but through a paid  
7 license. They license to one or more of these hardware  
8 vendors. So the hardware vendors pay Microsoft, pay someone  
9 like UNIX and they put it in here and they sell it to the  
10 end user.

11 Linux you have heard is open source. It gets into the  
12 computer through three different ways. One way is through a  
13 G.P.L. license. It is a free license. That is important.  
14 It is called a government public license. That is one way.

15 BY MR. BRENNAN

16 Q. What are other ways in addition to the general public  
17 license, what would be the other mechanisms that users could  
18 get Linux?

19 MR. HATCH: Your Honor, I know that standing up  
20 elicited a question finally, but I do have another issue if  
21 we could have a sidebar.

22 THE COURT: Yes.

23 (WHEREUPON, a side bar was begun.)

24 MR. HATCH: Your Honor, my objections are the  
25 following: One is Mr. Brennan has not laid a foundation for

1 this type of testimony. Mr. Musika talked about that he is  
2 a C.P.A. and he has worked for accounting firms and auditing  
3 firms, but he doesn't have any ability to be able to look at  
4 financial auditing and other financial things, and he has  
5 not laid a foundation other than he is the owner of  
6 companies. He has not laid the foundation that he  
7 personally has any expertise at the time of this to be able  
8 to estimate or explain markets or businesses of this type.

9 In fact, the type of stuff he is doing here is not  
10 in his report and it is beyond the scope of his report. I  
11 don't know the basis for this. I bring this up also because  
12 I don't know what the intention of Mr. Brennan is, but at  
13 some point Mr. Brennan has to lay the foundation to be able  
14 to do the type of things like we laid the foundation with  
15 Dr. Pisano, like if he has written journals and done things,  
16 the type of estimation of markets like Dr. Pisano. We have  
17 not gotten any of that from this witness, and he is --

18 THE COURT: You say that none of this basic  
19 framework is contained in his expert report?

20 MR. BRENNAN: That is certainly inaccurate.

21 MR. HATCH: It might be addressed peripherally  
22 certainly, but we don't have these kinds of graphs and he is  
23 explaining the, you know, all of this --

24 MR. BRENNAN: None of what Dr. Botosan -- that was  
25 not in her report. None of the demonstratives were in her

1 report.

2 THE COURT: Just a second. Let me --

3 MR. BRENNAN: None of that was in her report.  
4 This is all a prelude to both Dr. Pisano's testimony and to  
5 Dr. Botosan's testimony regarding their market analysis. He  
6 is explaining what a general public license is, and a  
7 general public license was referenced in the reports that  
8 Dr. Botosan relied on and --

9 THE COURT: This is the only question I have for  
10 you, and that is whether or not this type of information is  
11 contained within his expert report.

12 MR. BRENNAN: The description of a general public  
13 license is not articulated in his report. It is background.  
14 He has run a number of companies that have been identified,  
15 and this is information that is publicly gleanable by  
16 clicking on Wikipedia, and it is gleanable by looking at the  
17 expert reports, and Dr. Botosan relied on --

18 THE COURT: That is not the question.  
19 Mr. Brennan, the question is whether or not this witness is  
20 testifying beyond what the plaintiffs understood he would be  
21 testifying about, because it is not contained in his expert  
22 report.

23 MR. BRENNAN: I don't think this is going to  
24 become an issue, because he is criticizing, as he did in his  
25 report, the methodology employed by Dr. Pisano and he is

1 criticizing the methodologies employed by Deutsche Bank.

2 THE COURT: I think that is certainly appropriate,  
3 especially if it is all contained in the report. But I  
4 don't know that there is any foundation for him being the  
5 kind of expert to go into this very broad general area right  
6 now. In essence, if it is contained in the report and it  
7 was not challenged by them, then I think you probably ought  
8 to have him cut to that content of his expert report.

9 MR. BRENNAN: I can do that. He is explaining  
10 what the market is. They never explained what the market is  
11 and that is the basic problem.

12 THE COURT: I don't think that is a fair  
13 characterization. I think that testimony has been brought  
14 out, not necessarily by their experts, but in the course of  
15 the trial and I think the jury has a pretty good idea of  
16 what he is talking about.

17 MR. BRENNAN: Let me state that the basic  
18 criticism of Dr. Pisano that will be tendered here today is  
19 that he did not include in his survey the vendor license  
20 market.

21 THE COURT: Does he talk about that in his report?

22 MR. BRENNAN: Yes.

23 THE COURT: Then let's get to that.

24 MR. BRENNAN: Well, that is what he is describing  
25 here, the vendor market. That is exactly what he just wrote



1 on the board that gave rise to this criticism.

2 THE COURT: Yes.

3 MR. HATCH: That goes to the second part of my  
4 objection. That is that he has not laid that foundation  
5 either in his report or today, other than I own a company,  
6 and the fact you own a company does not give you that  
7 expertise, or I am a person in the company, and he has not  
8 laid that type of foundation like we did with Dr. Pisano,  
9 that he has experience in estimating the markets and  
10 understanding the markets, writing about the markets and how  
11 they react and what they do. They can't, just because this  
12 guy has an accounting degree and is a glib guy, just have  
13 him testify about everything in the industry.

14 MR. BRENNAN: You have cross-examination.

15 THE COURT: I would agree, to the extent that can  
16 be explored on cross-examination. To the extent that this  
17 is underlying the rest of his expert testimony and it is  
18 fundamental, and it was certainly implied to in his expert  
19 report, then I will allow you to continue. You'll have to  
20 deal with these objections by cross-examination.

21 MR. BRENNAN: The place I will pick up will be him  
22 explaining the vendor licenses and --

23 MR. HATCH: I understand the Court is giving them  
24 some leeway as far as giving narrative answers, and I  
25 understand that, and you did the same for us, but at some

1 point there ought to be a question once and awhile.

2 MR. BRENNAN: In fairness, and in reference to Dr.  
3 Botosan's examination, there were a few -- I don't want to  
4 characterize them as gratuitous questions --

5 THE COURT: We are wasting time.

6 MR. BRENNAN: With your permission, I would like  
7 to lean over and ask him to pick up the pace, but I don't  
8 want to be accused of ex parte communications.

9 THE COURT: Go ahead.

10 (WHEREUPON, the bench conference was concluded.)

11 MR. BRENNAN: Thank you.

12 BY MR. BRENNAN

13 Q. You were explaining a little bit about the vendors.

14 A. Yes. I was just saying that there are three ways,  
15 really three ways that Linux and the open source software  
16 gets into the product. One is through this. There are two  
17 other ways. The second way is through a paid subscription,  
18 that the owner of the server will purchase directly from a  
19 company like Red Hat, and the third way is free. It is just  
20 a free download from the Internet. Any of us could go home  
21 tonight and download Linux and load it. Those are three key  
22 ways.

23 That was the first thing that I did was to understand  
24 this industry, and that is before I would suggest to  
25 something that they make an investment in SCO.

1 Q. Having described the industry, what did you do next?

2 A. The next thing I did was I wanted to focus on SCO  
3 itself. Did they have a business plan? Where do they  
4 expect to go? We know that this market is really defined by  
5 these three -- we know who the competitors are. We know  
6 their competitors are Windows and UNIX, but we know that  
7 this is where they are going to sell. This \$200 million  
8 that they generate comes from here. I look next at the  
9 actual participation of these three competitors.

10 There is a slide that we can bring up.

11 MR. BRENNAN: We have some demonstratives we would  
12 like to display to the jury.

13 THE COURT: Have these been made available to  
14 Mr. Hatch?

15 MR. HATCH: No, I have never seen them.

16 MR. BRENNAN: I am happy to show them, Your Honor.  
17 Again, as with Dr. Botosan's examination, she was allowed to  
18 draw -- I am happy to show them to them.

19 MR. HATCH: Your Honor --

20 MR. BRENNAN: Your Honor, the proposed  
21 demonstrative shows market share between Windows and UNIX  
22 and Linux during the periods of 1995 to 2005.

23 MR. HATCH: Your Honor, these are materials that I  
24 think are beyond the Court's previous order. I object to  
25 them, and particularly that I have never seen them before.

1 THE COURT: Were they contained in the expert  
2 report?

3 MR. BRENNAN: This exact format was not, but the  
4 subject matter was, Your Honor.

5 THE COURT: If not in the exact format, was the  
6 data in the expert report?

7 MR. BRENNAN: This market analysis and the terms  
8 of what the market share was not, Your Honor.

9 THE COURT: Then I can't allow it, Mr. Brennan.

10 MR. BRENNAN: We'll move on.

11 BY MR. BRENNAN

12 Q. What I would like you to do, and we are standing behind  
13 the board, Mr. Musika, but is if you could explain to the  
14 jury in particular reference to Dr. Pisano and his analysis,  
15 what your observations or criticisms were with what Dr.  
16 Pisano presented to the jury.

17 A. Yes. What I focussed in on then were these three  
18 possible ways of actually selling the --

19 MR. HATCH: Your Honor, I object to the  
20 qualifications of this particular witness, that he does not  
21 have the same qualifications --

22 THE COURT: You can talk about this on  
23 cross-examination, Mr. Hatch. I will note that you have a  
24 standing objection.

25 MR. HATCH: That is what I wanted.

1 THE COURT: Okay.

2 THE WITNESS: I looked at the three ways. The  
3 first thing I looked at is I wanted to understand what the  
4 history has been certainly of SCO in actually selling these  
5 three things, the history in the marketplace. What I  
6 understood from looking at SCO's historical financial  
7 statements is that for the years 1998 to 2002 SCO had  
8 generated something like \$112 million of revenue, but that  
9 they had lost \$211 million. That is million. So this  
10 company leading up to 2002, during that five year period,  
11 had not made any money.

12 What I looked at next in terms of Dr. Pisano, was  
13 what was Dr. Pisano's approach? How did he approach  
14 determining and supporting that SCO was actually going to  
15 actually make sales in one, two and three. What I  
16 determined was that Dr. Pisano's approach to this neglected  
17 certainly number one.

18 As you will see, and you have heard from Dr.  
19 Botosan, this was a vendor license. Dr. Pisano's work only  
20 dealt with the R.T.U. licenses. He did not look at and he  
21 ignored totally the G.P.L. On this whole side of the  
22 business, Dr. Pisano ignored that.

23 BY MR. BRENNAN

24 Q. I'm sorry to interrupt. In addition to ignoring the  
25 vendor license market, what other defects did you observe in

1 Dr. Pisano's work?

2 A. I identified a number of defects. One, and if we could  
3 pull up the next slide that is on the --

4 MR. BRENNAN: Your Honor, this is a demonstrative  
5 that is the result of trial testimony offered by Dr. Pisano,  
6 and Mr. Musika was in court to observe that.

7 THE COURT: All right.

8 THE WITNESS: What Dr. Pisano did, as you can see  
9 here, is he identified the total market. He identified that  
10 total market that is in here in one and in two and three as  
11 7,388,000 potential servers. That is the total of two and  
12 three. He ignored this. He didn't look at this at all. It  
13 is still going to come into the damages, and it still comes  
14 in to want they want you to buy, but not in there.

15 What he then did was he said, oh, this \$7,388,000,  
16 what he is going to do is he says I'm going to divide that  
17 into two and three. He separates that out.

18 If we could have the next slide.

19 MR. HATCH: Your Honor, I thought we had an  
20 objection to these slides.

21 MR. BRENNAN: Your Honor, this is taken from Dr.  
22 Pisano's report. It is an excerpt from that very report.

23 THE WITNESS: This is actually a slide directly  
24 from Dr. Pisano's report. He divides the market into the  
25 two and the three. Basically he shows that the free market

1 is about 54 percent of the total, of his total 7.38, and the  
2 paid market is about 46 percent. This is the total, 100  
3 percent. What he does is he lumps those two together. He  
4 ignores this and he lumps these two together, even though  
5 these are two distinct markets, a free market and a paid  
6 market.

7 If I could draw one more board explaining what Dr.  
8 Pisano did, then I think I can probably return to my seat.

9 What Dr. Pisano did was he didn't say that they  
10 are going to generate this \$200 million in revenue and 100  
11 million in profits from all of this 7,388,000, he said we're  
12 only going to get 19 percent of it. Do you see that in that  
13 slide? The 1,404,000, that is the total number of servers.

14 The question is, where did he get that 19 percent?  
15 How did he actually get to that 19 percent?

16 BY MR. BRENNAN

17 Q. Where did he, to your understanding, get this 19  
18 percent figure that he identified in his testimony?

19 A. He got it from a separate web survey that was  
20 performed, as you may recall, by a group called the Yankee  
21 Group. He said that I'm going to use that, and I'm not  
22 going to do my own survey, I'm going to use it because he  
23 felt that it was a good proxy, he called it, or a good means  
24 to determine the reliability of the 19 percent.

25 I have certain questions or issues concerning that 19

1 percent.

2 Q. What are your criticisms, not criticisms but  
3 observations regarding the 19 percent that Dr. Pisano relied  
4 on based on the Yankee Group study?

5 A. I think I have four basic concerns about that Yankee  
6 Group Survey. What the Yankee Group survey did, and it was  
7 done for a different purpose, but what it did is it took  
8 these three markets. It took the Windows market, which is  
9 not at issue here, and this \$200 million and 100 million in  
10 profits is not coming from the Windows market.

11 It took the UNIX market, which is not at issue here and  
12 it is not in our box here, and Windows and UNIX are outside,  
13 and what SCO is going to sell to ultimately is Linux. Then  
14 what the survey did was take the Linux market, and that is  
15 the Yankee Group survey, and he told you was about 1,000  
16 samples, and within each of these operating system markets  
17 there are large companies and small companies. Large and  
18 small. Large and small. What the sample did was it took  
19 only large companies, and only a sample of large companies  
20 from each of these. Again, it took that 1,000 and asked  
21 those 1,000 users of these three how concerned are you about  
22 the indemnification and warranty for the open source market?

23 Q. So are you suggesting that he used the wrong  
24 population?

25 A. I am, because only this represents the 7,388,000



1 servers, not this, and not this.

2 It would be like if I was trying to determine in this  
3 courtroom what the average height of everyone in this  
4 courtroom was, and I selected the three tallest people in  
5 the courtroom, and I averaged their heights and then I said,  
6 well, that represents the average height in this total  
7 courtroom.

8 It would be worse if I went across the street to the  
9 hotel and selected people. These are not the population.  
10 When he got an answer from asking only the large companies  
11 with Windows and in UNIX and Linux that 19 percent were  
12 concerned, that is 19 percent that relates to only the large  
13 companies in Windows, and only the large companies in UNIX,  
14 and only the large companies in Linux. He took that 19  
15 percent and multiplied it times the total number of servers  
16 in Linux to get the 1,404,000.

17 Q. In addition then to selecting the wrong population, did  
18 he ask the wrong question?

19 A. He did.

20 May I take my seat?

21 MR. BRENNAN: Your Honor, may he return to his  
22 seat?

23 THE COURT: Yes.

24 BY MR. BRENNAN

25 Q. We have talked a little bit about the wrong population

1 being sampled in the survey, what was wrong with the  
2 question that was asked?

3 A. The question, if I could have the next slide, the  
4 question -- well, actually we have gone over this. That is  
5 the 54 percent. Let's go to the next slide.

6 The question that was asked -- here we can see at the  
7 top, and this is directly from the Yankee Group report that  
8 he used, so this is not my document, but I have highlighted  
9 it and put these boxes out to the side, but this is the  
10 actual group. We can see there the Yankee Group, 2004,  
11 Windows, UNIX and Linux comparison survey. Well, SCO is not  
12 selling UNIX and Windows. There is that point.

13 The second point is if your firm is a mid size large  
14 organization with 5,000 employees, rate the importance.  
15 Well, that survey then only tells us what large companies  
16 with 5,000 employees, what their feeling is about the  
17 importance of indemnification. It does not tell us about  
18 this 7,388,000, it only applies to a subset of that. This  
19 is an unrepresentative sample.

20 Last, it asks about indemnification and product  
21 warranty. They are concerned about indemnification and  
22 product warranty. Even Dr. Pisano told us that  
23 indemnification is different than the SCO product. The SCO  
24 product, he said, was superior in his mind, but it certainly  
25 was different. I would agree, again, not necessarily that

1 the SCO product was superior, but I'll agree with Dr. Pisano  
2 that it is different. Because if you get indemnification  
3 you're covered for whatever events might occur. What SCO  
4 was saying was this is a specific event and you're using my  
5 UNIX and you need to pay me. They are two very different  
6 things.

7 Q. You have told us that there was an incorrect population  
8 and the wrong question, was there another important factor  
9 that was left out of the survey?

10 A. Yes, another very key factor. If we can go to the next  
11 slide we see that this is a question and answer to Dr.  
12 Pisano during his deposition. He was asked this again in  
13 trial. What prices did the survey respondents base their  
14 answers on? His answer was there was no specific price that  
15 the were asked to consider. Well, this is fundamental.  
16 Even his Dr. Botosan, his co-expert agrees, that this is  
17 basic economics.

18 Everything we buy in this life is relative to price.  
19 The best example of that is the turmoil or confusion or  
20 controversy that exists today in America over health care.  
21 If I were to ask everyone in this courtroom are you  
22 concerned about health care? Do you want good health care?  
23 Of course, and we would all raise our hands and say, well,  
24 sure, I am concerned about health care. Then where the  
25 division comes is how much. How much are you willing to pay

1 for it? We all have different views and we all have  
2 different abilities.

3 What happened here in this survey is this survey was  
4 not conducted for the purposes of determining price. It  
5 asked, as Dr. Pisano states, no question concerning price.  
6 So these respondents and this 19 percent, not only is it the  
7 wrong question, not only is it the wrong sample, but we have  
8 no idea if their concern is relative to price. As price  
9 goes up, we all buy less. As price goes down, we buy more.  
10 That is the fundamental law of demand.

11 Q. In addition to the failure to take into account the  
12 proper population and the right question and this basic  
13 tenant of economics, that is price sensitivity, can you  
14 briefly tell us whether you think there are any other  
15 reasons that SCO through Dr. Pisano or others has failed to  
16 show that Novell was the sole cause of the inability to sell  
17 these SCO licenses?

18 A. Right.

19 If we could have the next slide.

20 Just as a brief introduction to this slide, again, we  
21 go back to my analogy in this but-for world and --

22 THE COURT: Excuse me. Mr. Hatch.

23 MR. HATCH: This is another slide we have never  
24 seen.

25 MR. BRENNAN: This is a simple summary, a

1 demonstrative summary of each of the opinions expressed by  
2 Mr. Musika. It is a summary.

3 THE COURT: It summarizes his expert report?

4 MR. BRENNAN: That is right.

5 THE COURT: All right.

6 Do you have a copy of it, Mr. Hatch?

7 MR. BRENNAN: Yes, they are in the binder.

8 MR. HATCH: Yes.

9 THE COURT: Go ahead.

10 BY MR. BRENNAN

11 Q. We are doing this simply to expedite what would be  
12 otherwise much longer testimony.

13 Knowing that this is a summary, go quickly through the  
14 points for the benefit of the jury.

15 A. Yes. These are questions that I asked myself, and as a  
16 financial adviser explaining a complex transaction I say to  
17 you, would SCO have made \$200 million of revenue with only  
18 one exception, the Novell act? Let's look at each one of  
19 these.

20 First, SCO does not know who their customers are. I'm  
21 going to explain these in a little more detail. I'm just  
22 going to mention them now, and we'll come back to them.  
23 There is no established demand for the SCO product. SCO has  
24 no profitable business structure. SCO has alienated their  
25 target customer. Again, these are things that you would

1 want to see before you put your money in a business. SCO  
2 lacks support of the industry experts. SCO's marketing plan  
3 was poorly conceived and implemented. SCO failed to  
4 consider the significance of product pricing, and that the  
5 infringing code could be removed from Linux. SCO  
6 contributed to Linux under the G.P.L., and identifications  
7 are available to consumers, and there are acceptable  
8 alternatives to SCOSource licenses.

9 Q. So with the limited time that we have, if you could  
10 briefly touch upon each of those factors as you have  
11 identified them.

12 A. Yes. We will go through it slide by slide.

13 Go to the next slide, if you could, please.

14 I would say to you that getting this 200 million, and I  
15 don't want to repeat this each time, and I will say it now  
16 and then I won't repeat it for each slide, they didn't  
17 receive the 200 million in revenue and the 100 million in  
18 profits, irrespective of Novell's act, because, and that is  
19 the premise to each one of these slides, because they have  
20 an inability to identify their customers. People are  
21 downloading from the Internet, they can't even identify who  
22 they are. How do you sell to someone if you don't know who  
23 they are?

24 Here is an example. SCO's own statement, the second  
25 one, is how does one track the payers from the non-payers

1 that they don't know?

2 Let's go to the next slide.

3 Well, again, in the interest of being brief, these  
4 three points are the actual customers that are coming back  
5 and saying, look, you sent us a blind mailing -- SCO sent  
6 out 1,000 letters and sent it to customers and here is Ace  
7 Hardware, Burger King and Dream Works, three well known  
8 companies that came back and said we don't even use Linux.  
9 It is a fishing mission. It is a blind mailing on SCO's  
10 part. Is that a basis in which they're going to make \$200  
11 million of revenue?

12 Next slide.

13 SCO's failure or inability to show that UNIX was in  
14 Linux. This has been an ongoing point of contention. The  
15 users or the alleged users, the customers that they are  
16 going to sell to, those servers over there, it has never  
17 been proven that it is actually in the Linux software. That  
18 is a proof that is still waiting. That is the whole other  
19 set of law suits, the primary one being the I.B.M. lawsuit.

20 Prove to me that UNIX is actually in Linux. We don't  
21 know that today. SCO does not know that today. They are  
22 asking you to put your money up to buy their position  
23 without knowing whether it is actually in the Linux product.

24 Q. The next factor?

25 A. We can go to the next slide.

1           SCO's inability to reach that 200 million in revenue  
2           and 100 million in profit is expressed in their own 10-K  
3           filing. While they are here in court asking you to buy into  
4           the 200 million in revenue, what they have said to the real  
5           investing public is the following. I want to focus on  
6           these, because these are very important.

7           These come right from SCO's own 10-K. We do not have a  
8           history of a profitable operation. They are asking you to  
9           buy into their 200 million even though they have never made  
10          a profit in the last -- I will say five years leading up to  
11          this.

12          Secondly, our future SCOSource licensing revenue is  
13          uncertain. They are telling you, the buyer, that we are  
14          uncertain as to whether we can do this. Our experts have  
15          told you we can, but we are uncertain.

16          Three, due to the lack of historical experience and the  
17          uncertainties related to the SCOSource licensing revenue, we  
18          are unable to estimate the amount and the timing of future  
19          licensing revenue. So SCO themselves are saying we don't  
20          know how much we can generate.

21          Fourth, SCOSource licensing revenue is unlikely to  
22          produce stable predictable revenue for the foreseeable  
23          future. Okay.

24          Q. Then what about public image, did that have an impact?

25          A. Yes.



1           Next slide.

2           The customers, once they find them, and we don't know  
3 who they are yet, and they don't know if they can actually  
4 project them, but the customers we do know are --

5           MR. HATCH: Your Honor, he is now showing things  
6 that are not in evidence.

7           MR. BRENNAN: Your Honor, he is an expert witness  
8 and is entitled to rely on hearsay, which he did in his  
9 report, and these are references that were included --

10          MR. HATCH: But he is not allowed to publish them.

11          MR. BRENNAN: This is a demonstrative. If you  
12 want him to read the reference and not use the  
13 demonstrative --

14          THE COURT: I'm going to allow him to use them.

15          THE WITNESS: I didn't hear you, Your Honor?

16          THE COURT: You may go ahead.

17          THE WITNESS: This focus group, these customers  
18 that they are looking for we know are open source. They are  
19 the people who download it for free, they are the people who  
20 purchase through a third party like Red Hat. So what we see  
21 is that the public has reacted adversely. This as a  
22 litigation scenario, a business plan that is founded on  
23 litigation, and it is founded on the ability to go in and  
24 identify a Linux user and sue them or threaten to sue them  
25 to receive a payment in the form of a royalty payment.

1           What Business Week says is this is the most hated  
2 company in tech. These other remarks are SCO's own remarks,  
3 can SCO afford bad press and legal costs that may become  
4 associated with this program? SCO knew that they were going  
5 to alienate and that they were going to have difficulty with  
6 this open source community, the very customers that they  
7 hope to bring in. In fact, it did happen.

8 BY MR. BRENNAN

9 Q. Then were there also industry analysts who commented on  
10 this poor image that SCO held?

11 A. Yes. As stated here, customers with large future Linux  
12 commitments should avoid paying SCO's server license fees  
13 since they appear arbitrarily high or represent a concession  
14 to SCO's claims and will expose them to even larger fees.  
15 So the Gartner group that was mentioned by Dr. Pisano and  
16 Dr. Botosan, are telling the focus customers again that you  
17 shouldn't pay this. He is saying certainly not pay it now,  
18 because it is a claim that is unfounded at this point and it  
19 is arbitrary.

20 Q. Then was there also a factor regarding a lack of a  
21 marketing plan by SCO?

22 A. Yes.

23           These are two SCO remarks that talk about the weakness  
24 on SCO's part of actually pursuing or developing a well  
25 thought out plan. I have not seen, nor did I see during the

1 weeks of trial, where if we were investors and we were going  
2 to put our money into a company that said we're going to  
3 have 200 million in revenue and 100 million of profits, we  
4 would expect to see a business plan. We would expect to see  
5 a discussion of the size of the market, and how it is they  
6 are going to attract these customers, and what price they  
7 are going to sell at, et cetera. I didn't see that.

8 What I have seen that SCO is concerned about are  
9 marketing plans. SCO is not aggressively marketing or  
10 selling the license proactively.

11 Then this remark is by a SCO employee, that I thought  
12 this idea was a bad idea when we discussed it in the days  
13 when we ran SCO, and I think it is a bad idea. New SCO has  
14 few enough friends anyway without pulling this stunt. This  
15 is their own remark concerning the proposed business plan.

16 Q. Let's turn to the issue of this general public license  
17 issue. What is the factor there, the risk factor, if you  
18 will?

19 A. Without getting --

20 THE COURT: Mr. Hatch?

21 MR. HATCH: Your Honor, we would request a  
22 sidebar.

23 (WHEREUPON, a side bar was begun.)

24 MR. SINGER: This I was a party to. It was our  
25 understanding and agreement that demonstrative exhibits that

1 would be used during trial would be shared the day before.  
2 This book was not. That is one problem. This should not be  
3 used.

4           Secondly, a lot of the material in this book is  
5 not evidence in the case. Certainly a Business Week article  
6 is not evidence in the case. As I look at the slides that  
7 are to come in they are filled with things that are not  
8 evidence in the case. Now, he can rely on this in rendering  
9 his opinions and what he tells the jury, but he cannot show  
10 these statements from those reports and quotes from people,  
11 like e-mails that may not be in evidence, anymore than any  
12 other document not in evidence can be shown to the jury.  
13 Just because he is an expert, he can't show that to the jury  
14 and this is highly improper.

15           MR. BRENNAN: Your Honor, these are demonstratives  
16 and they are based largely on SCO documents. I don't  
17 purport that these will go to the jury. They are being  
18 shown like their expert, Dr. Botosan, where she wrote  
19 figures and numbers and calculations on the board. This is  
20 simply illustrating and the basis for his opinion. It is  
21 premised both on his report and the documents that are  
22 marked.

23           THE COURT: The question is whether or not all of  
24 this information is contained in his expert report?

25           MR. BRENNAN: I believe that they are

1 representative of --

2 THE COURT: If it was included then you could have  
3 brought this up in a motion before trial, because if they  
4 are in his expert report, and if he relied on them, you had  
5 the opportunity to explain why --

6 MR. SINGER: I think the opportunity to -- he is  
7 now saying he relied upon this, but that is different than  
8 simply showing the jury what is on a board and --

9 MR. BRENNAN: They showed demonstrative exhibits  
10 and they were not --

11 THE COURT: I would agree. This should have been  
12 done before and I'm going to allow you to proceed.

13 MR. BRENNAN: Thank you.

14 (WHEREUPON, the bench conference was concluded.)

15 BY MR. BRENNAN

16 Q. Thank you.

17 In the interest of time, Mr. Musika, you have  
18 highlighted some of the concerns that one would have  
19 regarding this investment decision, as you put it, and I  
20 think I will conclude by asking you a bit about Dr.  
21 Botosan's report and the projections that she relied upon.

22 I would like to have you jump forward, if we could, to  
23 the Deutsche Bank analysis, if we could do that.

24 A. Yes.

25 Q. Thank you.

1 A. You want me to comment on her reliance on Deutsche  
2 Bank?

3 Q. Please.

4 A. Yes.

5 Deutsche Bank is an investment bank. Deutsche Bank and  
6 investment banks are in the business to sell stock or to  
7 represent companies that sell stock. The purpose of that  
8 Deutsche Bank report, once again, like the Yankee Group  
9 report, was not for the purpose of litigation, it was for  
10 the purpose of rating the SCO stock and getting individuals  
11 to buy that SCO stock.

12 Now, Dr. Botosan used certain numbers out of that  
13 report, but didn't consider or look at the entire purpose  
14 and comments that were made by Deutsche Bank. On the screen  
15 here are the cautionary comments by Deutsche Bank with  
16 respect to that particular projection. It says that this  
17 company and its forecasts and its prospects, the risks are  
18 huge. These are all direct quotes from Deutsche Bank.

19 Next it says we consider this investment to be risky  
20 and speculative. Again, they are asking you to put your  
21 money in this, but, as they say, a caveat, buyer beware.  
22 They are telling you that up front.

23 Number three, it is an extremely high risk investment.

24 Number four, once again, it is speculative.

25 Five, if it does not succeed in its lawsuit against

1 I.B.M., if it does not succeed ultimately in proving  
2 infringement, these shares will be worthless. It says it  
3 may collapse in value.

4 So you have to take everything that is in that report,  
5 certainly with all of the comments that are made and with  
6 the cautionary comments that are made about the likelihood  
7 of success.

8 Q. As you understand, this Deutsche report was the basis  
9 for Dr. Botosan's analysis and opinion, correct?

10 A. I do, yes.

11 Q. So summing up your observations and criticisms of Dr.  
12 Pisano's methodology, and the deficiencies in Dr. Botosan's  
13 analysis and reliance upon the Deutsche Bank report, what is  
14 your ultimate conclusion regarding damages that one might  
15 suffer as a result of the facts that have been presented  
16 during this case?

17 A. Can I come down and draw my last and final exhibit?

18 MR. BRENNAN: With the Court's permission?

19 THE COURT: You may.

20 THE WITNESS: I need a clean board, if we have  
21 one, or I will flip one over. Here is one.

22 Ultimately the approach is to try to explain to  
23 everyone is that SCO has a plan to sell, and it is going to  
24 sell based on a business plan that says we demand or we sue.  
25 They want payment from the open source community. The open

1 source community has to consider, do I infringe or do I not?  
2 If they infringe, then they make a payment to SCO. If they  
3 don't infringe, then there is no payment. We don't know  
4 this and this is an uncertainty. No one knows whether or  
5 not there is actual infringement. That is an event that  
6 will be determined ultimately, but it is not determined yet.

7           What does the Deutsche Bank report say? If there  
8 is no infringement, what is the amount and what is the  
9 outcome of the revenue and what the shares will be worth?  
10 Zero. Because of this major uncertainty I'm in the same  
11 position. I would not advise you as investors to buy what  
12 SCO has been offering, which is \$200 million in revenue and  
13 \$100 million in profit, unless and until this major  
14 uncertainty occurs.

15           In addition, of course, I believe there are many,  
16 many, many other obstacles as to why SCO has not and could  
17 not reach that \$200 million of revenue.

18 Q. One last question. The analysis that has been  
19 presented by Dr. Botosan and Dr. Pisano assumes that Novell  
20 is found liable for slandering title. If that decision is  
21 not made, what would the damages figure be?

22 A. I think they agree with that as well that that is zero,  
23 yes.

24           MR. BRENNAN: That's all that I have of this  
25 witness, Your Honor.



1 THE COURT: Thank you, Mr. Brennan.  
2 Mr. Hatch, do you want these charts to remain up?  
3 MR. HATCH: No, Your Honor.  
4 MR. BRENNAN: I would be happy to pull them down.  
5 THE COURT: Set them down in front of the jury  
6 box, and he can pull them up if he needs to.

## 7 CROSS-EXAMINATION

8 BY MR. HATCH

9 Q. Good morning, Mr. Pisano. Excuse me, Mr. Musika. I  
10 have Dr. Pisano on my mind.

11 I just want to spend a couple minutes on your  
12 qualifications to be here. You're obviously a very  
13 qualified guy and you have done a lot of things in your  
14 life. As I understood it from what you were talking about  
15 here, the bulk of your initial training is in accounting; is  
16 that right?

17 A. Work experience or academic?

18 Q. Academic and in your initial work.

19 A. No. I was a history major as undergraduate, and then  
20 graduate school was the master's in public finance. So  
21 there was some accounting there. I am really sort of -- my  
22 training came as a result of working in the accounting  
23 profession and owning and operating businesses.

24 Q. Okay. And at some point --

25 A. I am a C.P.A. I'm sorry.

1 Q. I think you did mention that.

2 You indicated a number of companies and things that you  
3 had been with. The last company you mentioned where you did  
4 your expert work, that is this Invotex company; is that  
5 right?

6 A. Yes.

7 Q. Now, that is the company under which you're here  
8 appearing today, correct?

9 A. That is my current employment, yes. That is the last  
10 company I formed, right.

11 Q. You're charging what rate to be here?

12 A. \$525 an hour.

13 Q. Do you know how many hours you have worked on this  
14 case?

15 A. No. I am sorry, I don't.

16 Q. Do you have any idea?

17 A. I don't. I'm sorry. It spans, as most witnesses have  
18 said, it goes all the way back four or five years. I don't  
19 remember.

20 Q. Do you have any idea? Can you tell the jury how much  
21 you have been paid?

22 A. Well, that goes to the company. That does not go to  
23 me. I get a salary. I don't receive the --

24 Q. You don't have an equity interest in the company?

25 A. No, I do not. I sold my equity two years ago. In 2007

1 I liquidated and sold all my ownership and I am just an  
2 employee.

3 Q. At the time you did the bulk of your work and your  
4 reports, you had an equity interest in the company, didn't  
5 you?

6 A. Again, the bulk of the work -- I have done a lot of  
7 work here in the last --

8 Q. The last few weeks?

9 A. Yes. I think I have done more work in the last month  
10 than I probably did in the entire time prior to that.

11 Q. Your report was in '07?

12 A. I'm sorry?

13 Q. Your report was sometime in 2007?

14 A. I think that is right, yes.

15 Q. At that time, the time of your report you were still  
16 involved in the company and had an equity interest, correct?

17 A. December -- the end of 2007 I sold my interest. We  
18 could look at the reports and see what the date of the  
19 report and the signing. I don't remember. It could have  
20 been, yes.

21 Q. I can give you a copy, but your opposition report is  
22 July 3rd, 2007?

23 A. Yes. I was still an equity owner of Invotex at that  
24 point, yes.

25 Q. You would expect that your billings would be over

1 \$200,000, correct? You and your firm's billings for this  
2 matter --

3 A. The total amount of all of the people working on it  
4 over the course of the -- I would say that is probably a  
5 fair estimate, yes.

6 Q. Now, at the time that you prepared your opinions for  
7 this case, you were spending between 75 and 85 percent of  
8 your time providing expert opinion, slash, consultations for  
9 litigation, correct?

10 A. I'm sorry. I'm having a little -- you're trailing off.

11 Q. I'll try to lean over. At the time that you prepared  
12 your reports, and I'm talking about going back to July of  
13 2007 --

14 A. Yes.

15 Q. You were spending about 75 to 85 percent of your time,  
16 your professional time providing expert, slash, consulting  
17 work for litigation, correct?

18 A. I think that is right, yes.

19 Q. And you have been deposed in over 200 cases, correct?

20 A. Yes.

21 Q. You have testified in 50 to 100 trials?

22 A. At least.

23 Q. So would it be fair to say that during this period of  
24 time, you and your company during this period of time were  
25 spending 75 to 85 percent of your time on litigation related

1 matters, and the bulk of our livelihood was providing expert  
2 opinions to your clients?

3 A. No, that wouldn't be true, because certain  
4 transactions, like the transaction with the University of  
5 Utah, can pay a much larger investment. Direct investments  
6 can pay much -- there are only 24 hours in the day and you  
7 can only charge so much per hour and you are limited and  
8 your time is capped. Our investments have over time paid us  
9 more than our hourly rate.

10 Q. From the money that you were making from your time,  
11 that is largely from expert opinions? 75, 85 percent of  
12 your time is doing expert work?

13 A. As you said, that was back at that point in time. It  
14 varies from time to time. As of the date of this report,  
15 yes, that would be right.

16 Q. Just to be real clear with the jury, you were hired to  
17 do a report and to make an analysis of damages and to  
18 evaluate Dr. Botosan's and Dr. Pisano's reports, right?

19 A. Yes. That was part of what I was asked to do.

20 Q. At that time the bulk of your time and the way you made  
21 your living was by, 75, 80 percent of your time, by  
22 providing expert reports for clients in litigation?

23 A. Again, you said two things. You said the amount of  
24 time you spent and the bulk of how you made a living. I  
25 will say yes to the first part, the bulk of my time, but, no

1 to the second part, because investments are paying us a  
2 better return than our rate per hour.

3 Q. I think I was clear earlier, and I probably was less  
4 clear there, but the money you make from your billing of  
5 your time, that was from expert reports, right? The  
6 investments are something that you have already got out  
7 there, I mean like if I am getting interest from my bank  
8 account, right?

9 A. I don't understand the question.

10 Q. Let's move on. I think that is probably obvious.

11 You have never written any papers on technology  
12 licensing, have you?

13 A. I have taught courses to the patent bar and to judges,  
14 and I have produced some papers in connection with -- I  
15 taught a course on how to calculate lost profits to the  
16 American Bar Association in two separate years, and I  
17 produced papers in connection with that work, yes.

18 Q. But that is calculating profits. Here you're  
19 explaining the market to the jury. You have not published  
20 any technology licensing papers in the tech industry that go  
21 to the business aspects of it, other than profits and  
22 looking at accounting stuff, have you?

23 A. I don't understand that question.

24 Q. You have put up this board and explained what you  
25 viewed as the industry and what was the market for this

1 business, but you have not written in this area, have you?

2 A. I have probably produced -- I don't know how many  
3 business plans for companies of my own, for reorganization  
4 plans for trouble companies, business plans for start-up  
5 companies and representing it to venture capitalists, so I  
6 have written many, many, many -- hundreds of business plans.

7 Q. Not my question, sir.

8 Let me put it in context for you. Dr. Pisano came here  
9 and you were here for his testimony, correct?

10 A. I was, yes.

11 Q. He holds a chair at the Harvard Business School,  
12 correct?

13 A. He does.

14 Q. You understood that he is an expert in the technology  
15 industry?

16 A. I do.

17 Q. He presented to this jury a number, which are on his  
18 resume, of articles and other things that he has written,  
19 and he has devoted his professional career to this  
20 particular industry, correct?

21 A. Yes.

22 Q. And your resume, and you will recall I objected that it  
23 was incomplete, but on it there were no publications. There  
24 was nothing in a peer review journal like Dr. Pisano has  
25 done, right?

1 A. I certainly agree with you, and I feel for the people  
2 in academia because, as they say, it is publish or perish.  
3 That is what their job is. They have to publish. My job is  
4 to run companies. My job is to make payroll. My job is  
5 to --

6 THE COURT: Mr. Musika, if you would please answer  
7 the question posed.

8 THE WITNESS: Yes.

9 BY MR. HATCH

10 Q. Do you know what a peer reviewed journal is?

11 A. Yes.

12 Q. What is that?

13 A. It is a journal that is usually in a particular field  
14 in which the professionals are peers within that field and  
15 they will edit it and scrutinize it and will agree to an  
16 participate in its publishing and creation and distribution.

17 Q. For an academic his livelihood rises or falls based on  
18 other people being able to see it and be able to criticize  
19 it if he does not have it right, correct?

20 A. Yes.

21 Q. Okay. You have not published in those areas like Dr.  
22 Pisano?

23 A. That is not my job.

24 Q. You have not published in those areas like Dr. Botosan  
25 has, have you?



1 A. Again, that is not my job, no.

2 Q. Now, I want to be very clear, because there was some  
3 criticism of Dr. Botosan. If I heard you right you agree  
4 that using a but-for world analysis is the proper way to  
5 look at damages, correct?

6 A. I think that is a proper construct, yes, within the  
7 calculation of damages. I clarified what I understood the  
8 but-for world to be, but I think that is the proper  
9 construct, yes.

10 Q. Well, you argued with what Dr. Botosan had used in the  
11 construct for the but-for world, but you did not argue with  
12 the fact that a but-for world analysis is proper, correct?

13 A. I think that is a part of what damage experts do, yes.  
14 I agree with that.

15 Q. And a large part of what you did here is you were  
16 criticizing Dr. Botosan, correct, and what she put into her  
17 analysis?

18 A. No.

19 Q. So you agree with her numbers?

20 A. No.

21 Q. You agree with the inputs that she relied on?

22 A. No.

23 Q. Okay. As I understand it, those are the types of  
24 things that you went into, and in particular you talked  
25 about a Deutsche Bank report, correct?

1 A. Yes.

2 Q. Now, let me give you a copy of your report.

3 MR. HATCH: Mr. Calvin, bring up R-21.

4 I believe this has been admitted.

5 THE CLERK: It has.

6 BY MR. HATCH

7 Q. Mr. Musika, I have put in front of you an exhibit that  
8 is the Deutsche Bank report from October 14, 2003.

9 Do you see that?

10 A. Yes, I do.

11 Q. You spoke about that during your direct examination,  
12 correct?

13 A. Yes, I did.

14 Q. Now, one of the things that you criticize, I think, if  
15 I heard your right, is you talked to the jury about your  
16 conclusion that these shares would be worth zero and you  
17 recommended that they don't buy?

18 A. That they don't buy the decision and the position that  
19 Dr. Pisano and Dr. Botosan are offering, that there would  
20 have been \$200 million of revenue and \$10 million of profits  
21 except for Novell's slander.

22 Q. You specifically said the stock was worth nothing?

23 A. That is what the Deutsche Bank report says, yes.

24 Q. Well, let's look at the Deutsche Bank report.

25 We went through this with Dr. Botosan I think the other

1 day with Mr. Brennan. As of the date of this report, and as  
2 you can see under buy --

3 MR. HATCH: Mr. Calvin, pull that up. It is up in  
4 the right-hand corner.

5 BY MR. HATCH

6 Q. The price of the stock at that point was what price?

7 A. \$16 and one cent a share.

8 Q. Let's go back to the beginning.

9 I think as we pointed out before, if you were just  
10 looking at the stock -- now, the Deutsche Bank report talked  
11 about some of the limitations that you talked about here  
12 with the jury, right, the risk factors including the risk of  
13 litigation and infringement and other things?

14 A. Yes.

15 Q. It took those into account, right?

16 A. It took the risk factors into account to do what?

17 Q. It told the people who were reading this report and  
18 deciding how they wanted to view the SCO Group, it gave  
19 those as risk factors to them, didn't it?

20 A. It said if you choose to buy this stock you should be  
21 aware that you could lose everything you're putting into  
22 this. This could be worthless. This is a binary  
23 investment.

24 Q. Exactly. Just to be clear, the date of this is before  
25 any of the alleged Novell slander, correct?

1 A. No.

2 Q. It is after this, right?

3 A. Yes.

4 Q. Even with all of those things in play, what is the  
5 price that they say the stock is going to be, they think?

6 A. They identify -- well, we should be careful here, too,  
7 because it is not they, it is Brian Skiba. Deutsche Bank,  
8 as it says in the report, this is not their report. This is  
9 Brian Skiba's report. That is a very important point.

10 Secondly, what Brian Skiba says is \$45 a share is the  
11 target price. Not Deutsche Bank, Brian Skiba.

12 MR. HATCH: Mr. Calvin, go to page 17, I think it  
13 was. Page 19. Excuse me. Page 18 is what I want.

14 BY MR. SINGER

15 Q. Deutsche Bank, they don't have a relationship with SCO,  
16 do they?

17 A. Yes, I think they do.

18 Q. What do you believe that relationship is?

19 A. There is a disclosure, and I think Dr. Botosan was  
20 shown, that they make a market in the stock.

21 Q. Okay. Were they doing that at this time?

22 A. Which time?

23 Q. The time of this report?

24 A. No.

25 Q. So they were not making a market, so is there any

1 relationship between Deutsche Bank and SCO at this time?

2 A. On October 14th, 2003?

3 Q. Right.

4 A. Well, again, are you talking about Deutsche Bank or  
5 Brian Skiba specifically?

6 Q. I am talking about Deutsche Bank.

7 A. Deutsche Bank, I don't know. Brian Skiba, there may  
8 have been.

9 Q. In here they do talk about what you call vendor  
10 licenses, don't they?

11 A. They do include vendor licenses, yes, in their  
12 projections. Yes, that is correct.

13 Q. The date of this report is prior to the litigation with  
14 Novell, correct?

15 A. Yes.

16 Q. So we're talking about here an independent group who is  
17 saying what these vendor licenses might be, and what they  
18 say here, do they not, is they are estimating \$10 million  
19 recognized over three quarters, correct, from a large  
20 license agreement that was already signed?

21 A. Well, you're reading from that second paragraph and it  
22 says the source license deals which enable licensees to work  
23 with the System V code in their own products are typically  
24 large deals where timing is difficult to predict. There are  
25 two things there. One is they are telling us, again, that

1 it is difficult to predict and, number two, they are talking  
2 about System V. They are not talking about vendor licenses  
3 that relate to SCO.

4 Again, this is an attempt to take one set of  
5 projections that were prepared for one reason and force feed  
6 them or force fit them into a SCO license which deals with  
7 Linux. That does not say that at all.

8 Q. Dr. Botosan relied on this, right?

9 A. She did, indeed.

10 Q. And you criticized her for relaying on this, right?

11 A. Yes.

12 Q. In the Deutsche Bank report, so we can move this on,  
13 they put a price at what they thought the SCO licenses would  
14 sell for, a range, didn't they?

15 A. Which licenses are you talking about?

16 Q. The R.T.U. license.

17 A. Okay.

18 Q. Deutsche Bank said between \$100 and \$300, correct?

19 A. Yes.

20 Q. You are aware that SCO had priced them as high as  
21 \$1,400 and at \$695, but Deutsche Bank was taking the  
22 conservative range of \$100 to \$300, correct?

23 A. I don't think that is conservative.

24 Q. Well, that is not the question I asked.

25 MR. BRENNAN: That is the question that he asked.

1 THE COURT: No, it is not.

2 MR. HATCH: That was not the question I asked.

3 THE COURT: He asked whether or not that is what  
4 the bank did.

5 MR. BRENNAN: Just so we are clear, Your Honor, he  
6 said conservative in his question.

7 THE COURT: He did, but he said did the bank take  
8 the conservative view. It was the bank.

9 We're going to take a recess here. 15 minutes.

10 (WHEREUPON, the jury leaves the proceedings.)

11 THE COURT: Counsel, when we return I want you to  
12 be able to tell me exactly how much time there is left for  
13 each of you and how you intend to allocate it. All right.

14 MR. BRENNAN: Thank you.

15 (Recess)

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