

1 THE COURT: Mr. Jacobs, Mr. Singer, where are we?

2 MR. SINGER: Your Honor, first with respect to  
3 time, I think the parties have agreed that SCO has 52 minutes  
4 and Novell has 22 minutes.

5 MR. JACOBS: That's correct, Your Honor.

6 MR. SINGER: I assume there's no further witnesses  
7 from Novell?

8 MR. JACOBS: That's correct.

9 MR. SINGER: We would with the Court's approval  
10 like to reserve the issue of Rule 50 motions that we have with  
11 respect to their case. And we would have two rebuttal  
12 witnesses, the first of whom would be Robert Frankenberg and  
13 the second witness would be Christine Botosan.

14 THE COURT: All right.

15 Anything to respond to that, Mr. Jacobs?

16 MR. JACOBS: We're ready, Your Honor.

17 THE COURT: All right.

18 Again, Mr. Singer, the times were?

19 MR. SINGER: To be exact, 52 for SCO and 22 for  
20 Novell.

21 THE COURT: All right.

22 Now, I have to ask those of you in the audience,  
23 when we put on the white noise, is that deafening to you? Has  
24 anyone suffered physical damage? Well, some have said yes and  
25 some have said no. I need to know. Is it too loud so that

1 it's harmful?

2 THE AUDIENCE: No.

3 THE COURT: Anyone who wants to say otherwise? All  
4 right.

5 (Whereupon, the jury returned to the court  
6 proceedings.)

7 THE COURT: Go ahead, Mr. Hatch.

8 Q. BY MR. HATCH: Mr. Musika, just so we can get to  
9 the bottom line, you never actually calculated a number other  
10 than zero for damages; correct?

11 A. I calculated the number as zero, yes, that's  
12 correct.

13 Q. And you never did an actual survey of consumers,  
14 did you?

15 A. I did not survey consumers, no.

16 Q. Okay. Now, you were here in the Court when  
17 Dr. Botosan stood in front of the jury and calculated damages;  
18 correct?

19 A. Yes, I was.

20 Q. And in response to questions from your counsel  
21 today, you indicated that her analysis was somehow deficient;  
22 right?

23 A. Was somehow?

24 Q. Deficient.

25 A. I don't agree that it takes into consideration all

1 of the factors that should be considered, yes.

2 Q. Okay. Fair enough. You and Dr. Botosan both did  
3 reports, expert reports during the course of this litigation;  
4 correct?

5 A. That's correct.

6 Q. All right. And you understood that Dr. Botosan  
7 also did -- you reviewed her initial damages report; correct?

8 A. I did.

9 Q. All right. And then she had the opportunity to  
10 review your report and criticize that; correct?

11 A. Yes, that's correct.

12 Q. All right. And she filed also a rebuttal report  
13 that took issue with your report, as well; correct?

14 A. Yes.

15 Q. And you read that one, didn't you?

16 A. Yes, I did.

17 Q. And that report was in July of 2007?

18 A. I don't recall exactly when it was.

19 Q. You understand it was just shortly after your  
20 report; correct?

21 A. I think that's right, yes.

22 Q. And you attended her deposition in this matter in  
23 August of 2007; correct?

24 A. Twice. She was deposed in 2007, and I attended  
25 both times, and then again in 2010.

1 Q. Okay. And you were impressed with her, weren't  
2 you?

3 A. I'm sorry?

4 Q. You were impressed with her work?

5 A. No.

6 Q. Okay.

7 A. I'm sorry to say.

8 Q. Well, in fact, weren't you so impressed that only a  
9 few months after her first deposition and after she had issued  
10 a report criticizing your work, didn't you contact Dr. Botosan  
11 regarding your interest in hiring her to work for your expert  
12 consulting business?

13 A. No. I can explain.

14 Q. Well, that's a yes or no. Did you or didn't you?

15 A. I contacted Dr. Botosan and had a discussion with  
16 her concerning accounting. The federal government had  
17 contacted me and asked me to be involved with specific --  
18 there's a new PCAOB board --

19 MR. HATCH: Your Honor, it's not responsive.

20 THE COURT: He said no.

21 MR. HATCH: I agree.

22 Q. BY MR. HATCH: Didn't you tell her, urge her to  
23 look at your firm's website and let you know if she would have  
24 an interest in discussing your firm's interest in her?

25 A. Exactly, for the PCAOB work that the federal

1 government had contacted us about, because she is an  
2 accounting professor, and we did not have an accounting  
3 professor, so to respond to the federal government's request,  
4 to assist with the -- basically it's the federal government's  
5 review of accountants. And so I contacted her about that to  
6 see if she would be interested in joining us to look at the  
7 accounting side, yes.

8 Q. Well, you didn't say any of that when you  
9 communicated with her that you wanted to hire her shortly  
10 after she had criticized your report?

11 A. I disagree with that.

12 Q. You disagree with that?

13 Your Honor, can we have a side bar?

14 THE COURT: You may.

15 (Whereupon, the following proceedings were  
16 held at the bench:)

17 MR. HATCH: In the interest of time, I think I have  
18 a right I think under the rules to do impeachment. And I have  
19 handed you a copy, the Court a copy that directly contradicts  
20 his testimony here today. I think in the case law and  
21 certainly in the rules that evidence offered solely for  
22 impeachment, it doesn't need to be disclosed prior to trial.  
23 And plus we just became aware of this. And I would ask to be  
24 able to show it at this point. It doesn't mention anything  
25 about accounting, and he specifically said, no, he didn't do

1 this.

2 MR. BRENNAN: And I don't think (inaudible.)

3 Were you waiting for me, Your Honor?

4 THE COURT: No, Mr. Brennan. I'm waiting for  
5 myself.

6 MR. BRENNAN: That's what I thought. I'll wait.

7 (Time lapse.)

8 THE COURT: I believe it is a close call as to  
9 whether or not this is impeachment, what this witness just  
10 said.

11 MR. HATCH: He said --

12 THE COURT: He did not deny that he talked to her  
13 about having her do some specific work. And that is not --  
14 there's nothing in this that would indicate he's asking her to  
15 come to work for him full-time. And that's the way to impeach  
16 him because that seems to me the difference you're trying to  
17 make here.

18 MR. BRENNAN: I would say if he says contrary to  
19 what's here then perhaps he could, but he hasn't done that.

20 THE COURT: He hasn't done that.

21 If you truly could impeach, it would be permitted.  
22 It would not have to be disclosed, it would be allowed. But I  
23 don't see that it's really impeachment. And I think we  
24 probably ought to move on.

25 MR. HATCH: I'm talking about firm -- I'll ask him

1 about it.

2 THE COURT: If you want to go ahead, go ahead.

3 (Whereupon, the following proceedings were  
4 held in open court:)

5 Q. BY MR. HATCH: When you talked, you had this  
6 communication with Dr. Botosan, did you tell her that your  
7 firm's greatest challenge is finding qualified experts to  
8 handle the volumes of referrals that you receive?

9 A. Concerning the accounting literature, yes. And I  
10 put this in the context, too. This was after the summary  
11 judgment motion --

12 Q. I don't have a question pending.

13 I want to know if you said a specific thing.  
14 Didn't you tell her that your firm's greatest challenge is  
15 finding qualified experts to handle the volumes of referrals  
16 that you receive?

17 A. That has always been a challenge for us. I don't  
18 remember. I know the reason I called her again was because of  
19 the Public Accounting Oversight Board contacted me and asked  
20 for accounting experts. And I contacted her since this matter  
21 had been concluded under summary judgment after I talked to  
22 counsel. And I don't know what else I said about the firm. I  
23 don't remember.

24 Q. So what we do know is shortly after your seeing her  
25 report criticizing her, you made this offer to hire her?

1           A. No, that is absolutely wrong. It was after the  
2 summary judgment motion was decided in this motion, and SCO  
3 had filed for bankruptcy.

4           MR. HATCH: Your Honor, he's not responsive. He's  
5 testifying to things I haven't asked him.

6           THE COURT: I will agree, and first of all,  
7 instruct the jury to disregard what Mr. Musika just said and  
8 instruct the witness to answer the question as directly as  
9 possible.

10          MR. BRENNAN: Your Honor --

11          THE COURT: If Mr. Hatch has not represented the  
12 timeline, then you may say no.

13          THE WITNESS: No.

14          Q. BY MR. HATCH: But you were interested in hiring  
15 her; correct?

16          A. At some point I contacted her about interest  
17 because of the special nature of the request from the  
18 government, yes.

19          Q. Yes. Thank you.

20                 That's all I have, Your Honor.

21          MR. BRENNAN: Just a few questions, Your Honor.

22          THE COURT: Go ahead.

23                         REDIRECT EXAMINATION

24 BY MR. BRENNAN:

25          Q. Mr. Hatch asked you a series of questions regarding



1 a possible relationship between Deutsche Bank and SCO, and you  
2 indicated that there was some reason to believe that there was  
3 a relationship between the authors of the Deutsche Bank report  
4 including Brian Skiba and Darl McBride?

5 A. Yes, that's correct.

6 Q. And what I'd like to do is have displayed to the  
7 jury a demonstrative, Your Honor, and this indicates both  
8 Deutsche Bank disclosure and also an e-mail from Ms. Bingham  
9 of SCO. And I'd like to ask the witness a question or two  
10 about that.

11 Mr. Musika, what is your understanding or suspicion  
12 regarding personal relationships between the authors of the  
13 Deutsche Bank forecast and Mr. McBride?

14 THE COURT: Mr. Hatch?

15 MR. HATCH: Your Honor, I think, one, it's beyond,  
16 beyond the scope, and I think also there's no foundation to  
17 talk about this.

18 MR. BRENNAN: This is directly within the scope of  
19 what he was asked about, the relationship issue.

20 THE COURT: Has this e-mail been admitted as  
21 evidence?

22 MR. BRENNAN: It's not been admitted as evidence,  
23 but it is one that was relied upon in his report and cited in  
24 his report.

25 MR. HATCH: And, Your Honor, it was -- there was a

1 lot of things that Mr. Musika put in his answers, a lot that  
2 was not responsive to my questions, and I don't think he gets  
3 to get anything in that he just chooses, just throws in.

4 THE COURT: Did you ask him any questions about the  
5 relationship between Brian Skiba and --

6 MR. HATCH: I asked about the relationship with  
7 Deutsche Bank.

8 MR. BRENNAN: That's what opened the door, Your  
9 Honor.

10 THE COURT: All right. You may go ahead.

11 MR. BRENNAN: Thank you.

12 Q. BY MR. BRENNAN: So what do you understand or  
13 suspect may be the relationship between SCO and Mr. McBride  
14 and Brian Skiba and Deutsche Bank?

15 A. As an auditor we are taught to exercise  
16 professional skepticism or healthy skepticism when we're  
17 auditing or examining companies. In examining the record of  
18 these two companies, Novell and SCO, I came upon two things  
19 that are presented here. One is that Deutsche Bank disclosed  
20 in their 2004 report that they were not independent, that they  
21 actually make a market in the SCO stock.

22 And then secondly, I found in SCO's records an  
23 e-mail correspondence that says:

24 Please book a car in Rome for Darl -- that's  
25 Darl McBride -- for now. Also I'm going to pdf a

1 hotel reservation for Darl in Cannes, Nice, at  
2 Hotel Martinez. Please finalize and book for us  
3 in as much as there is a good chance that Darl  
4 and Andrea may be staying with Brian Skiba in  
5 his place Oceanfront.

6 Now, that is a serious red flag to me as an  
7 auditor. I don't come here to represent that there was a  
8 social relationship. I don't come here to represent that  
9 Darl McBride ultimately stayed there, but this is in the  
10 corporate records of SCO certainly indicating that there was  
11 some potential contact between the two. And that's a serious  
12 red flag for me as an auditor that warrants further  
13 investigation and concern about the lack of independence of  
14 Brian Skiba in preparing that report SKIBA.

15 MR. BRENNAN: Thank you. No further questions.

16 THE COURT: Mr. Hatch?

17 MR. HATCH: Just quickly, Your Honor.

18 RE-CROSS-EXAMINATION

19 BY MR. HATCH:

20 Q. Mr. Musika, I notice -- if you notice what's on the  
21 first page, there are two authors to this report; correct?

22 A. Can you high- -- highlight that for me, please?

23 Yes. There's Brian Skiba and Matthew Kelly, yes. So there's  
24 the same Brian Skiba that was in the e-mail.

25 Q. Okay. But -- and as to Matthew Kelly, do you have

1 anything to say about him?

2 A. No, I don't.

3 Q. And he has qualifications and certification here,  
4 do you see that? CFA? What does that stand for?

5 A. Certified financial analyst.

6 Q. And that shows he's a professional in the financial  
7 industry; correct?

8 A. You're speaking way fast.

9 Q. Tell me what certified financial analysts do.

10 A. It's a certain certification like a CPA. It's just  
11 a different certification. It's -- you need to take a test  
12 and qualify and pass the test.

13 Q. You don't have anything bad to say about Mr. Kelly?

14 A. I don't have anything good or bad to say about  
15 Mr. Kelly. I don't have anything to say about him.

16 Q. Now, you said professional skepticism would have  
17 looked into this relationship with Mr. Skiba. Is that the  
18 summary of your testimony?

19 A. Yes.

20 Q. What's the date of this report?

21 A. I got it. It's October 14, 2003.

22 Q. Okay. And this conference that you're talking  
23 about, you weren't there, you weren't at the conference that  
24 you say Mr. Skiba provided some housing for Mr. McBride?

25 A. Well, I didn't say that. That's incorrect.

1 Q. I didn't ask you that. You weren't there, were  
2 you?

3 A. Weren't where?

4 Q. I'll tell you what. Give me the date of that  
5 conference. Wasn't that a year after this report of 2004?

6 A. What conference are you talking about?

7 Q. You just testified about Mr. Skiba and  
8 Mr. McBride --

9 MR. BRENNAN: Your Honor, if it would help, we can  
10 put it back up.

11 THE COURT: Put it back up, please.

12 MR. HATCH: That would be helpful.

13 Q. BY MR. HATCH: You're talking here about a contact  
14 between Mr. Skiba and Mr. McBride. What's the date on that?

15 A. The date is September 20, 2004.

16 Q. Okay. Take that down and put up the other.

17 That's about a year later; right?

18 A. Yes, it is.

19 Q. So your skepticism that a report in '03 is not  
20 accurate because something that happened in '04? Is that what  
21 you're saying?

22 A. Yes. That raises a red flag to me that there was  
23 potentially a relationship that needs investigation before you  
24 could accept the representations of Brian Skiba as being --

25 Q. You have no evidence of any relationship as of the

1 date of this particular report, do you?  
2 A. No.  
3 Q. Okay. Thank you.  
4 THE COURT: May this witness be excused, counsel?  
5 MR. BRENNAN: Yes. Thank you, Your Honor.  
6 THE COURT: Mr. Hatch?  
7 MR. HATCH: Thank you, Your Honor. Yes.  
8 THE COURT: Mr. Musika, that means you do not need  
9 to worry about being recalled. I would ask, however, that you  
10 not discuss your testimony in the presence of any other  
11 witness or with a witness in this case.  
12 THE WITNESS: Yes, Your Honor.  
13 THE COURT: Thank you very much.  
14 THE WITNESS: Thank you.  
15 THE COURT: Let me ask, Mr. Brennan, do you have  
16 any additional witnesses?  
17 MR. BRENNAN: We don't have. That was our last  
18 witness, Your Honor.  
19 THE COURT: You rest your case?  
20 MR. BRENNAN: We do.  
21 THE COURT: All right.  
22 MR. SINGER: Your Honor, we have two rebuttal  
23 witnesses, the first of which is Robert Frankenberg.  
24 THE COURT: Mr. Frankenberg, you were already sworn  
25 in this case, so you do not need to be sworn again. So if you

1 would take a seat.

2 ROBERT FRANKENBERG,  
3 called as a witness at the request of Plaintiff,  
4 having been previously duly sworn, was examined  
5 and testified further as follows:

6 THE COURT: Go ahead, Mr. Singer.

7 MR. SINGER: Thank you, Your Honor.

8 DIRECT EXAMINATION

9 BY MR. SINGER:

10 Q. Thank you, Mr. Frankenberg, for coming back to  
11 provide a little more information in connection with this  
12 matter.

13 First of all, was Jim Tolonen the chief financial  
14 officer of Novell at the time that Novell and Santa Cruz  
15 entered into an asset purchase agreement?

16 A. Yes, he was.

17 Q. Did Mr. Tolonen have responsibilities relative to  
18 the asset purchase agreement?

19 A. He did, yes.

20 Q. What were they?

21 A. Largely to make sure that financially this made  
22 sense, that the revenue could be recognized, that we were  
23 appropriately taking into account any implications from  
24 shareholder -- from shareholder viewpoint, and any elements of  
25 taxation that might take place as a result of the sale.

1 Q. Was Mr. Tolonen a key executive assigned by the  
2 company to be the business executive on that transaction?

3 A. No, he was not.

4 Q. Whose responsibility at Novell was it to make the  
5 decision on what technology assets and intellectual property  
6 would be transferred to Santa Cruz as part of that deal?

7 A. Ultimately it would be mine with the approval of  
8 the board.

9 Q. And did Jim Tolonen have that responsibility?

10 A. No, he did not; although he certainly could  
11 influence it.

12 Q. And what about David Bradford, did he have that  
13 responsibility?

14 A. No, he did not.

15 Q. Did Tor Braham have that responsibility?

16 A. No. Tor Braham was an attorney in an outside legal  
17 firm. No, he did not have that responsibility.

18 Q. Did any of these three people, Messrs. Tolonen,  
19 Bradford or Braham, have the authority or responsibility to  
20 decide whether copyrights would stay with Novell or be  
21 transferred to Santa Cruz?

22 A. None.

23 Q. Who was the person that you put in charge of the  
24 initial deal negotiations?

25 A. Excuse me. That was Duff Thompson, and with him



1 Ed Chatlos.

2 Q. Were the copyrights a critical part of selling a  
3 software business?

4 A. Yes, they were.

5 Q. And, Mr. Frankenberg, I'd like you to take a look  
6 at Exhibit 754, which has been put into evidence.

7 Do you recognize this to be a memo that  
8 Mr. Bradford sent to the Novell board of directors on  
9 September 15, 1995, a few days before the board meeting?

10 A. Yes, I do.

11 Q. And I have a copy here. I think there may be a  
12 copy already up there. If not, here's one.

13 A. On the screen there is.

14 Q. One of the items attached here is a term sheet for  
15 a proposed transaction. Mr. Calvin will move to that page of  
16 this.

17 Do you see on this term sheet a discussion of what  
18 Novell transfers to SCO, what Novell retains and what Novell  
19 receives from SCO?

20 A. Yes.

21 Q. Do you see anywhere on the section of what Novell  
22 retains any copyrights mentioned?

23 A. No, I do not.

24 Q. Now, did you rely on this information in a board  
25 meeting on September 18, 1995, to provide an accurate summary

1 of what was in the transaction documents as of that time?

2 A. I'm sure we would have, yes.

3 Q. And did it inform your view that the copyrights  
4 that were mentioned in the board resolution that you looked at  
5 a couple weeks ago when you were here that Novell would retain  
6 referring to something other than the UNIX copyrights?

7 A. Yes.

8 Q. And I think, did we discuss before that there was a  
9 company, there was a business called NetWare which had  
10 copyrights that were owned by Novell?

11 A. Yes.

12 Q. To your best recollection, was an exclusion of any  
13 of the UNIX copyrights discussed at the board meeting on  
14 September 18, 1995?

15 A. No.

16 Q. Is that something you would have remembered if that  
17 had come up?

18 A. I might have. There would have been a lot  
19 discussed on a sale of this nature, but I do not recall any  
20 discussion of copyrights.

21 Q. Well, if someone had said to you that, well, we're  
22 trying to sell the software business but we're going to retain  
23 the copyrights, would that have been something you think would  
24 have gotten your attention?

25 A. That definitely would have gotten my attention,

1 because it's ludicrous to think about selling software without  
2 selling the copyrights. If you don't have the copyrights, you  
3 don't have the ability to freely use what you bought.

4 Q. Did the intent to transfer the UNIX and UnixWare  
5 copyrights ever change according to your understanding?

6 A. No.

7 Q. And when you were here in trial earlier, we  
8 discussed briefly a dispute that arose a year later between  
9 Novell, IBM and SCO about a royalty buyout. Do you recall  
10 that?

11 A. I do, yes.

12 Q. And was Mr. Tolonen involved in that issue?

13 A. Yes, he was.

14 Q. Do you recall what his involvement was?

15 A. Again, this was a significant transaction, so  
16 Mr. Tolonen would have been involved in the financial aspects,  
17 any tax implications, the ability to recognize the revenue  
18 that would be derived from such a sale.

19 Q. I'd like you to look at Exhibit 123.

20 A. Thank you.

21 Q. At some point was a term sheet prepared to address  
22 these issues?

23 A. Yes.

24 Q. And do you recognize this document?

25 A. I do, yes.

1 Q. What is it?

2 A. It's a proposed IBM term sheet for IBM's buyout of  
3 their license to UNIX.

4 Q. Do you recall seeing this sometime during the time  
5 of that dispute when you were still chief executive officer of  
6 Novell?

7 A. I'm sure I did, yes.

8 Q. And do you recall who drafted this IBM term sheet?

9 A. I do not. I'm sure Jim Sullivan was involved in  
10 it, also potentially Mr. Tolonen, but I'm not sure who did the  
11 actual drafting.

12 Q. And Mr. Sullivan is also a Novell executive?

13 A. Yes, he was.

14 Q. As was Mr. Tolonen; is that correct?

15 A. Correct.

16 MR. SINGER: I move for the admission of  
17 Exhibit 123.

18 MR. BRENNAN: Your Honor, I don't think this has  
19 been properly authenticated, nor has there been a foundation  
20 laid regarding this document.

21 THE COURT: I will overrule the objection and admit  
22 Exhibit 123.

23 (Whereupon, Plaintiff's Exhibit 123 was received.)

24 Q. BY MR. SINGER: Exhibit 123 is now in evidence, and  
25 the jury will be able to see the document on the screen. This

1 was the term sheet. Can you explain what this document is?

2 A. This would have been a term sheet or the iteration  
3 of a term sheet for dealing with the key provisions offered to  
4 and hopefully agreed on with IBM to allow them to purchase,  
5 one-time purchase their royalty -- pay off their royalties in  
6 a one-time purchase for UNIX.

7 Q. I'd like to point you to a specific provision in  
8 the term sheet. Would you look at the last paragraph?  
9 Perhaps Mr. Calvin can highlight that. This is Item 6.

10 Could you read that into the record, if you would,  
11 please, Mr. Frankenberg?

12 A. IBM agrees to residual rights language to be  
13 defined. SCO demands to limit IBM from studying  
14 UNIX code while programming a non-AIX platform.  
15 IBM insists SCO is protected by copyright.

16 Q. Where it says, IBM insists SCO is protected by  
17 copyright, what did you understand that to mean?

18 A. Well, what I understand it to mean is that SCO has  
19 copyright protection.

20 Q. Would that be referring to the UNIX copyrights?

21 A. Yes.

22 Q. Did you understand that whether SCO -- excuse me --  
23 whether IBM wanted to limit what they could look at relative  
24 to SCO's UNIX code because they thought that SCO was protected  
25 by the UNIX copyrights?

1 A. I'm sorry, Mr. Singer. Could you try that again?

2 Q. Yes. Right.

3 Do you understand that IBM did not want to limit  
4 what they could look at relative to SCO's UNIX code?

5 A. Yes.

6 Q. And what relationship did that have to the issue of  
7 whether SCO was protected by UNIX copyrights?

8 A. Well, if SCO were protected by UNIX copyrights,  
9 then IBM could not use it without gaining permission of using  
10 the copyright.

11 Q. Even if they had taken a look at it?

12 A. Yes.

13 Q. Did anyone at Novell including Mr. Tolonen tell you  
14 that IBM's position was not correct because Novell had kept  
15 the UNIX copyrights?

16 A. No, not to my recollection.

17 Q. And to your knowledge, during this dispute with SCO  
18 and IBM, did anyone at Novell ever tell SCO or IBM that Novell  
19 owned the UNIX copyrights?

20 A. Not that I heard, no.

21 Q. Thank you, Mr. Frankenberg.

22 CROSS-EXAMINATION

23 BY MR. BRENNAN:

24 Q. Good afternoon, Mr. Frankenberg.

25 A. Good afternoon.

1 Q. We meet again.

2 A. We do, indeed. Good to see you again.

3 Q. Nice to see you, as well.

4 Is it your position that Novell would never sell  
5 assets of a business involving software and retain copyrights  
6 with respect to that software?

7 A. No. But it would be highly unusual, and I would  
8 think it would require licenses back to the purchaser for the  
9 copyrights.

10 Q. You're aware of what's called the TUXEDO  
11 transaction; right?

12 A. Yes.

13 Q. And Novell sold certain assets relating to the  
14 TUXEDO business to BEA; right?

15 A. Yes. And license and the technology.

16 Q. And Novell retained ownership of the copyrights of  
17 that software; right?

18 A. That's what I've been informed of, yes.

19 Q. And that transaction happened within a year of the  
20 transaction involving Santa Cruz; right?

21 A. I believe so, yes. I don't know. I don't remember  
22 the exact time.

23 Q. So within your experience at Novell, you'd be aware  
24 that within a one-year period or less of the Santa Cruz  
25 transaction Novell did another transaction involving the

1 TUXEDO software, transferred assets relative to that software  
2 to the buyer BEA, but Novell retained the copyright ownership  
3 to that software; correct?

4 A. I believe that was a licensing transaction as  
5 opposed to an asset sale, but I'm not sure.

6 Q. You're not sure?

7 A. I'm not sure.

8 Q. Now, I'd like to ask you a bit about, once again,  
9 the board of directors meeting.

10 A. Okay.

11 Q. And if we could pull up Exhibit Z3.

12 Now, you'll agree that at the September 18th, 1995,  
13 board meeting that both Mr. Bradford and Larry Sonsini, the  
14 senior partner at Wilson Sonsini, reviewed the terms of the  
15 asset purchase agreement with the board; right?

16 A. Yes.

17 Q. You had chance to follow that discussion; right?

18 A. Yes, I did.

19 Q. You had a chance to look at what the terms and  
20 conditions were of the asset purchase agreement; correct?

21 A. Correct.

22 Q. And the asset purchase agreement that was entered  
23 into included the exclusions that we looked at when you were  
24 here last time of, all copyrights and trademarks except for  
25 the trademarks UNIX and UnixWare; correct?



1           A.    That's what it said, yes.

2           Q.    So the very document that was before the board, the  
3    very document that was discussed by two attorneys, one inhouse  
4    counsel Mr. Bradford, the other member of the board and senior  
5    partner Wilson Sonsini, that document had that expressed  
6    exclusion of copyrights; correct?

7           A.    Correct.

8           Q.    And you followed that discussion, didn't you?

9           A.    Yes.

10          Q.    And with respect to the minutes, let's focus again,  
11    just so we can leave this trial without any question in  
12    anyone's mind, let's look at Page 2.  And you will see in the  
13    resolution once again the language, quote:

14                    Novell will retain all of its patents,  
15                    copyrights, and trademarks except for the  
16                    trademarks UNIX and UnixWare.

17                                Right?

18          A.    That's what it says.

19          Q.    And that was the resolution approved by the board  
20    of directors; right?

21          A.    Yes.

22          Q.    You were the chairman of that board; right?

23          A.    Yes.

24          Q.    You recall this very resolution being approved at  
25    the board meeting; right?

1           A.    Yes.

2           Q.    And after the board meeting you had a chance to  
3 review the minutes that included this specific resolution;  
4 correct?

5           A.    Yes, I did.

6           Q.    And you believe that the board minutes are  
7 accurate; right?

8           A.    I believe that they are accurate to the extent  
9 that -- well, as I testified before, we were very concerned  
10 about copyrights on NetWare.  And I'm sure that when I looked  
11 at this and saw the provision, what I read was, NetWare  
12 copyrights, even though it doesn't say that.

13          Q.    So you read something that didn't appear in the  
14 minutes?

15          A.    Yes.

16          Q.    But --

17          A.    That happens to all of us.

18          Q.    It certainly might.

19                So let me just see if I understand what you're  
20 saying.  Is it your contention that although what was  
21 discussed with the board was an expressed exclusion of  
22 copyrights and although the words that were in the asset  
23 purchase agreement expressly excluded the transfer of  
24 copyrights and the minutes of the board of directors meeting  
25 excluded all copyrights, somehow in your mind you either saw

1 or thought you heard something different than the expressed  
2 provisions; is that essentially what you're telling us?

3 A. Yes, it is.

4 Q. So is it correct, then, that somehow in your mind  
5 you thought or pictured something different than was written  
6 in the words of the asset purchase agreement?

7 A. Yes.

8 Q. And is it possible in your mind you thought  
9 something different than the words spoken at the board  
10 meeting?

11 A. I don't recall the discussion of copyrights at the  
12 board meeting.

13 Q. Is it possible --

14 A. I do recall a discussion of the deal and a review  
15 by Mr. Bradford and Mr. Sonsini. I don't recall a discussion  
16 specifically about copyrights.

17 Q. You do recall this resolution being discussed?

18 A. I do, yes.

19 Q. And the resolution was actually presented to the  
20 board; right?

21 A. It was, yes.

22 Q. And the words that we see in the resolution were  
23 presented to the board as set forth in the minutes; right?

24 A. Yes.

25 Q. So is it possible, then, that although the words of

1 the resolution were spoken, somehow in your mind you didn't  
2 hear the words the same way that they're recorded in the  
3 minutes?

4 A. Yes.

5 Q. And you do acknowledge the possibility that, in  
6 fact, what happened is that just as we've heard during the  
7 course of the trial that Novell expressly made a determination  
8 not to transfer the copyrights; correct? You leave that  
9 allowance open, don't you?

10 A. Well, I wasn't here for the trial, and I wasn't  
11 supposed to be listening in on anything, so I can't say --

12 Q. Fair enough.

13 A. -- what happened during the trial.

14 Q. I appreciate that.

15 A. Could you repeat your question?

16 Q. I'd be happy to.

17 A. So that I can focus on it, please.

18 Q. You leave open the possibility that what happened  
19 when the asset purchase agreement was signed by you in behalf  
20 of Novell and signed by Mr. Mohan in behalf of Santa Cruz  
21 Operation that the words that were used in the asset purchase  
22 agreement did, in fact, reflect the intent of both those  
23 parties. You leave open that possibility, don't you?

24 A. No, I don't. It was not my intent. It could have  
25 been somebody else's intent. It was not my intent, nor what

1 we agreed on between Alok Mohan and myself.

2 MR. BRENNAN: Your Honor, I would like to read from  
3 the deposition of the witness taken on February 10, 2007. And  
4 for the benefit of counsel, I'd like to read from Pages 84 and  
5 85. And I can present it.

6 THE COURT: Which line on Page 84?

7 MR. BRENNAN: I think I'll start at Line 9, Your  
8 Honor.

9 THE COURT: All right.

10 Q. BY MR. BRENNAN: So if you can see that. Is that  
11 before you?

12 A. It is.

13 Q. Wonderful. Thank you, Mr. Lee.

14 Question. So setting aside your personal intent,  
15 is it your testimony that the negotiating team acted outside  
16 of its authority in drafting an exclusion to the asset  
17 purchase agreement that was broader than just network  
18 copyrights?

19 Answer. That's possible.

20 Question. It's a possibility?

21 Answer. It's a possibility.

22 Question. What other possibilities are there?

23 Answer. A drafting error is another possibility.

24 Question. And does the fact that there was the  
25 three-month period in which Amendment Number 1 had a chance to

1 be prepared in the wake of the signature of the asset purchase  
2 agreement and before the closing, does that affect your  
3 estimate of the probability that it was a drafting error?

4 Answer. I only said that both of those things were  
5 possible. I still think it's -- excuse me -- I think it's  
6 still possible it was a drafting error or that they acted  
7 outside of their scope. I think either of those are possible.

8 Question. Are there any other possibilities?

9 Answer. Not that I can think of.

10 Question. Well, we discussed one, which was that  
11 you gave them direction to try to make sure that they could  
12 protect their right to do buyouts; correct?

13 Answer. Correct.

14 Question. Is it possible that they effectuated  
15 that direction by obtaining the UNIX copyrights?

16 Answer. I guess that's possible, as well, yes.

17 And do you recall when your deposition was taken at  
18 least at that point in time your mind was open with the  
19 possibility that the asset purchase agreement as signed and  
20 executed by both parties and which had an expressed exclusion  
21 of copyrights was, in fact, done purposely so as to protect  
22 Novell's interests?

23 A. That was a possibility, yes.

24 Q. And you would acknowledge even today that that's a  
25 possibility?



1 not be admitted, you're right.

2 MR. BRENNAN: Thank you, Your Honor.

3 MR. SINGER: Yes.

4 Q. BY MR. SINGER: Will you take a moment to look the  
5 at document?

6 A. Which part of it? It may take more than a moment.

7 Q. Yes. Just the title.

8 Have you done that?

9 A. Yes.

10 Q. Does this refresh your recollection of whether the  
11 transaction with TUXEDO was a licensing agreement?

12 A. Yes. Can I say what it says?

13 Q. No. If you could put it aside.

14 A. Yes.

15 Q. And I can now ask you if your recollection having  
16 been refreshed, are you now able to say whether or not the  
17 TUXEDO deal was a licensing agreement as opposed to a sale of  
18 assets?

19 A. It was a licensing agreement as opposed to a sale  
20 of assets.

21 Q. Now, with respect to the transaction that we've all  
22 been spending a lot of time talking about, the asset purchase  
23 agreement in this case, are you aware of the license back of  
24 assets from SCO to Novell to use after the transaction?

25 A. Yes, I am.



1 Q. Would that have made any sense if the UNIX  
2 copyrights weren't being transferred to Santa Cruz?

3 A. I don't think so, no.

4 Q. And when you were saying that it's a possibility  
5 that some people were trying to act zealously to protect  
6 Novell's interest, there are a lot of things that are possible  
7 in this world; right?

8 MR. BRENNAN: Your Honor, that's a leading  
9 question.

10 THE COURT: Correct, it is.

11 Q. BY MR. SINGER: Are there a lot of things which are  
12 possible?

13 A. Yes.

14 Q. Having established that --

15 A. You guys were having fun there, so I didn't want to  
16 interrupt.

17 Q. Having established that, does it remain it was  
18 always your intent, though, as the chief executive officer of  
19 Novell at the beginning of the transaction with Santa Cruz  
20 that the copyrights be transferred?

21 A. Yes.

22 Q. UNIX. Was it your intent throughout that  
23 transaction that the copyrights be transferred?

24 A. Yes.

25 Q. Was it your intent at the end of that transaction

1 that the copyrights be transferred?

2 A. Yes.

3 Q. And if someone was whether zealously and well  
4 intentioned or not acting otherwise to put that in the  
5 document, would that be outside of the scope of authority in  
6 your view?

7 A. Yes.

8 MR. SINGER: I have nothing further.

9 MR. BRENNAN: Just one question, if might from  
10 here, Your Honor?

11 THE COURT: You may.

12 RE-CROSS-EXAMINATION

13 BY MR. BRENNAN:

14 Q. Was the board of directors of Novell acting outside  
15 of the scope of its authority in approving the asset purchase  
16 agreement?

17 A. No, they were not.

18 MR. BRENNAN: Thank you.

19 THE COURT: Mr. Frankenberg, thank you. You may  
20 again be excused, except this time I think finally you're  
21 done.

22 THE WITNESS: Finally.

23 THE COURT: The same caution about discussing your  
24 testimony, however, not discussing your testimony, to be more  
25 specific, apply until the case is over.

1 THE WITNESS: Okay.

2 THE COURT: Thank you, Mr. Frankenberg.

3 THE WITNESS: Thank you, Your Honor.

4 Thank you, ladies and gentlemen.

5 MR. SINGER: Your Honor, our next witness will be  
6 Christine Botosan. I should say our next witness and final  
7 witness will be Christine Botosan.

8 THE COURT: Dr. Botosan, if you would just come  
9 back up. You remain under oath, so you do not need to be  
10 sworn again. If you would just take a chair, please.

11 THE WITNESS: Thank you.

12 CHRISTINE BOTOSAN,  
13 called as a witness at the request of Plaintiff,  
14 having been previously duly sworn, was examined  
15 and testified further as follows:

16 DIRECT EXAMINATION

17 BY MR. HATCH:

18 Q. Welcome back, Dr. Sonsini.

19 A. Thank you.

20 Q. You think.

21 A. Yeah. You said it, not me.

22 Q. I'll let you get your water.

23 You had the opportunity to be here while Mr. Musika  
24 gave his testimony; correct?

25 A. I did, yes.

1 Q. Okay. And you were able to hear it okay?

2 A. I did.

3 Q. All right. Mr. Musika had made some statements  
4 about the riskiness of an investment in SCO, SCO's stock. Do  
5 you remember that?

6 A. I do.

7 Q. Is SCO's stock price relevant to its loss -- the  
8 calculation of its lost customer sales?

9 A. No. My damages analysis is based on lost revenues.  
10 And so the risks that Mr. Musika was referring to when he  
11 talked about the riskiness of the stock are completely  
12 separate from the risks that exist in SCO's product market.  
13 Those risks are very relevant. The risks, some of which he  
14 mentioned, that there was hostility against SCO, that  
15 infringement hadn't been proven in the marketplace, all of  
16 those product market risks that are very relevant to my damage  
17 analysis and are incorporated in my damage analysis.

18 Q. Did the Deutsche Bank forecast that you relied on  
19 take market risk into consideration?

20 A. Yes. It talked about -- it talked about all of  
21 those risks. Every one of the risks that Mr. Musika referred  
22 to in his testimony are discussed in the Deutsche Bank report.  
23 They were just market factors that existed at the time that  
24 were commonly known and impacted the amount of revenues that  
25 the analysts forecasted for SCOsource.

1           Q.   Now, you considered Dr. Pisano's report, as well;  
2 correct?

3           A.   Yes.

4           Q.   Did he take into account those same factors in his  
5 analysis?

6           A.   He did. I was here when Dr. Pisano testified, and  
7 I can still picture him talking about purchasers of SCOSource,  
8 and that there were some people at one point that wouldn't  
9 purchase all of the sorts of factors that we've been hearing  
10 about this morning, and that was why he didn't assume market  
11 penetration of anywhere close to 100 percent. In fact, at the  
12 low end his calculations assumed that SCO would only sell to  
13 about 1 in 5 Linux users.

14                   And given that his numbers, as I testified before,  
15 are very similar to the numbers that I came up independently  
16 using analysts forecasts, they provide support for each other.  
17 They're all consistent with both Dr. Pisano based on his  
18 expertise and the analysts at the time being aware of the fact  
19 that these market factors existed, and that as a result, only  
20 a fraction of the Linux users would purchase the SCOSource  
21 license.

22           Q.   Okay. Now, Mr. Musika talked about Dr. Pisano  
23 using a survey that he used. Did he use more than one survey?

24           A.   That's my understanding, is that he looked at  
25 multiple surveys and had percentages from those multiple

1 surveys, and then I believe used the most conservative one.

2 But he looked at multiple surveys, three.

3 Q. Dr. Pisano used more than one survey?

4 A. That was my understanding.

5 Q. And you didn't hear Mr. Musika speak about the  
6 other surveys; correct?

7 A. No, I did not.

8 Q. What is the significance in using three surveys?

9 A. Just again, you want to try to get data from  
10 multiple sources because it just provides you with comfort  
11 that the information you're using is reliable.

12 Q. Now, you indicated you relied on Dr. Pisano. Did  
13 you work directly with Dr. Pisano in doing his work?

14 A. No. We worked totally independently.

15 Q. Why did you work independently?

16 A. Because Dr. Pisano is an expert in the technology  
17 market, in assessing the size of the market, in assessing  
18 penetration rates. That's not my expertise. I'm an  
19 accounting expert. I'm an expert that knows how to look at  
20 financial information, analyst reports and do damages analysis  
21 based on that type of input, and that was the type of analysis  
22 I did. So Dr. Pisano stayed out of my -- out of my area, and  
23 I stayed out of his because we have different types of  
24 expertise.

25 Q. But Doctor -- but Mr. Musika did both; right?

1                   MR. BRENNAN:  Objection, Your Honor; leading the  
2 witness.

3                   THE COURT:  Sustained.

4                   Q.  BY MR. HATCH:  Did Mr. Musika in doing his  
5 analysis, did he do more than just accounting?

6                   A.  He provided a response to both Dr. Pisano's and  
7 mine.

8                   Q.  Now, you heard about price.  Does Deutsche Bank  
9 forecast take price into account?

10                  A.  Yes, it does.

11                  Q.  And what was the importance of that?

12                  A.  So in the Deutsche Bank forecast, they not only  
13 looked at the number of RTE licenses that they thought SCO  
14 could sale under various scenarios, but they also talked about  
15 what the possible price range was going to be.  And they  
16 provided a range from 100 to \$300.  They stated in the report  
17 that they thought \$200 would be the most likely price.  But  
18 then in computing the forecast, they said, but we're going to  
19 be conservative because there's some uncertainties in the  
20 marketplace.  We're going to go with \$100.  So that's the  
21 price that they used.

22                  Q.  So you had a choice on what you could use; right?

23                  MR. BRENNAN:  Objection; leading the witness again.

24                  THE COURT:  Sustained.

25                  MR. HATCH:  Let me re-ask it.

1 Q. BY MR. HATCH: Did you have a choice?

2 A. I did, yes. Throughout the Deutsche Bank report  
3 there were a number of choices I had to make in which numbers  
4 I relied upon. And in making those choices, as I testified  
5 before, I tried very hard to be conservative.

6 Q. Okay. Now, Mr. Musika testified about statements  
7 in SCO's 10K. Do you know what a 10K is? Right?

8 A. I do.

9 Q. And he said particularly regarding forecasting  
10 SCO's SCOSource. Did you hear that testimony?

11 A. I did.

12 Q. Forecasting SCOSource profits. Was that a concern  
13 to you, the statement in the 10K?

14 A. It's not. So one of my main areas of expertise is  
15 in corporate reporting strategy. That's one of the things  
16 that I've studied a lot as a Ph.D. And I spent a lot of time  
17 reading 10Ks and annual reports. I've read thousands. My  
18 husband kind of thinks I'm kind of weird. I think they're  
19 kind of neat.

20 But anyway, I spend a lot of time reading annual  
21 reports. And that type of boilerplate language that was in  
22 their 10K was also repeated in their 10Q is used by companies  
23 for a variety of reasons. One reason that they would use that  
24 type of boilerplate language back away from providing the  
25 forecast in their 10K is that they're worried about litigation



1 risk. So they're concerned that they're going to get sued if  
2 they provide forecast information. And so they will use that  
3 type of language to say, look, we can't provide a forecast  
4 because we're concerned about litigation risk.

5 Another reason they might use that type of  
6 boilerplate language is if they don't want to communicate a  
7 forecast because they don't want their competitors to know  
8 what it is that they think they can generate from this  
9 business. Or maybe they didn't want to sort of add fuel to  
10 the fire for the Linux community by going publicly and saying,  
11 we think we're going to generate 100,000 -- you know,  
12 \$100 million worth of revenues.

13 So they'll put that type of language in their  
14 public reports to give them an excuse not to provide a  
15 forecast. But clearly it was a possible forecast for  
16 SCOSource. Deutsche Bank did it. Other analysts at the time  
17 did it. Internals from SCO, they were doing it, and  
18 Dr. Pisano did it ex-post.

19 Q. So you -- did you look at more than one source?

20 A. For forecasts?

21 Q. Yes.

22 A. Yes, I did.

23 Q. Now, Mr. Musika also testified about the history of  
24 profits of SCO, the SCOSource program. Do you recall that  
25 testimony?

1           A.    No.  But I recall him saying that the company had  
2 not had a history of profits.

3           Q.    So when he was talking, he was talking about the  
4 company and not exactly the SCOSource program?

5           MR. BRENNAN:  Objection; leading again, Your Honor.

6           THE COURT:  It is.

7           MR. HATCH:  Sorry, Your Honor.

8           Q.    BY MR. HATCH:  What's the distinction he was making  
9 as you understood it?

10          A.    Oh, okay.  So my understanding was that he was  
11 talking about historically SCO had not been a profitable  
12 company and that that had implications for the forecasts.

13          Q.    Was that important to you?

14          A.    No, it wasn't; because the SCOSource program that  
15 is the crux of the damages calculation was a new -- it was an  
16 extension of an existing line of business that they were in,  
17 but it was a new opportunity, and they were very excited about  
18 it.  The external analysts were very excited about it for SCO,  
19 as well.  The analysts talked about how SCO was well  
20 positioned to take advantage of this new opportunity that they  
21 were pursuing.

22                 And so even just if you look at sort of what was  
23 happening to SCO over that time period, the SCOSource program  
24 was generating quite a bit of profitability for SCO prior to  
25 Novell's slanderous statements.  So there was no reason to

1 expect at that point in time that SCO was not going to do  
2 quite well with the SCOSource program regardless of its past  
3 history.

4 Q. When you looked at the profitability of the  
5 SCOSource program, how would you characterize the way you made  
6 your calculations?

7 A. So in doing my calculations, I made a number of  
8 decisions. So if we go back to the vendor license revenues  
9 that we talked about, that was one stream of revenue, I  
10 testified before that both internal to SCO and the independent  
11 external analysts felt they were up to 15 of those deals that  
12 SCO could do at \$10 million a piece. So that's \$150 million  
13 was the total potential market vendor license revenues.

14 The revenues that I picked up were a little more  
15 than half of that, 87,250,000. So I tried -- that was just  
16 one example of how I tried to be conservative in doing the  
17 calculations.

18 With the RTU license revenues, there were a number  
19 of decisions that I had to make. Did I go with the  
20 Deutsche Bank forecast of 65 million or the 90 million or the  
21 400 million? And I went with what they described as the  
22 number that was reasonable but most conservative, and that was  
23 65 million.

24 Q. So there was a higher number or a lower number, you  
25 took somewhere in the middle?

1           A.    I did.

2           Q.    Okay.  Now, Mr. Musika, did you hear his testimony  
3 regarding attitudes of the OpenSource community?  Do you  
4 recall that?

5           A.    I do.

6           Q.    Was the OpenSource community SCO's customer base?

7           A.    No.  SCO was targeting corporate customers.

8           Q.    So what was the relevance of the OpenSource  
9 community?

10          A.    I'm not sure.  It wasn't relevant to my analysis.

11          Q.    Okay.  And why not?

12          A.    Because that was not the customer base that they  
13 would have been selling to.  They were selling to corporate  
14 users of Linux.

15          Q.    Now, Mr. Musika suggested there might be a  
16 connection between Deutsche Bank and SCO.  Do you recall that?

17          A.    I do.

18          Q.    Mr. Calvin, would you bring up, R21.  
19                Does the report in any place indicate whether there  
20 was a connection or not?

21          A.    They have a disclosure statement at the back of the  
22 report that talks about any potential sources of relationship  
23 between SCO and Deutsche Bank.

24          Q.    Okay.  In reviewing Dr. Musika's report, did he  
25 address that at all?

1           A.    He did.  So I think this is where some of the  
2           confusion comes in on Mr. Musika's part about a lack of  
3           independence of SCO and Deutsche Bank.  If we could go to that  
4           document.

5                    THE COURT:  What page?

6                    MR. HATCH:  Right there.

7                    THE COURT:  What page is this?

8                    MR. HATCH:  24.

9                    THE WITNESS:  It's still very tiny.

10                   So what this is is a disclosure statement that  
11           Deutsche Bank attaches to the back of its -- to the back of  
12           the forecast which outlines where there might be potential  
13           conflicts of interest between the -- because of a relationship  
14           between the bank and its analysts and the company.

15                   THE COURT:  Excuse me.  Can you read this?

16                   MR. HATCH:  I'll try to blow up parts of it as we  
17           get through it.

18                   THE COURT:  All right.  Thank you.

19                   Q.    BY MR. HATCH:  Before we do that, just so we  
20           understand, this is something -- this is something that  
21           Mr. Musika raised today in trial and in his report; correct?

22                   A.    That's correct.  So --

23                   Q.    And to give us some context, what did he say about  
24           the lack of independence?

25                   A.    So in his report he expressed some concern that I

1 had relied on the Deutsche Bank report because he said that  
2 all 11 of these sources of conflict existed between  
3 Deutsche Bank and SCO. But that was just factually incorrect.  
4 If you'll notice right at the top of the disclosure check list  
5 where it says, SCO Group Inc., ticker symbol --

6 Q. Can you bring up the top part, Mr. Calvin?

7 A. Recent price, and then disclosures, it says none.  
8 So what Deutsche Bank was stating on this document was that  
9 there were 11 potential sources of conflicts, but none of them  
10 applied with respect to the relationship between Deutsche Bank  
11 and SCO.

12 Q. Just so we're clear, Mr. Musika said how many of  
13 the 11 applied?

14 A. All of them.

15 Q. And how many applied?

16 A. None of them.

17 Q. He got it completely wrong?

18 A. Right.

19 Q. Okay. Now, how do you know that?

20 A. Well, a couple of --

21 Q. Other than the none?

22 A. Right. So first of all, when I was looking at the  
23 disclosure statement, there were a few in here that were real  
24 red flags that it was clear that they couldn't have applied in  
25 this case. So, for example, I think it might be Number 5,

1       yeah:

2                   An employee of Deutsche Bank and/or its  
3                   affiliate serves on the board of the directors  
4                   of the company.

5                   It was obvious that that one couldn't apply because  
6                   if you go back a few pages in this document it lists the board  
7                   of directors, none of whom are affiliated.

8           Q.     Let's do that.

9                   I think it's Page 17.  There it is.

10          A.     There it is.

11          Q.     Could you expand the board of directors?

12          A.     So it listed the board of directors, and none of  
13                 those were either Mr. Skiba or Mr. Kelly or anyone else that  
14                 was affiliated with Deutsche Bank.

15          Q.     So how far is Mr. Musika -- how far -- how much  
16                 work would he have had to have done to determine whether that  
17                 was an actual conflict that Deutsche Bank had with SCO?

18          A.     So he would have had to flip back a few pages in  
19                 the report.

20          Q.     Okay.  Let's go back.  Do you have more to say  
21                 about that?

22          A.     And the other thing I did because I just wanted to  
23                 make sure that I hadn't, you know --

24          Q.     Let's go back.

25          A.     Back to the disclosure.

1                   Because when I received Mr. Musika's report that  
2 had so, you know, completely differently interpreted this  
3 document the way that I had interpreted it, I called  
4 Deutsche Bank, and I asked them, I said, when you say none, do  
5 you mean none? And they said, yes, we mean none. So I said,  
6 okay. None means none. And so that was the other piece of  
7 evidence that I gathered.

8                   Q.    Okay. And did you have trouble doing that?

9                   A.    It was a little embarrassing. But other than that,  
10 because they kind of treated me like I was -- anyway.

11                  Q.    We heard some testimony at the end of Mr. Musika's  
12 testimony. Did Mr. Musika ever contact you during this case?

13                  A.    He contacted me -- he e-mailed me after my  
14 deposition. I think it was in November of 2007.

15                  Q.    So it wasn't a phone call?

16                  A.    No.

17                  Q.    And how did you respond to his e-mail?

18                  A.    So I received an e-mail that I interpreted based on  
19 what he stated in the e-mail that they were --

20                  Q.    Maybe I should put this in context. When was this?

21                  A.    November of 2007. So after my deposition.

22                  Q.    Okay. Go ahead.

23                  A.    And so the e-mail just indicated that they were  
24 always interested in finding qualified experts, that they had  
25 a big caseload, international caseload, and that he would like



1 to speak to me about it. I was flattered, but I wrote back  
2 and just said that I was not interested in pursuing any other  
3 opportunity at that time.

4 Q. Okay. You were here for his testimony and his  
5 characterization of that e-mail. Was that accurate?

6 A. No.

7 Q. Okay.

8 A. It was not.

9 Q. In what way?

10 A. I mean, maybe it was in his head, PCAOB, but it was  
11 never communicated to me in that fashion.

12 Q. What was your response?

13 A. Just I responded respectfully that I was not  
14 interested.

15 Q. Okay. Now, we talked about all of -- we went  
16 through all of these risk factors. Were there any of the risk  
17 factors that Mr. Musika spoke with during the day that were  
18 not included in the report?

19 A. No. All of the risk factors that he identified,  
20 the product risks that are relevant to the profit analysis,  
21 every single one of them he raised is discussed in the  
22 Deutsche Bank report. It was known at the time. And I feel  
23 very comfortable it was incorporated into those forecasts for  
24 a number of reasons. One is because you can look at the  
25 number of RTU licenses that the Deutsche Bank analysts were

1 forecasting would be sold. And again it was nowhere close to,  
2 you know, a large portion of the market. It was again about  
3 1 in 5 Linux customers. So clearly they, you know, took into  
4 consideration that not everybody would buy a SCOSource  
5 license.

6 They were also -- those factors were taken into  
7 consideration explicitly by Dr. Pisano in his analysis. And  
8 as I said before, his numbers and my numbers are consistent  
9 with one another.

10 Q. Okay. And let's by you --

11 THE COURT: Mr. Hatch, so you know, you've got  
12 about four minutes left.

13 MR. HATCH: I think that's all I need, Your Honor.

14 Q. BY MR. HATCH: You were asked to calculate damages  
15 in this case; correct?

16 A. I was.

17 MR. BRENNAN: Objection; leading the witness again,  
18 Your Honor.

19 MR. HATCH: Background question.

20 Q. BY MR. HATCH: What were you asked to do in this  
21 case?

22 A. I was asked to calculate damages.

23 Q. And were you given any direction on that, how to do  
24 that?

25 A. No. The only direction that I was given was that I

1 was to assume that SCO owned the copyrights, and that for  
2 purposes of calculating damages that Novell did not slander of  
3 title, because I have to be in a but-for world and say that  
4 didn't happen, but for there to be damages in the first place  
5 I have to assume that they did. And I know that seems kind of  
6 weird to think about it that way, but that's just the way that  
7 we have to do a damages analysis. We have to assume the bad  
8 thing happened, but then when it comes to calculating the  
9 damages number say, what would the world have looked like if  
10 the bad thing hadn't happened?

11 Q. And in doing that, that was the same assignment you  
12 understood that Mr. Musika was to do as well; right?

13 MR. BRENNAN: Objection; leading once again, Your  
14 Honor.

15 Q. BY MR. HATCH: What was your understanding that  
16 Mr. Musika was to do?

17 A. My understanding was he was to do the same thing.

18 Q. Now, in making your damage analysis, would it have  
19 been possible for you to come to a larger number?

20 A. Yes, quite possible.

21 Q. And what number did you come to?

22 A. At the bottom end 137 million, and at the top end  
23 215 million.

24 Q. And if you were to describe those numbers in one  
25 word, what would that word be?

1 A. Conservative.

2 Q. Now, you heard Mr. Musika here indicate that his  
3 number was what?

4 A. Zero, is my understanding.

5 Q. Did you hear him do any calculations?

6 A. No.

7 Q. Do you consider zero to be a reasonable number?

8 A. Absolutely not.

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

10 THE COURT: Mr. Brennan?

11 MR. BRENNAN: Thank you, Your Honor.

12 THE COURT: So that you know, according to my  
13 calculations you have nine minutes.

14 MR. BRENNAN: Thank you. That's the same number I  
15 have.

16 THE COURT: Thank you.

17 CROSS-EXAMINATION

18 BY MR. BRENNAN:

19 Q. Good afternoon, Dr. Botosan.

20 A. Good afternoon.

21 Q. I'd like to ask you about your assumptions. I'd  
22 like you to assume that SCO does not prevail in litigation  
23 against IBM. What does that do to the number that you  
24 presented to the jury?

25 A. Well, that's not relevant because that's not in the

1 but-for world. So in the but-for world, the only thing that  
2 changes from the real world is whether SCO slandered the title  
3 or not.

4 MR. BRENNAN: Your Honor, I'd ask the witness to  
5 directly respond to the question.

6 MR. HATCH: I think she did.

7 THE COURT: I believe she just did.

8 MR. BRENNAN: Well, my apologies. I'll try it  
9 again.

10 Q. BY MR. BRENNAN: Assume that SCO does not prevail  
11 in its litigation against IBM. Does that change any  
12 assumption or projection that you've given whatsoever?

13 A. No.

14 Q. Okay. Your analysis is premised upon projections  
15 by Deutsche Bank; right?

16 A. That's one of the inputs that I used.

17 Q. And the other inputs are internal projections by  
18 SCO; right?

19 A. I also used internal projections by SCO plus  
20 another forecast, as well.

21 Q. Now, you understand that Deutsche Bank's analysis  
22 is premised upon SCO being able to establish that a UNIX is  
23 infringed by Linux; correct?

24 A. No.

25 Q. You don't read the Deutsche Bank report as being

1       premised upon prevailing in the litigation?

2           A.    No.  In fact, they talk specifically about the fact  
3       that SCO had not proven infringement at the time that they  
4       were making the forecasts.

5           Q.    And what does Deutsche Bank say if SCO is not able  
6       to prevail in that litigation?  What is their prognostication  
7       regarding the future of SCO?

8           A.    I'm not sure what litigation you're talking about.

9           Q.    The IBM case.

10          A.    So in terms of the company as a whole, they talked  
11       about it being a binary investment, that there was the  
12       potential that SCO could be worth a ton of money or it could  
13       be worth nothing, depending on what happened not only in the  
14       IBM case, but also with respect to their SCOSource program.  
15       So they identified both of those.

16          Q.    So you understand that at least Deutsche Bank  
17       suggests that if SCO does not prevail in its IBM litigation it  
18       will be a worthless company?

19          A.    But that's not relevant again to the but-for case.

20                    THE COURT:  That was not the question to you,  
21       Dr. Botosan.

22                    THE WITNESS:  Sorry.  Could you repeat the  
23       question?

24          Q.    BY MR. BRENNAN:  I'd be happy to.

25                    Do you understand that Deutsche Bank in its

1 prognostication indicated that if SCO does not prevail in the  
2 IBM litigation SCO will be worthless?

3 A. That's what they said, yes.

4 Q. Now, I'd like to ask you a question about this 10K  
5 report. I'd like to -- excuse me -- the 10Q report. I  
6 believe it's Exhibit Q22.

7 First of all, I want to ask you a quick question  
8 about securities and exchange filings. Do you believe that a  
9 party is free to make misrepresentations to the government in  
10 a filing such as a Form 10K?

11 A. No.

12 Q. Do you believe that a company has a legal  
13 obligation both to the federal government, securities exchange  
14 commission and the investing public to make truthful, honest  
15 statements in its filings?

16 A. I would hope so, yeah.

17 Q. So let's look at Exhibit 19, if we might, of the  
18 Form 10K. And we'll highlight the language that I believe  
19 Mr. Hatch had you focus on without actually showing it to you.

20 THE COURT: Page 19, you said?

21 MR. BRENNAN: I misspoke, Your Honor. I believe  
22 it's actually Page 39.

23 THE COURT: 30 what?

24 MR. BRENNAN: 39.

25 THE COURT: 39. Thank you.

1 MR. BRENNAN: My mistake, Your Honor.

2 Q. BY MR. BRENNAN: So this is the statement. Do you  
3 consider what's highlighted here to be boilerplate?

4 A. The general flavor of it, yes.

5 Q. And you consider boilerplate to be meaningless  
6 language?

7 A. No. What I'm saying is that I've seen any number  
8 of companies provide similar statements when it comes to  
9 forecasting the future.

10 Q. So let's look at what SCO did say in its public  
11 filings. And you understand that this document is  
12 electronically signed by the officers of SCO; right?

13 A. Correct.

14 Q. Including Mr. McBride; right?

15 A. Correct.

16 Q. It states:

17 We initiated the SCOSource licensing efforts  
18 in January of 2003 to review the status of UNIX  
19 licensing and sublicensing agreements. This  
20 effort resulted in the execution of two  
21 significant vendor license agreements during the  
22 fiscal year 2003 and generated \$25,846,000 in  
23 revenue.

24 Now, I'd like you to focus on this.

25 Due to the lack of historical experience and



1           the uncertainties related to SCOSource licensing  
2           revenue, we are unable to estimate the amount and  
3           timing of future SCOSource licensing revenue, if  
4           any.

5           Now, you're aware that this public filing was made  
6           after what you -- I think your term was, Novell made  
7           slanderous statements; right?

8           A.    This was -- what's the date on this document? It  
9           was January?

10          Q.    This is the 10K of 2003; right?

11          A.    That was filed in January of 2004?

12          Q.    Right.

13          A.    Yes.

14          Q.    So you understood that even, and again your words,  
15                Novell slanderous statements, that even after that here we  
16                have a public filing by SCO saying that because of  
17                uncertainties SCO would not be able to estimate the amount and  
18                timing of the SCOSource licensing revenue; right?

19          A.    That's what it says there.

20          Q.    But you think you can?

21          A.    I think that there were a number of people that did  
22                that I relied upon. Deutsche Bank did. REG did. Internal  
23                SCO did, and Dr. Pisano did via his market analysis.

24          Q.    SCO continues, quote:

25                If we do receive revenue through this source,

1           it may be sporadic and fluctuate from quarter to  
2           quarter. Our SCOSource initiatives are unlikely  
3           to produce a stable or predictable revenue stream  
4           for the foreseeable future. Additionally, the  
5           success of this initiative may depend on the  
6           strength of our intellectual property rights and  
7           contractual claims regarding UNIX including the  
8           strength of our claim that unauthorized UNIX  
9           source code and derivative works are prevalent in  
10          Linux.

11                    Do you see that?

12           A.    I do.

13           Q.    So would you acknowledge at the least that SCO  
14           itself believed that the success of its SCOSource licensing  
15           program was a function of whether it would be able to  
16           establish that UNIX was infringed by Linux?

17           A.    I think I've acknowledged that several times, that  
18           that was one of the market risks that existed at the time the  
19           forecasts were produced. That is why nobody, not myself, not  
20           Dr. Pisano, not Deutsche Bank, not REG, not any of the other  
21           forecasts that we examined, ever assumed that 100 percent of  
22           the people that owned Linux were going to purchase a SCOSource  
23           license.

24           Q.    And if SCO were not to prevail in establishing that  
25           Linux infringes UNIX, there would be no one that would buy a

1 SCOSource license; right?

2 A. If we had gotten to that point. But that has never  
3 happened. That is not in the but-for world that I'm  
4 examining.

5 Q. Outside of your but-for world, in the real world  
6 had SCO been able to establish that Linux infringes UNIX?

7 A. Again, my analysis, I'm sorry, but --

8 MR. BRENNAN: Your Honor, if I could ask the  
9 question and get an answer.

10 THE COURT: I agree.

11 I believe it's either a yes or no, Dr. Botosan.

12 THE WITNESS: My understanding is at this point  
13 there has not been any proof of that.

14 Q. BY MR. BRENNAN: Now, I'd like to ask you just a  
15 few questions about Deutsche Bank since you relied upon it.  
16 I'd like to turn to Page 19 of the demonstratives that we  
17 used. These are accurate comments on the Deutsche report;  
18 right? These are accurate quotes?

19 A. Taken out of context, but accurate.

20 Q. Yes. And are you also aware of the e-mail that was  
21 sent regarding Mr. McBride's potential trip to meet with the  
22 author of the Deutsche Bank report in Cannes, France?

23 A. My understanding of the context of that was  
24 different than what you've purported, but I'm aware of the  
25 e-mail.

1 Q. And when did you first become aware of the e-mail?  
2 A. It was during my deposition.  
3 Q. When?  
4 A. I can't remember when we did it. It was recently.  
5 Q. In the last four weeks?  
6 A. Uh-huh (affirmative).  
7 Q. And so prior to four weeks ago, you were not aware  
8 that SCO was having communications regarding Mr. McBride, the  
9 then chief executive officer of SCO, meeting with the author  
10 of the Deutsche Bank report at the Deutsche Bank report  
11 author's home in France?  
12 A. Again, this did not happen at the time that the  
13 reports that I used were prepared. In 2003 --  
14 MR. BRENNAN: Your Honor, I hate to interrupt, but  
15 my time is limited and she's not responding to my questions.  
16 THE COURT: Yes or no?  
17 THE WITNESS: No.  
18 Q. BY MR. BRENNAN: Do you think it would be important  
19 in your analysis to know whether or not there was a personal  
20 relationship between Darl McBride at SCO and the author of the  
21 Deutsche Bank report?  
22 A. Based on my analysis on what they presented, I was  
23 comfortable with the numbers and the fact that -- so no, I  
24 would not be concerned about it.  
25 Q. You completely discount any connection between

1 Deutsche Bank and SCO?

2 A. It didn't exist in 2003, so, no. If one existed I  
3 would have looked into it.

4 Q. Now, also there was questions asked about  
5 Deutsche Bank's relationship on the stockbroker's side with  
6 SCO. You're aware that Deutsche Bank was a market maker for  
7 the SCO stock, aren't you?

8 A. Not in 2003.

9 Q. It was as of January 21st; 2004; right?

10 A. In 2004, but not in 2003.

11 Q. So you're aware that at least as early as  
12 January of 2004, Deutsche had already announced that it was a  
13 market maker for SCO stock; right?

14 A. That's correct.

15 MR. BRENNAN: Your Honor, I'm mindful of the clock.  
16 I have no further questions.

17 THE COURT: Thank you, Mr. Brennan.

18 Two minutes, Mr. Hatch.

19 REDIRECT EXAMINATION

20 BY MR. HATCH:

21 Q. We keep hearing talk about real and but-for world.  
22 Let's talk real for just a second.

23 A. Okay.

24 Q. When talking about infringement, I think you gave  
25 an answer, there was no proof of that; do you remember that?

1           A.    Yes.

2           Q.    What -- has there been -- in your knowledge and  
3           understanding, has there been any determination in the real  
4           world yet that infringement does not exist?

5           A.    No.

6           Q.    Okay.  No court's ruled on that?

7           A.    No.

8           MR. HATCH:  Thank you, Your Honor.  That's all I  
9           have.

10          THE COURT:  Dr. Botosan, thank you.

11          THE WITNESS:  Thank you.

12          THE COURT:  Excuse me, Mr. Brennan.  I need to give  
13          you --

14          MR. BRENNAN:  You're very kind.  I will not press  
15          the clock.  I'm concluded.  Thank you.

16          THE COURT:  Thank you.  You are then finished.  
17          Thank you very much.

18          Mr. Singer?

19          MR. SINGER:  Your Honor, at this time that  
20          concludes our presentation of our rebuttal case.

21          THE COURT:  You rest on your entire case?

22          MR. SINGER:  We do.

23          THE COURT:  Mr. Brennan?

24          MR. BRENNAN:  Yes, we do.  Thank you, Your Honor.

25          THE COURT:  You rest, as well, on your entire case.

1                   Ladies and gentlemen of the jury, that means that  
2 all the evidence has now been provided. Tomorrow morning, as  
3 I indicated earlier, we will begin with you being instructed  
4 by the Court on the law that you are to apply in this case,  
5 and then you'll hear closing arguments, and then you finally  
6 get to begin the process of making up your minds. Now, I  
7 realize there may be a temptation having heard everything you  
8 may think that you have what you need to decide this case, but  
9 you have not. The law to be applied is a critical part of  
10 this process. So I would again encourage you to not be  
11 thinking about it in that way.

12                   All the other instructions that you have been given  
13 as far as your conduct applies even though the evidentiary  
14 part of the trial is now over. And we will begin as promptly  
15 as we can at 8:30 in the morning. And you have a pleasant  
16 evening.

17                   Ms. Malley?

18                   (Whereupon, the jury left the court proceedings.)

19                   THE COURT: Mr. Singer?

20                   MR. SINGER: Your Honor, there were two points that  
21 we need to raise with the Court. The first is that Mr. Musika  
22 in response to a question that didn't call for it decided to  
23 volunteer that there's a bankruptcy proceeding involving SCO,  
24 which up to this point in time I think with the possible  
25 exception of a passing reference to reorganization that the

1 jury probably didn't get the parties had not raised pursuant  
2 to the understanding that that would not be relevant in this  
3 proceeding. Given that it has come in now in the way that the  
4 jury clearly heard, I believe I need to be able to address  
5 that in closing and indicate that there is a reorganization  
6 proceeding and that the opportunity for the company to emerge  
7 from that is something which will be influenced by the ability  
8 of them to pursue this case. And I think that there needs to  
9 be some ability on my part to appropriately put this case in  
10 the context that just because the company is in bankruptcy  
11 these things don't matter. That can't be in the jury's mind.

12 THE COURT: Mr. Brennan?

13 MR. BRENNAN: First of all, we need to visit the  
14 context in which Mr. Musika made the limited statement. He  
15 was confronted by Mr. Hatch with the suggestion that somehow  
16 he had done something untoward in contacting Dr. Botosan.  
17 Your Honor was presented with the e-mail which did not impeach  
18 the witness but made specific reference to the conclusion of  
19 the work in the case at that time. Mr. Hatch continued to  
20 press on the matter. Frankly, I withheld my tongue at the  
21 time thinking that Mr. Hatch by his question was opening the  
22 door into a whole range of matters. And so I think whatever  
23 issue is now being identified was elicited by the questioning  
24 of Mr. Hatch on an entirely extraneous matter.

25 Second of all, there was a passing reference, but



1 just yesterday in this courtroom in the expressed phraseology  
2 of the question by Mr. Normand, Mr. Jones, there was reference  
3 to prior trial testimony. That was again a reference made  
4 through the questioning.

5 So in the light of previous issues that have been  
6 faced by this Court would have been passing references and the  
7 way that the Court has dealt with that I think it would be  
8 highly inappropriate for SCO's attorney to make the suggested  
9 argument they would like in their closing.

10 THE COURT: I don't think it would be appropriate  
11 to be done in closing, but I will allow and will request that  
12 the two of you work on a specific jury instruction that will  
13 deal with the issue of reference to prior trial in contrast to  
14 the prior hearing -- or rulings. It would also encompass  
15 reference to the bankruptcy.

16 MR. SINGER: Your Honor, there is a second issue  
17 which I would like SCO to have the opportunity to present an  
18 instruction on for the Court to give. And that is the fact  
19 that this morning Novell made repeated efforts to try to  
20 suggest to the jury that the appropriate legal issues here  
21 concern essentially board resolution matters, whether the  
22 board of Novell properly approved some action or other, even  
23 to the extent of having a witness who is here as a fact  
24 witness try to tell the jury what they should do as a matter  
25 of law. That shouldn't have happened.

1                   And there should be an instruction that makes clear  
2                   that they're not here to judge whether or not a particular  
3                   measure was passed in a way which is --

4                   THE COURT: If you want to supply the Court with an  
5                   instruction at 3 o'clock you can do so.

6                   MR. SINGER: We will do so. Thank you, Your Honor.

7                   THE COURT: What about your Rule 50 motion?

8                   MR. SINGER: Our Rule 50 motion, I'm prepared to  
9                   make oral argument now or we can submit something later today.

10                  THE COURT: No; because this is what I wanted to  
11                  tell you. The Court has paid strict attention to the  
12                  testimony in this case, and I have heard absolutely nothing  
13                  regarding damages on a slandered title for -- on Novell's  
14                  counterclaim. And if that's the fact, if there are no special  
15                  damages referenced to them, that slander of title must be  
16                  dropped. And that's something we have to deal with rather  
17                  quickly because it requires completely the rewriting of the  
18                  jury instructions.

19                  MR. SINGER: Can I make two points in connection  
20                  with that? I think that that claim is deficient for two  
21                  reasons. One of those is the lack of special damages. The  
22                  only reference that conceivably bears on it is the fact that  
23                  they decided to apply for copyright registrations on our  
24                  copyright. I don't think that constitutes any damages from  
25                  any slander of title that SCO could be held liable for. So I

1 don't think there's any damages, any special damages, as the  
2 term is understood, that would relate to any slander.

3 But there's a second even more fundamental problem  
4 with that. They haven't proven any basis to get across the  
5 level that you have to for malice in the first place to get to  
6 any slander of title on liability. Here there's nothing as  
7 opposed to all the evidence that has been elicited regarding  
8 Novell's action in this case.

9 THE COURT: Mr. Jacobs?

10 MR. JACOBS: Your Honor, we will deliberate on the  
11 topic of whether we wish to proceed on this claim this  
12 afternoon. As a technical matter Mr. Singer is wrong. First  
13 of all, Mr. Jones testified to the expenses of registering the  
14 copyrights on Novell's behalf, and that is precisely the kind  
15 of special damages that are contemplated by the slander of  
16 title cause of action. It was an expense that the company  
17 bore to cure the claim of ownership of title that SCO had  
18 placed by registering the copyrights. They were as a fact --  
19 Mr. Singer's characterization is incorrect. They were really  
20 parallel registrations. They did their registrations, Novell  
21 did their registrations. In so far as the registrations  
22 themselves are concerned, Mr. Singer is factually wrong.

23 They were a calculable amount. Right there on the  
24 side of the cover of the registration the fee is, and that's  
25 Novell's claim for special damages.

1           As for the question of intent, you know, we're all  
2 jockeying on this topic. It is a fact that before this issue  
3 of ownership was a matter of public concern, Mr. McBride,  
4 relying only on the asset purchase agreement and Amendment  
5 Number 1, not Amendment Number 2, they didn't have it,  
6 asserted that SCO owned the UNIX copyrights. He did that in  
7 the face of an e-mail from one of his advisors that said, you  
8 don't own what you think you own. And he did that in the face  
9 of his own repeated requests for Novell viewing the evidence  
10 in the light most favorable to us to transfer the copyrights  
11 to SCO.

12           So in terms of reckless disregard for the truth,  
13 Your Honor ultimately is going to have to call where that  
14 standard lies. But I don't think their Rule 50 motion should  
15 be granted at this time.

16           THE COURT: Counsel, my reading of what a special  
17 damage is does not include a business expense.

18           Special damages are ordinarily proved in  
19 a slander of title action by evidence of a lost  
20 sale or the loss of some other pecuniary advantage.  
21 Absent a specific monetary loss flowing from a slander  
22 affecting the salability or use of the property there is  
23 no damage.

24           I'm just reading from statements of the case law  
25 that we have all I think relied on as we come up with our

1 special damage jury instruction in this case.

2 But the Court understands the framework of your  
3 motion and response to it, and we'll be looking at it again.  
4 But again, the dilemma is if the Court grants the motion, then  
5 we have to redo the jury instructions in a significant way, so  
6 I can't wait too long to make that decision. In other words,  
7 I can't wait until you supply me with a written memorandum.

8 MR. SINGER: We don't believe we need a written  
9 memorandum on this. We think the Court is well apprised of  
10 the evidence that it's heard. We don't think any of it shows  
11 any intent on behalf of SCO. The reference that they were  
12 making with respect to Mr. McBride I think refers to private  
13 e-mails. And in any event, they bought the company. Their  
14 understanding was they owned the company from all the evidence  
15 that has been presented here.

16 Second point on damages is exactly the one that the  
17 Court raised. We don't believe that the decision to register  
18 their copyrights and incur that business expense is under the  
19 law damages that are recoverable in a slander of title claim.  
20 So for both of those reasons, without need for further  
21 briefing, we would rest on that, Your Honor.

22 THE COURT: Anything else, Mr. Jacobs?

23 MR. JACOBS: No, Your Honor.

24 THE COURT: All right. The Court will be looking  
25 at it. And if you consult and decide that perhaps the Court

1       ought to decide it in one way, if you'll let me know.  
2       Otherwise, we'll be analyzing it between now and 3 o'clock,  
3       and deal with it then.

4                       We'll be in recess until 3 o'clock.

5                       (Whereupon, the court proceedings were concluded.)

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1 STATE OF UTAH )  
2 ) ss.  
3 COUNTY OF SALT LAKE )

4 I, KELLY BROWN HICKEN, do hereby certify that I am  
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of  
7 the foregoing matter on March 25, 2010, and thereat reported  
8 in Stenotype all of the testimony and proceedings had, and  
9 caused said notes to be transcribed into typewriting; and the  
10 foregoing pages number from 2526 through 2595 constitute a  
11 full, true and correct report of the same.

12 That I am not of kin to any of the parties and have  
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this \_\_\_\_ day of  
15 \_\_\_\_\_ 2010.

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KELLY BROWN HICKEN, CSR, RPR, RMR