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1 (Recess)

2 (WHEREUPON, a sidebar conference was begun.)

3 MR. BRENNAN: Your Honor, just two items. We
4 observed during the opening closing argument that there were
5 a number of sounds coming from the gallery, and we could
6 hear a specific individual laughing and making certain
7 comments. I wonder if it is appropriate to perhaps
8 encourage the gallery not --

9 THE COURT: Absolutely. I did not hear that or I
10 probably would have stopped it. Thank you for bringing that
11 up.

12 MR. BRENNAN: The second is, and we probably
13 should have brought this up before, but particularly with
14 the fact that we're near the end and we will have the
15 alternate excused, what are the rules of engagement that
16 ought to be observed by the parties in terms of contact with
17 jurors?

18 THE COURT: I always tell the jury that they are
19 permitted to discuss the case with counsel, but they are not
20 required to. I leave it up to them.

21 MR. BRENNAN: We just wanted to make sure that we
22 were both operating on the same --

23 THE COURT: That is what I will tell them.

24 MR. BRENNAN: That is agreeable.

25 THE COURT: Thank you.

1 (WHEREUPON, the sidebar was concluded.)

2 THE COURT: Ladies and gentlemen, and this is
3 addressed to those of you in the courtroom, not counsel, it
4 was just brought to my attention that during the closing
5 argument thus far that there has been some response, audible
6 and otherwise, to the arguments that have been made. I need
7 to tell you that that is very inappropriate. If I had heard
8 that I probably would have stopped the argument and I would
9 have instructed the court security officer to remove you
10 from the courtroom.

11 So just by way of a caution, do not react in any
12 way to especially anything that might be observed or heard
13 by the jury. That is totally inappropriate. Okay.

14 Ms. Malley, if you would please bring the jury in.

15 (WHEREUPON, the jury enters the proceedings.)

16 THE COURT: Go ahead, Mr. Brennan.

17 MR. BRENNAN: Thank you, Your Honor.

18 Ladies and gentlemen, I also wish to thank you for
19 your attention during this three-week period. No doubt
20 there has been sacrifice and difficulty in arranging your
21 schedules to be here. On behalf of Novell we appreciate it,
22 and we comment that this system of justice that we have in
23 this great land is entirely dependent upon people like you
24 who are willing to make the sacrifice, to endorse an
25 inconvenience, to hear a dispute and hear it fully and then

1 to make a decision.

2 It is true at the outset that I asked you to wait
3 for the rest of the story, and I do hope to sum up today
4 what the rest of that story is.

5 I should also indicate, that as the judge has
6 shared with you, because the burden of proof falls squarely
7 and heavily on the plaintiffs, SCO in this case, I will not
8 have a chance to address you a second time, and so I'll have
9 to simply ask you if there is any further argument that is
10 made by SCO's counsel, at least to anticipate what you think
11 Novell might say in response, since I won't have that
12 opportunity.

13 I am the first and I may be the last lawyer in my
14 family. We'll see how that turns out. But when I grew up
15 there was often a statement that was used, and sometimes I
16 used it myself, something like don't make a federal case out
17 of it. The suggestion was that if there was a minor or
18 trivial disturbance, that that paled in comparison to a
19 federal case.

20 Well, here we are in federal court, this is a
21 federal case, and unlike some of those minor annoyances or
22 disturbances that I saw as a child, this really is a big
23 deal. It is a big deal for a couple of reasons. I would
24 like to suggest a few of those to you.

25 First of all, what you have heard during the

1 course of this trial is that was something known as the
2 SCOSource license program. What that program was intended
3 to do was to reach out to users of the Linux operating
4 system and extract from them a payment. And that SCOSource
5 program has threatened many, many, many Linux users across
6 the world, and because of that a huge uproar has resulted.

7 It has been highly publicized. There have been
8 many comments made about it. This case has been closely
9 followed. This is of great significance to people beyond
10 Novell. The threat to the open source community is
11 presented by this case. And for that reason Novell, as I
12 will share with you, has felt compelled to respond in the
13 public marketplace with its view and opinion and position
14 regarding this case.

15 Now, secondly, this case is frankly a gateway to
16 other litigation. You heard and saw in the presentation of
17 some of the evidence that there are other cases out there
18 awaiting to be heard. If SCO is successful in this case,
19 and there is some determination of ownership of copyrights,
20 contrary to what we believe the evidence is, then there will
21 be other suits filed. At least of threat of suit hangs over
22 all Linux users, particularly in the marketplace. So this
23 is the entree to many, many other cases if there is an
24 adverse determination made here in this one.

25 The third point is this case presents a very

1 important fundamental question regarding the meaning and
2 sanctity and reliability of contracts. When I mentioned it
3 the first day I held up for you the contract at issue in
4 this case, carefully drafted, meticulously written, lawyers
5 on both sides representing their clients to the best of
6 their ability. But if we're going to disregard the words of
7 the contract, and we're going to look to some other source
8 other than that which the parties wrote, and, in particular,
9 if we're going to try to devine what people might have
10 thought or hoped or wished in hindsight that they had put in
11 the agreement but didn't, to gain an advantage now 15 years
12 later, then the whole reliability of contracts it
13 threatened.

14 It does not a take a broad imagination to consider
15 the chaos that would result if two parties, ably
16 represented, were to reach an agreement and express their
17 agreement in writing and then later, much later, have that
18 written agreement challenged by outside thoughts or
19 improvications. This case represents the fundamental
20 question as to whether a party can rely upon the written
21 contract.

22 Now, there is also a fourth issue here. This
23 case, and it is a unique one, and in some ways it is a
24 thrill to be a lawyer in this case, because although this
25 case has come to you in a commercial transaction it involves

1 a fundamental constitutional right, and that is the right of
2 free speech guaranteed to all citizens, including
3 corporations, to speak freely their position on a matter of
4 public interest.

5 The First Amendment guarantees the right that
6 individuals and businesses and, of course, as the
7 instruction suggests, that businesses are comprised of
8 individuals, and a corporation is a collection of many who
9 work for it, and its shareholders, and so these really are
10 individuals, and whether or not an individual, whether
11 through a corporation or acting on his or her own, has the
12 freedom in the marketplace when there is a matter of public
13 controversy to stand and state their position without fear
14 of reprisal or monumental damage claims because of speaking
15 what one believes. This case presents that question.

16 Now, with that in mind, and in the limited time
17 that I have, I am going to try to walk through and distill
18 three weeks of evidence as briskly as I can and highlight
19 some of the important points that I think will help and
20 guide and assist you in making these very important weighty
21 decisions. I recognize I cannot compress three weeks of
22 evidence into the hour that I have. I'll do my best. I'll
23 rely upon your ability to recall some of the evidence that
24 you have heard and witnesses that I am not able to touch
25 upon.

1 At the conclusion I too will turn to the verdict
2 form that you will receive, and suggest to you what I would
3 recommend on behalf of Novell would be the appropriate
4 result for you to consider and make as you deliberate.

5 Now, the first question that is presented is this
6 fundamental point of whether or not the amended asset
7 purchase agreement, this contract, transferred the UNIX and
8 UnixWare copyrights as of the date of the asset purchase
9 agreement from Novell to SCO. The answer is it did not.
10 How do we know that? Well, first of all, we do need to look
11 at the parties' intent. There are two parties to this
12 contract.

13 You saw time and time again, and I apologize for
14 the repetition, but you saw the minutes of the board of
15 director meeting where Novell, governed by its board of
16 directors, met and considered the asset purchase agreement
17 before it was signed, and very clearly presentations were
18 made to the board, and there is a resolution which states
19 without equivocation that Novell will retain all of its
20 patents and copyrights and trademarks. That very language,
21 and you'll see it in Exhibit Z-3 when you have a chance to
22 retire to the jury room and look at it, that very language
23 is what actually appears in the contract.

24 I hold this book up again, and you'll have a
25 chance to look at Schedule 1.1-A which sets forth in four

1 short pages the list of assets that were sold. The contract
2 speaks very clearly that only the assets listed in that
3 schedule were the ones being sold. This was not the sale of
4 an entire business, it was the sale of specified assets, and
5 that is what the contract tells us.

6 You'll also have a chance to then turn to Schedule
7 1.1-B, which is the express list of excluded assets. Over
8 and again you have heard that all copyrights and trademarks
9 except for the trademarks UNIX and UnixWare were excluded.

10 Now, one of the things that was passed by us
11 quickly in the early presentation, but I trust it didn't get
12 past you, is that this asset purchase agreement signed on
13 September 19, 1995 did not go without review. There was
14 almost three months from the time it was signed until the
15 time that the deal closed on December 6, 1995 where everyone
16 involved had a chance to review it. If somebody somehow
17 thought the wool had been pulled over their eyes, or they
18 didn't understand or there was a mistake or a
19 misrepresentation or an omission, both sides had full
20 opportunity to review it.

21 In fact, they did. You'll see when you retire to
22 the jury room and you can look at Exhibit T-5 which is the
23 amendment number one to the asset purchase agreement. It
24 covers in a span of some ten or 12 pages modifications made
25 to the initial asset purchase agreement. Importantly,

1 Schedule 1.1-A which identified the assets was not modified
2 to include copyrights, and significantly Schedule 1.1-B,
3 which expressly excluded copyrights, was not changed either.

4 There can be no suggestion, no credible suggestion
5 that somehow the wool was pulled over somebody's eyes. Both
6 sides had a full chance to review it and both sides had a
7 chance to make suggested revisions, and there was not even a
8 suggestion, let alone an agreement, that the excluded
9 copyrights ought to be modified.

10 Now, in addition, on December 6, 1995 there was a
11 document that was entered into that actually transferred the
12 assets. The asset purchase agreement itself transfers
13 nothing. Instead, it is a promise that Novell would
14 transfer assets, but the actual document that accomplishes
15 that was the bill of sale. The bill of sale that you saw,
16 Exhibit W-5, references the transfer only of the assets.
17 The assets are, again, described in the asset purchase
18 agreement, so to really understand what was sold one would
19 have to look to the bill of sale and say what does the bill
20 of sale say? The bill of sale tells us that to understand
21 what was sold we look to the asset purchase agreement, the
22 assets, Schedule 1.1-A. So that is straightforward and
23 clear.

24 Now, there is also something that was passed by,
25 and you'll recall that Novell acquired the entire UNIX

1 business from AT&T, not an asset purchase agreement, but a
2 full merger, and Novell held those assets for about two
3 years and then there was a limited transfer of some of the
4 assets in 1995. Then a couple years after Novell sold some
5 of the assets to the Santa Cruz Operation, and Santa Cruz
6 Operation turned around and decided to sell whatever it
7 acquired from Novell to a company called Caldera, now known
8 as SCO.

9 Well, if we were to look at the agreement that
10 Santa Cruz Operation entered into with Caldera or SCO, we
11 would see in Exhibit 010 that the seller, Santa Cruz
12 Operation, could not represent to SCO that it had a chain of
13 title with respect to all of the intellectual property.
14 That includes the copyrights. So when Santa Cruz Operation
15 sold what it had to its buyer, SCO, Santa Cruz Operation
16 realized it could not make an entire sale.

17 Now, was this a mystery? Was this something
18 unknown to SCO? Absolutely not. Let's fast forward to
19 January 4th, 2003. You may recall this. Mr. McBride, who
20 was not involved in any way with the asset purchase
21 agreement or either of the amendments, does join SCO in
22 2002. One of the first things that he does is he wants to
23 see whether he can change the business. The business that
24 SCO had been engaged in up to that date was it was selling
25 UNIX and UnixWare in particular, and it was even servicing

1 the Linux world and helping Linux users and customers.

2 The business was not going well, and so Mr.
3 McBride said is there something different that we can do?
4 Is there another business we can pursue contrary to the one
5 we have been engaged in? The idea came to him, well, maybe
6 we can try to turn on our customers, our Linux users, and
7 we'll go after them and try to extract payments. We'll go
8 after the open source community rather than aid them. So he
9 employed consultants, and one of them was Mike Anderer, who
10 advised Mr. McBride in no uncertain terms in January of
11 2003, that there was far less that had been transferred to
12 SCO than Mr. McBride would have hoped. In fact, it is an
13 asset purchase that excludes all patents, copyrights and
14 just about everything else. We need to be really clear on
15 what we can license. It may be a lot less than we think.

16 Well, SCO relies on the wrong documents. Let's
17 take a quick look at some of the things that SCO has
18 suggested to you. First of all, what was presented was the
19 so-called term sheet. First of all, where did that term
20 sheet come from? It was presented first in court when
21 Mr. Ty Mattingly came, and you'll recall that he found some
22 documents in his garage, not previously presented during the
23 course of the trial, and one of the documents in his garage
24 was this term sheet. The term sheet wasn't the final
25 agreement. The term sheet didn't represent what the parties

1 signed off on. If anything, it was a preliminary sketch of
2 a possible agreement, but it has been suggested to you that
3 the term sheet was the final agreement. Not so. The final
4 agreement was what the parties agreement to and signed.

5 Well, also suggested to you as evidence that the
6 parties, contrary to what they said in their agreement
7 signed, was that there was a press release, a joint press
8 release. Well, of course, it was not a joint press release,
9 it was one issued by SCO and it has its logo and Novell is
10 not even a party to it.

11 And then it was suggested to you that, well, maybe
12 what indicates a transfer of the copyrights is the
13 technology license agreement, which is one of the exhibits
14 to the asset purchase agreement. This slight of hand was
15 performed. The suggestion was that, well, maybe what Novell
16 was doing was it was taking a license back of the assets
17 that it sold, and that means certainly the copyrights might
18 have transferred because otherwise why would Novell take
19 back that which it retained? That was the argument. The
20 fact of the matter is that when you look at the technology
21 license agreement, which you'll have a chance to do in the
22 jury room, the license back provision related to assets that
23 had been transferred. Clearly Novell and SCO agreed that
24 when Novell transferred assets, Novell would have a license
25 back to those assets. But the assets that were transferred

1 didn't include the copyrights. That is what Schedule 1.1-B
2 clearly said. So that was a slight of hand. I think you'll
3 see past that quickly.

4 Now, in terms of the witnesses that were
5 presented, there was a board put up in front of you about
6 various witnesses, but if one looks carefully and listens
7 carefully one will quickly devine as well that the witnesses
8 that were presented to you either were not involved in the
9 final negotiations, had not even read the asset purchase
10 agreement, or were misinformed.

11 Well, let's look at who the actual witnesses were
12 who were involved in the asset purchase agreement. You
13 heard no mention of Jim Tolonen. He came here in court. He
14 supervised the preparation of the asset purchase agreement
15 as the chief financial officer of Novell. He testified that
16 Novell had purposefully excluded the copyrights from the
17 transfer. It wasn't a mistake. It wasn't a slight of hand.
18 It wasn't an omission. He was present at the two board
19 meetings held after the asset purchase agreement was entered
20 into and at those board meetings reported on it. He is
21 actually the one who signed amendment number two to the
22 agreement, and he has no financial interest in the outcome
23 of this case. He left Novell in 2000.

24 Well, should we rely upon Mr. Tolonen? Mr.
25 Frankenberg said he did. In his testimony he indicated that

1 he relied upon Mr. Tolonen's recommendation and advice. Mr.
2 Frankenberg even said that he would expect that Mr. Tolonen
3 would be in a position to accurately state what the position
4 of Novell was relative to the asset purchase agreement.

5 Well, you heard from David Bradford, the general
6 counsel of Novell. He came to court and he testified, and
7 he is no longer with Novell, he has no financial interest in
8 this case, but he told you that he had supervised the
9 drafting of the asset purchase agreement, that he gave
10 specific instruction to Novell's outside counsel to preserve
11 the copyrights, and that he prepared the board meeting
12 minutes and was at the board meeting when that very
13 presentation was made, and that the board minutes were
14 accurate. Mr. Frankenberg, of course, confirmed all of that
15 as well. Mr. Bradford was deeply involved and he knew what
16 happened.

17 You had the benefit of hearing from the lawyer who
18 actually wrote the asset purchase agreement. He came here
19 to court and testified extensively. If anyone would have
20 known the language that was used and whether it was done
21 perfectly, Mr. Braham would have been the one to do that.
22 He testified that there was a specific strategy employed by
23 Novell to protect its interests in this license stream,
24 these SVRX license streams, and so the asset purchase
25 agreement was carefully crafted in a particular way to

1 protect that. Mr. Braham has no financial interest in the
2 outcome.

3 Less there be any question as to whether Mr.
4 Braham actually was involved, you saw the drafts. Now, it
5 is hard to read the writing, and I feel badly for my own
6 secretary who has to read some of my writing, but Mr. Braham
7 wrote from start to finish and commented on the very
8 specific terms of the asset purchase agreement.

9 This is important. Mr. Braham made it clear who
10 his client was, not a single individual at Novell, but the
11 client was the board of directors. The board of directors
12 of the company makes the decisions and is the ultimate
13 governing body. Mr. Braham shared with us that the board is
14 the one that approved the asset purchase agreement. And
15 then in terms of others who came that were not directly
16 involved, you heard him identify the fact that Mr. Thompson
17 was more involved in looking after the interests of SCO than
18 Novell, and that others who had been involved certainly in
19 the process, Ed Chatlos and Ty Mattingly, that they had not
20 been as deeply involved when the agreement came to the final
21 negotiations, and whatever views they had were not relevant
22 to the board's decision.

23 Mr. Chatlos wasn't even at the board meeting. Mr.
24 Mattingly was present, but as you have heard and we will
25 highlight in a moment, does not remember things that were

1 said. The board minutes speaks as to what really did
2 happen.

3 Now, we also had a chance to hear from Allison
4 Amadia. She is the one who drafted amendment number two.
5 She is the one who commented on the initial language
6 suggested by SCO's attorney. She is the one who knew best
7 what the intent of Novell is along with Mr. Tolonen, and she
8 has no financial interest in the outcome of the case.

9 Now, let's compare that to the witnesses that were
10 presented to you on SCO's behalf. Duff Thompson was made
11 reference to. You'll recall that Mr. Thompson had not been
12 with Novell for very long. He had been previously at Word
13 Perfect and when he came over there wasn't a place for him
14 as general counsel at the company, because Mr. Bradford was
15 the general counsel while this deal was being negotiated.
16 He had already, as he testified, decided to leave the
17 company. You heard the testimony that he had checked out.
18 In fact, he was already planning to go to SCO and to be on
19 its board of directors. You heard the testimony that Mr.
20 Thompson was on SCO's litigation committee which approved
21 the filing of this lawsuit against Novell. Mr. Thompson
22 owns at least 110,000 shares of SCO stock.

23 We did get some good entertainment out of
24 Mr. Michaels. The important thing is what did he actually
25 say? Here is a portion of what Mr. Michaels actually

1 testified to. He had no specific memory as to any specific
2 agreement. He didn't even know what amendment number two
3 was. He had not read the asset purchase agreement when it
4 was prepared. He had never read it. And he had no comment
5 on the asset purchase agreement. What we're going to do is
6 look to the parties' agreement here, and we need to look to
7 witnesses who actually read it and knew it and understood it
8 and negotiated it. Whatever wishes or hopes or dreams
9 Mr. Michaels may have had, he was not involved in the
10 preparation of the asset purchase agreement.

11 We did hear from Mr. Mattingly formerly with
12 Novell. You heard that he owns SCO stock. You heard that
13 he was not involved by his own testimony in the details or
14 the crafting of the asset purchase agreement. You heard
15 that he had no involvement in the preparation of either
16 amendment number one or amendment number two. You heard
17 that he has no memory of what even happened at the September
18 18th, 1995 board meeting.

19 Well, let's look at some of the other witnesses.
20 Steve Sabbath did not appear in court but you did have a
21 chance to hear a portion of his testimony through videotape
22 deposition. Now, it is very critical that we look at what
23 Mr. Sabbath actually said. I would like to share with you a
24 couple of snippets. As you recall his testimony, Mr.
25 Sabbath had signed a declaration under penalty of perjury

1 regarding what his views were. He had signed that in
2 connection with the previously filed litigation involving
3 I.B.M.

4 When asked about this he said, question, do you
5 recall executing this declaration? Answer, I do, yes.
6 Question, referring to that sworn declaration, you say in
7 paragraph 11 of the declaration, quote, under the asset
8 purchase agreement Novell retains significant UNIX related
9 assets following the sale. For example, Schedule 1.1-B of
10 the asset purchase agreement provided that much of the UNIX
11 System V intellectual property would not be transferred.
12 That was his sworn statement. It didn't end with that.

13 In that same declaration that was referred to in
14 his videotaped testimony the following quote was elicited
15 from his sworn statement. Quote, as described above in
16 relation to the related agreements and amendment number two,
17 Novell retained certain rights under the UNIX System V
18 licensing agreements as well as certain UNIX System V
19 intellectual property. This is the very lawyer at SCO who
20 prepared the initial draft of amendment number two and
21 signed it. So when he was first asked to make a statement
22 under penalty of perjury, he confirmed, just as Novell has
23 presented it to you in this courtroom, that Novell retained
24 its intellectual property rights relative to UNIX.

25 Let's go back to Mr. Frankenberg. We were told by

1 SCO's counsel that in their view he is the most important
2 witness in the case. Well, if they believe that let's look
3 at bit at what Mr. Frankenberg said. You'll recall both the
4 first day he appeared and even here yesterday that I had the
5 chance repeatedly to ask him about what the board had done
6 and what it had approved. I asked him straight on whether
7 the language in the asset purchase agreement signed by the
8 parties, signed by him, was consistent with what the board
9 of directors had approved. He said yes. And then there was
10 some suggestion maybe that, bizarrely, even somehow that the
11 board of directors of Novell was acting beyond its
12 authority. To make sure that that was not the claim, I
13 asked him and he said, no, of course not, they were not
14 acting beyond their authority.

15 This is the testimony that you heard just
16 yesterday. I apologize for the length of the question.
17 Here is what he said. I asked him in this courtroom 24
18 hours ago this. So let me just see if I understand what
19 you're saying. Is it your contention that although what was
20 discussed with the board was an express exclusion of
21 copyrights, and although the words that were in the asset
22 purchase agreement expressly excluded the transfer of
23 copyrights, and the minutes of the board of directors
24 meeting excluded all copyrights, somehow in your mind you
25 either saw or thought you heard something different than the

1 express provisions? Is that essentially what you're telling
2 us? Yes, it is.

3 Here is the problem. Imagine the difficulty any
4 one of us would face if we were to make some sort of
5 purchase or enter into some transaction, and we wrote it
6 down and both parties signed it, and we thought we could
7 rely on it, and then later someone were to suggest, well, I
8 know that is what it says, and I heard the words telling me
9 that that is what was agreed to, but I had something else in
10 mind, and now I want to step away from it and not honor it.
11 That is what is going on. That is the mischief in this
12 case, from the most important witness, according to the
13 plaintiff.

14 Now, Mr. Chatlos, and we don't want to place this
15 out of proportion, but it must be known, as was elicited in
16 testimony, that Mr. Chatlos's wife does work for SCO. He
17 and his wife will make money if they win this case.
18 Importantly, when we look to what was actually agreed to,
19 and we look to the intent of Novell, he was not present at
20 the board of directors meeting. He was not involved at that
21 level. So his view or belief or suggestion has to be
22 wondered a bit about.

23 We also did hear from Kim Madsen, who was an
24 assistant to Mr. Sabbath at SCO. She had no specific memory
25 or intent of the negotiation of amendment number two. She

1 did not remember what was felt or believed or thought by
2 that, and she testified that she had no specific
3 recollection of discussing with Mr. Sabbath what he might
4 have thought about amendment number two.

5 Now, there are others who came to court and
6 testified. We heard from SCO's former chief executive
7 officer, the one who we were told was in essence the sponsor
8 of this SCOSource license program, what his interest is, and
9 he told you how many millions of dollars he would make if
10 SCO were to prevail. He acknowledged that he had a
11 financial interest in the outcome of this case. Unlike
12 other witnesses, it is not ending with that.

13 Mr. McBride, by his own admission, had no
14 involvement in the preparation of the asset purchase
15 agreement or any of the two amendments to it. He simply was
16 not a party to it. He can't be looked to to understand what
17 the intent of the parties was at any time.

18 Now, we also had a chance to hear from Mr.
19 Tibbitts, who is the general counsel of SCO. He too has a
20 financial interest in the outcome of this litigation. He
21 too stands to gain if SCO prevails, but he too, like Mr.
22 McBride, having joined SCO not until 2003, had no
23 involvement whatsoever in the preparation of this agreement.

24 So, again, who we heard from was a parade of
25 witnesses who either weren't there, far removed from the

1 activities, not directly involved, not present at the board
2 of directors meeting, or have a personal financial interest
3 in the outcome of the case.

4 Now, you may ask the question, why would Novell
5 have decided to exclude the transfer of copyrights when it
6 entered into this agreement? Even posing the question
7 sounds one sided. Keep in mind there were two parties to
8 this transaction. The question might as easily be asked why
9 did SCO agree not to transfer the copyrights? Because they
10 did agree to that. Well, I think you'll find and you'll
11 recall that there are significant, valid business reasons.

12 Let's first turn to Mike DeFazio. He was not on
13 the list of witnesses that SCO's attorneys put up, but he
14 was a critically important witness. You'll recall that he
15 appeared by videotape deposition as well. Mr. DeFazio, as
16 he testified, was the general manager of the UNIX business
17 unit at Novell at the time that this transfer took place.
18 He previously had worked for AT&T and he then came to Novell
19 with that acquisition and he was asked, was it your
20 understanding that the A.P.A. at the time was intended to
21 transfer the copyrights for UNIX to Santa Cruz? His answer
22 was no. The A.P.A. as it was written retained it and it was
23 my understanding that the retention was the way that the
24 team crafted the words to implement the goal of
25 bulletproofing this financial asset stream, to protect it.

1 Now, that is exactly what Mr. Braham told you.
2 What was the rationale for excluding the copyrights? He
3 testified that it was to protect Novell's interests, it was
4 a concern that SCO might move into bankruptcy, and if it did
5 there would be real entanglement and difficulty for Novell
6 to protect its interests in those SVRX licenses, and there
7 was also concerns about Microsoft.

8 One of the other things that was passed by is this
9 important fact. The suggestion has somehow been made that
10 Novell must have sold the entire business. Well, that is
11 contrary to what the words say. It is also contrary to the
12 practical economic realities. Novell paid over \$300 million
13 to acquire the business and what it got in return was about
14 \$50 million in stock. It retained what it already held, and
15 that was rights to license fees, and then the other portion
16 of possible consideration was if SCO actually succeeded in
17 what it bought, and that was the right to develop the
18 UnixWare, and if SCO had succeeded and it developed this
19 merged product, as you'll see reference to in the asset
20 purchase agreement, and made a profit, then Novell would
21 have at a certain level been able to participate in that.
22 SCO did not succeed and Novell did not receive any of those
23 funds.

24 Well, back to Mr. Frankenberg, apparently the
25 most important witness in the case. He was asked, despite

1 his testimony, whether it was possible that in fact the
2 asset purchase agreement purposefully had excluded the
3 copyrights and he finally was able to acknowledge, yes, that
4 is a possibility. We asked him several times about the
5 asset purchase agreement exclusion and whether that is what
6 the board had agreed to. He acknowledged, yes, that is what
7 the board had agreed to.

8 Now, there were some people that you did not hear
9 from in this trial. I wonder if you were curious about
10 them. You heard that Novell's in-house counsel, David
11 Bradford, working with Jim Tolonen, the chief financial
12 officer, worked with outside counsel of Novell to prepare
13 this asset purchase agreement. Santa Cruz Operation was not
14 without its representatives. In fact, they hired a very
15 talented set of lawyers from a very large law firm, a
16 prominent law firm at the time, the Brobeck Phleger firm.
17 You heard about Ed Leonard, this very experienced senior
18 partner, Jeff Higgins and Scott Lester who worked with them,
19 and none of them appeared in this case. None of them
20 appeared by deposition testimony. Those are empty chairs.

21 That must tell you something about it if SCO was
22 not able or willing to present any witnesses to suggest
23 anything contrary to Novell's presentation. There was a
24 complete failure or lack of evidence by SCO with respect to
25 the actual negotiations on the asset purchase agreement.

1 They have the burden of proof. They should have been
2 required to present witnesses. They should have come
3 forward with those who are on the other side of the table if
4 they actually were going to try to substantiate this rumor
5 or innuendo that there was a mistake or that Novell slid
6 something passed them. Those very talented lawyers were not
7 here. Nor did they go and ask the questions so that they
8 could present it to you.

9 We do agree that amendment number two is of
10 critical importance. Let's look at what amendment number
11 two says and what it does not say. You may recall that the
12 very first draft of this agreement resulted when Steve
13 Sabbath, Santa Cruz's in-house counsel, contacted Ms. Amadia
14 and said words to the effect, according to her testimony,
15 there has been some clerical error. We need to fix that
16 now, more than almost a year after the agreement was signed,
17 and he sent over some language.

18 Well, what was the language that he proposed?
19 This compares the language that he proposed with what
20 actually was agreed to. You'll see in red the language that
21 Novell struck out and which it rejected, and the language
22 that was struck out was this very broad terminology about
23 this amendment number two which pertained to the UNIX and
24 UnixWare technologies. Mr. Sabbath also suggested and which
25 SCO has acquired hereunder.

1 Mr. Sabbath by the words he used wanted to have a
2 document signed to suggest that in fact there had been a
3 transfer of copyrights, but that was not the case and the
4 language we have rejected that. So the final language of
5 the asset purchase agreement very clearly contradicts the
6 claim that SCO has been making in this case that there was a
7 transfer of the UNIX and UnixWare copyrights.

8 Instead, the language is all copyrights and
9 trademarks except for the copyrights and trademarks owned by
10 Novell as of the date of the agreement required for SCO to
11 exercise its rights with respect to the UNIX and UnixWare
12 technologies.

13 Well, what was required? First of all, what was
14 meant? We turn again to Mr. Tolonen. If we were to compare
15 the people involved, Mr. Tolonen, the business
16 representative, the chief financial officer who signed the
17 asset purchase agreement, and Novell's legal representative,
18 Ms. Amadia. On the other side of the transaction, Mr.
19 Sabbath. What testimony did you hear on either side?

20 Very clearly Mr. Tolonen said we did not intend to
21 transfer ownership of the copyrights to Santa Cruz. He made
22 reference to the fact that when the suggestion was made by
23 Santa Cruz that such a transaction be entered into that it
24 was rejected. Then he testified that amendment number two
25 so clearly was not intended to transfer ownership of the

1 copyrights, that he did not go back to the board of
2 directors to get approval for it, and he testified that to
3 change the asset purchase agreement, to undo that which the
4 parties had agreed to, to actually include the transfer of
5 copyrights would have been such a material change, a big
6 deal, that Novell's board of directors would have had to
7 have been involved and they were not.

8 Let's go back to Ms. Amadia, the one who wrote the
9 agreement. In your mind are you positive that Novell did
10 not intend to transfer the copyrights? I am. How can you
11 be so sure? Because I negotiated it, I drafted it, and that
12 was not my intent. I didn't have the authority to do
13 otherwise.

14 Well, so we have looked at the two people at
15 Novell involved, the senior executive, Mr. Tolonen, the
16 lawyer, Ms. Amadia, and who is on the other side? Back to
17 Mr. Sabbath. What did he tell you about the intent and
18 meaning of the second amendment? Question, and to the best
19 of your recollection who at Santa Cruz would have been
20 involved in negotiating the language of paragraph A of
21 amendment number two? I don't know. Question, can you
22 recall prior to signing amendment number two focusing on
23 paragraph A to any extent? I don't.

24 A complete absence of anyone from Santa Cruz or
25 SCO coming into this courtroom and suggesting what the

1 intent or meaning was of amendment number two. Once, again,
2 we have a clear contrast. You heard the evidence from
3 Novell's representatives, and they testified without
4 equivocation that there was no intent to transfer the
5 copyrights, and then we have a complete absence by SCO.

6 Now, that then prompts this question. Were
7 copyrights required for SCO to exercise its rights with
8 respect to the acquisition of UNIX and UnixWare
9 technologies? Well, we need to get an answer to that
10 question, and so the first place we ought to look to is SCO
11 itself. We heard this testimony from Mr. McBride. He was
12 asked this very question. You may recall this. Question,
13 didn't you tell them that you could run that part of your
14 business without ownership of the UNIX copyrights? Answer,
15 we could run our business without the copyrights just like
16 H.P., I.B.M., and all of the other licensees of UNIX can run
17 their businesses as well.

18 Let me pause right there. I will come back and
19 finish this.

20 What is the significance of his open admission in
21 this courtroom on this point? First of all, you'll recall
22 that companies like Hewlett-Packard and I.B.M. and others,
23 Sun Micro Systems, a number of other companies, they have a
24 license to use the UNIX software. They then would take the
25 license that they had to UNIX and build on top of it their

1 own flavor, their own amendments and derivatives and
2 additions. None of those companies owns the UNIX
3 copyrights, but are perfectly capable of running their
4 business by working on their derivatives and marketing and
5 selling and profiting in some respects handsomely. That was
6 the business that SCO said it was going to be in when this
7 asset purchase agreement was entered into.

8 The SCO business was to take the UNIX operating
9 system and then to build on to it, to amend it, to create
10 derivative works, their own flavor, and they were left free
11 to sell that and to derive royalties and payments for that
12 additional work. They did not need ownership of the UNIX
13 copyrights to do that. That is precisely what Mr. McBride
14 acknowledged was the case.

15 Here is part two. The business that was involved
16 in this sale of assets wasn't the business that Mr. McBride
17 wanted to get into in 2003. He wanted to start a new and
18 different business, a business that is not the subject of
19 this agreement. He wanted to turn on his customers, and
20 instead of helping them with UNIX or with Linux, he wanted
21 to claim on SCO's behalf that these many customers who have
22 been using this free open source software now were
23 infringing UNIX. That is a new and different business. It
24 is not the business that was the subject of the asset
25 purchase agreement.

1 This is why Mr. McBride says the part that we
2 differ on here is we were unable to run our business for the
3 licensing side without the copyrights, and the licensing
4 side was really the future of the company. What he was
5 talking about was the litigation shop that he wanted to turn
6 SCO into.

7 So there will be no question, and you may recall
8 this, Mr. Acker asked so let me get it straight so the jury
9 understands. You could operate as a software company
10 without the UNIX copyrights? You couldn't run your
11 SCOSource campaign without the UNIX copyrights? Do I have
12 that correct? Mostly.

13 Now we need to understand precisely what it is
14 that SCO is doing. You'll recall that in May of 2003 it
15 sent out letters to some 1,000 or more companies claiming
16 that it owned the UNIX copyrights and licenses and it wanted
17 to extract payments out of these various companies. What
18 was it supposed to be doing? What was it prohibited from
19 doing? If we look at the asset purchase agreement, Section
20 4.16-B as amended, you'll see in the highlighted portion
21 that SCO shall not and shall have no right to enter into new
22 SVRX licenses except in the situation specified in small i
23 of the preceding sentence or as otherwise approved in
24 writing in advance by seller. What SCO was doing was
25 directly violating its contractual obligation by turning on

1 people that it previously was designed to service and help.

2 Now, the suggestion has been, oh, it would be
3 ludicrous and impossible and how could a software company
4 possibly operate without holding the copyrights? And then
5 you heard in open court from the general counsel, Mr.
6 Tibbitts, and I asked him this question. You're aware of a
7 proposed transaction just in the last year whereby SCO would
8 have sold its business and retained solely the UNIX
9 copyrights, correct? Correct. So although you have been
10 told it would be ludicrous, that is precisely what SCO has
11 given contemplation to. I didn't want there to be any
12 confusion so I asked him to clear it up. What SCO has
13 proposed to do is sell the UNIX business, product business,
14 but retain the UNIX copyrights? Yes, and the rights to
15 enforce those copyrights. SCO is interested in being a
16 litigation shop.

17 Now, others were asked about whether or not
18 copyrights were required. Mr. Messman told you that in his
19 view as of 2003 that SCO didn't need the ownership of
20 copyrights to run its legitimate UNIX and UnixWare
21 technologies.

22 Let's make sure that we have a very clear
23 understand again of what is at issue. These are Legos.
24 Maybe some of you have seen these in your home and stepped
25 on them and tripped on them. A Lego represents a building

1 block. What initially Novell had and owned, and that the
2 part it had acquired from AT&T, is represented by the small
3 block on the left, the UNIX and the UnixWare copyrights that
4 pertain to Versions 1.0 and 2.0. Under the asset purchase
5 agreement certainly SCO had the right to use that
6 intellectual property without ownership to develop its
7 building block on top, the UnixWare copyrights. Whatever
8 SCO has developed on its own, its derivative work, it owns
9 the copyrights to. There has never been a challenge to
10 that. Novell does not dispute that. SCO has every right
11 and has and did for eight years before this litigation was
12 commenced operate that business. It was not until Mr.
13 McBride and SCO came up with its new litigation strategy,
14 that the suggestion has been made that copyrights were
15 needed.

16 Again, you heard the suggestion that somehow Mr.
17 Braham or Mr. Bradford snuck the copyright exclusion into
18 the A.P.A., that it was done in a corner, no one saw it, and
19 no one had time to think about it. That is belied by the
20 actual evidence. Mr. Levine, he is the one who was an AT&T
21 lawyer who came over to Novell, and he is the one who
22 actually then moved on to SCO after the transaction. He is
23 the one who provided comments on Schedules 1.1-A and B. You
24 heard and saw what he said. This is his very draft that
25 supposedly was snuck by or snuck in. You will see that in

1 his draft of Schedule 1.1-B, the excluded assets, very
2 clearly all copyrights and trademarks except for the
3 trademarks UNIX and UnixWare. That wasn't a last second
4 invention. Mr. Levine, who, again, SCO purports as its
5 witness, actually wrote that language.

6 Now, was Mr. Frankenberg duped? Here is the
7 question. Now, do you recall whether or not you ever
8 reviewed this excluded asset schedule in connection with the
9 transaction? I am sure that I did, yes.

10 Mr. Mattingly, he also came to court. Sir, to
11 your knowledge did the lawyers and business people at Santa
12 Cruz have the opportunity to read the included and excluded
13 asset schedule before they agreed to the A.P.A.? Yes. No
14 question that those people had a chance to do that.

15 Here is an interesting document. You may have
16 seen it from two sources. The first time you saw it was
17 when Mr. Mattingly came into court and had that folder that
18 none of us had seen before, said that he had it in his
19 garage, he had given the documents or showed them to SCO's
20 lawyers without ever notifying Novell, and I hadn't seem
21 them before and I asked him for them. This is one of them.
22 On it is a draft, a handwritten notation of September 16th,
23 1995, before the transaction closed, and it includes the
24 exclusion of all copyrights and trademarks. It was not a
25 secret. People knew about it.

1 Now, the suggestion has been made that somehow if
2 we disregard the language of the agreement, if we forget
3 that it is there, or we want to act and believe contrary to
4 it, let's see how people behaved and that should inform us
5 as to whether or not Novell transferred the copyrights. You
6 were told about three individuals that SCO brought forth,
7 all SCO employees that suggested that somehow Novell acted
8 inconsistently with the retention of copyrights. The first
9 example was that somehow on the copyright notices, the marks
10 that are put on the physical, tangible medium, that there
11 was a copyright notice suggesting that SCO held the
12 copyrights.

13 In his testimony he indicated that we didn't go
14 back and change prior versions. We only put the SCO
15 copyright notice on current or go-forward versions. Of
16 course, that makes perfect sense. I showed you before that
17 if you in essence inherent or have rights to use a product
18 and you build your own on top of it, you can claim copyright
19 protection and rights for the new work that you have
20 performed. That doesn't mean the previous work you own
21 copyright protection to. Mr. Broderick acknowledged that.

22 Then you heard from Mr. Nagle. The suggestion was
23 that, well, maybe there is a copyright notice on the box in
24 which the SCO C.D. is sold. He acknowledged that what is
25 written on the box does not tell you what the ownership

1 resolution is, you have to look to the legal agreements to
2 establish copyright ownership. Fortunately, we have the
3 legal agreements.

4 Then we had Mr. Maciaszek. The suggestion was
5 made that Novell sent these letters out to customers after
6 it entered into the asset purchase agreement, and somehow
7 there was some concession by Novell in those letters that it
8 had transferred ownership of the copyrights. You'll have a
9 chance to look at examples of those letters. You'll see
10 that they do not say that Novell transferred ownership of
11 the copyrights. Mr. Masiaszek was good enough to confirm is
12 that these letters were simplifications, and that what
13 customers actually were being told is after the transition
14 that if they had questions they should contact Santa Cruz.
15 Why? Because Santa Cruz was acting as the administrative
16 agent and was being paid five percent to administer the
17 collection of royalties, that they should do something for
18 the work they were asked to do and that is one of the items.

19 Now we get the important question. Did Novell
20 have a First Amendment right to state its position? This is
21 probably something you are familiar with. The First
22 Amendment is incorporated and is the very first and is the
23 most preeminent of the Bill of Rights. It protects a number
24 of things. I'll take you back to a civics class. Congress
25 shall make no law respecting an establishment of religion or

1 prohibiting the free exercise thereof or abridging the
2 freedom of speech or of the press or the right of the people
3 peaceably to assemble and to petition the government for the
4 redress of grievances. This is the fundamental foundation
5 of our union and is the fundamental protection for our
6 individual liberties. Novell does have a constitutionally
7 protected right to comment on matters of public interest.

8 The Court has given you an instruction, and some
9 of this was covered in part, but not in its entirety with
10 you with Mr. Singer, and it bears some repetition. The
11 instruction that you received states the following: The
12 third element requires the party claiming slander of title
13 to prove by clear and convincing evidence, not a
14 preponderance, just a little bit more than a tip of the
15 scales, but clear and convincing evidence, that the
16 statement disparaging the ownership of the UNIX and UnixWare
17 copyrights existed as of the date of the asset purchase
18 agreement was made with constitutional malice.

19 Let's pause. Why is this very high and heavy
20 burden placed on SCO? To protect constitutional rights, to
21 avoid the chilling of speak, to avoid reprisal for those who
22 choose to speak out on a matter of controversy. Imagine the
23 difficulty that would occur to any one of us, to any
24 citizens, individual or corporate, if they could not speak
25 their mind because of a fear that they would be hailed into

1 Court and held accountable for monumental damages. That is
2 why this heavy burden exists. It is a constitutional right.

3 The instruction continues. That is, the party
4 claiming slander of title must prove that the statement was
5 published with knowledge that it was false or reckless
6 disregard of whether it was true or false. What does that
7 mean? The instruction is clear. Which means that the party
8 making the statement acted with a high degree of awareness
9 of the probable falsity of the statement, or that at the
10 time the statement was transmitted, the party making the
11 statement had serious doubts that the statement was true.

12 So as we examine the statements that are at issue
13 in this case, that is the standard that has to apply. In
14 order to hold Novell liable for slander, you must be
15 convinced to the heightened degree of clear and convincing
16 evidence that at the time the statement was made it was
17 known to be false, or that it was made with reckless
18 disregard that all of these other factors are satisfied.

19 What is clear and convincing evidence? The Court
20 has instructed us. Clear and convincing evidence leaves no
21 substantial doubt in your mind that the constitutional
22 malice is highly probable. That is a very high standard.
23 It protects all of us. Spite, ill will, hatred, bad faith,
24 evil purpose or intent to harm does not alone support a
25 finding of constitutional malice.

1 So with that in mind, let's make sure that we
2 understand what was going on in the marketplace and what
3 Novell was facing when it made its alleged and accused
4 statements. First of all, and you'll have a chance to look
5 at this, Exhibit I-11. Not long prior to the announcement
6 of the SCOSource licensing program SCO itself was in the
7 business of licensing Linux and selling Linux to users,
8 encouraging Linux users to use that open source product. It
9 reached out and developed a clientele of Linux users. Those
10 are among the very type of customers that SCO then turned on
11 when it figured it wanted to make a bit more money.

12 What was the motivation for that dramatic turn, a
13 new and different business? Well, Mr. McBride told us that
14 it was because of the financial condition of the company.
15 Things were not in good shape. Asked about this same
16 licensing extraction program, Mr. Thompson was asked about
17 whether it was a hail mary and he said, well, like every
18 other company there are good times and bad times and we were
19 looking for ways to improve our business.

20 What did Santa Cruz Operation think of what SCO was
21 doing? Keep in mind Santa Cruz Operation ran the UnixWare
22 business and sold it to SCO. When they themselves were
23 asked what they felt about SCO's license extraction and
24 litigation shop we got this answer. Guys who run protection
25 rackets occasionally make a short-term profit, but never

1 build a long-term business. That is what Santa Cruz
2 Operation itself thought SCO was doing. There was an uproar
3 in the market. There was tremendous publicity. There was a
4 backlash of significance among Linux users and those who
5 serviced Linux.

6 Well, what is it that SCO sought to do? You'll
7 recall this, that in February of 2003, recognizing
8 apparently that it did not own the copyrights, and that its
9 licensing program would be dependent on actually owning the
10 copyrights, SCO came to Novell through various means, one of
11 which was senior executives to in-house counsel. One of the
12 things that SCO sent over to Novell was a proposed agreement
13 to clarify that, in fact, SCO owned the copyrights. If,
14 indeed, SCO owned the copyrights as it claimed, so it could
15 carry out its licensing extraction program, why on earth in
16 2003 was SCO asking for written confirmation? It is a
17 little hard to see, but you'll have a chance to look at
18 Exhibit I-31, and there was even a signature block put on
19 that. What did Novell do in response? It rejected and did
20 not sign that agreement.

21 Well, there were threats that went out. This is
22 a threat that went everywhere. It even went to Novell. The
23 claim was made that Linux infringes our UNIX intellectual
24 property and other rights. That is the claim that was made.
25 It was not made in isolation. It was made broadly and

1 throughout the marketplace. You have heard that this demand
2 was made to at least the Fortune 1000. Novell was faced not
3 only with a public uproar, but it itself was challenged, it
4 itself was the recipient of one of these letters.

5 This is only a small sample, and time does not
6 permit more, but what was in fact the response? Linux
7 advocates doubt the validity of the SCO licensing scheme.
8 Advocates claim scheme violates the general public license
9 or G.P.L. software license.

10 There are other examples. SCO irks about
11 everyone in tech except Microsoft. Time does not permit,
12 but if one were to think about the implications, Linux was a
13 challenge to Microsoft. The Linux market was growing and
14 developing, and it presented a market challenge to
15 Microsoft's operating system. Who would be a chief
16 beneficiary of the failure of Linux? Microsoft.

17 Well, ultimately Novell had to respond. In the
18 midst of this adverse publicity, these claims and threats to
19 Linux users, yes, on May 28, 2003 Novell did respond. And
20 Novell did at that time report to Mr. McBride that Novell
21 owned the UNIX copyrights.

22 Well, you heard this testimony. We need to put
23 ourselves in the time and place of May 28th. Where is
24 Novell? What is it thinking? What is available to it? It
25 has the asset purchase agreement. Mr. Messman, as you

1 recall, testified that he was present at the board meeting
2 in which it was approved, and despite efforts to embarrass
3 him because at one point he said in the 1980s instead of the
4 1990s, but you saw the board meeting minutes and you saw
5 that he was present, and he recalled that the asset purchase
6 agreement did not convey copyrights.

7 Mr. McBride was asked whether he thought that it
8 would be reasonable for a person reading the asset purchase
9 agreement, without the benefit of amendment number two, to
10 conclude that there was no transfer of copyrights. Mr.
11 McBride acknowledged that that would be a reasonable reading
12 of this document. That is where Mr. Messman was in May of
13 2003.

14 Now, the suggestion has been made somehow that
15 Novell must have known about amendment number two or it was
16 creating or fabricating. Well, why did Novell respond as it
17 did on May 28th? We heard from Mr. LaSala, the then general
18 counsel of Novell, and he indicated that it was imperative
19 to Novell's business interest to respond formally and
20 publicly, although he did not know anything about SCO's
21 earnings announcement. Mr. Stone testified that the issue
22 was of wide interest. I don't think there is any dispute
23 about that. He had no idea of the earnings timing. Mr.
24 Messman told us that Novell had to put out its side of the
25 story, and he wanted the world to know what Novell's

1 position was.

2 Now, the suggestion has been made that there was
3 some sort of malice. I think the sole witness actually that
4 was presented to you was a journalist, this Maureen O'Gara.
5 You heard her testimony by videotape. It was skimmed by in
6 the argument by SCO's counsel. In fact, she confirmed to
7 the public relations director of SCO that she wanted war pay
8 for the articles and promotion that she was making for SCO.
9 Excuse me. She was asked by SCO to send a jab P.J.'s way.
10 You heard the testimony. P.J. is a woman who writes and
11 comments on interests of the open source community, and SCO
12 wanted Maureen O'Gara to write something negative about her.
13 That hardly is evidence of a detached, objective journalist.

14 The other thing if you listened carefully, and you
15 had a chance to see it again today, was the attempt by Ms.
16 O'Gara to create words of Mr. Stone that he never said. If
17 you listen carefully to the testimony, she was pressed
18 several times, tell me what were the words that Mr. Stone
19 used. She never answered that question squarely. Instead,
20 she talked about, well, maybe he was laughing. These are my
21 impressions. Pressed repeatedly, it is important to know
22 what he said, she could not do that.

23 I would like to take a pause right now and have
24 us focus on what was going on and why Novell responded the
25 way it did. There are a number of things that are

1 represented on this time line. I'm going to run across them
2 and I hope they will be of help to you in summarizing and
3 understanding.

4 The first event that we have here is the May
5 12th, 2003 threat letter sent by SCO to Fortune 1000
6 companies and others. SCO's gone public with its SCOsource
7 licensing program and has made demands on many companies
8 including Novell. Here is an interesting thing. Two days
9 later on May 14th, SCO pre-announces publicly its earnings
10 for that quarter. Now, you have heard a big deal made about
11 Novell must have conspired and planned to release its
12 response on the earnings date. Those earnings were
13 announced two weeks before. Anyone knew that the earnings
14 had been out there if they did careful research. What
15 Novell did do on May 28th is respond and you have seen that
16 response.

17 What happened a few days later on June 5th is Mr.
18 McBride, having discovered himself a signed copy of
19 amendment number two, sends it over to Mr. Messman. I will
20 pause just for a minute on this. You heard in Mr. Singer's
21 argument that what Novell should have done is reached out to
22 its law firm, Wilson Sonsini, to get a copy of amendment
23 number two. But you also know, if you had a chance to
24 carefully listen, Wilson Sonsini was not involved in
25 amendment number two. That was done by Ms. Amadia in-house.

1 Then the suggestion was made that, oh, Novell
2 should have reached out to its former chief executive
3 officer, Bob Frankenberg, and got a signed copy of amendment
4 number two. Well, that is an interesting proposition. Mr.
5 Frankenberg had left the company well before amendment
6 number two had been signed and had nothing to do with it.
7 Novell did not discover amendment number two, the signed
8 copy, until Mr. Messman received it, and then Novell, trying
9 to act responsibly, did release the statement that you have
10 seen suggesting that amendment number two appears to support
11 the position articulated by SCO.

12 However, Novell then with some time undertook to
13 review matters more carefully. Why did Novell respond the
14 way it did on June 6th? You heard that it was because SCO
15 was claiming that it was going to go public with an
16 announcement, it was going to call a press conference on
17 June 6th and go public, and Novell wanted to be responsible
18 in its response and thus gave the muted response that it did
19 on June 6th, because of the public pressure being exerted on
20 it by SCO.

21 On June 6th, 2003, Novell did send a private
22 letter to SCO indicating that now that it had a chance to
23 look more closely at amendment number two, that it did not
24 agree with the position that amendment number two effected a
25 transfer of ownership. So as of June 6th, 2003, in a

1 private non-published communication, Mr. McBride and SCO
2 knew that there was no claim or concession of ownership.

3 Let's take just a quick look at then what SCO does
4 on July 21st, if we could highlight that.

5 In the face of Novell's private letter that it did
6 not agree that ownership transferred, Mr. McBride in an
7 interview, a public interview said if you go talk to Novell
8 today I'll guarantee you what they will say, which is they
9 don't have a claim on those copyrights. That was a direct
10 contradiction of a private communication. In the face of
11 what Novell said privately, Mr. McBride and SCO went public
12 suggesting something directly to the contrary.

13 Let's go back to the time line, please.

14 The next development is Novell again on August
15 4th sent another letter and said we dispute SCO's claimed
16 ownership of these copyrights. So now here are two letters
17 by Novell, private ones, not published, disputing the claim.
18 What does SCO do in the face of those private
19 communications? Mr. McBride in a public address said this.
20 If we could look at the development on August 18th. In a
21 keynote address, a public address, Mr. McBride said in
22 regard to Novell's recent claim that it still owns the
23 copyright to UNIX, McBride said it took SCO just four days
24 to press the eject button on that claim. What Mr. McBride
25 is doing, having received private letters from Novell where

1 Novell said we did not transfer ownership, Mr. McBride is
2 going public and claiming that Novell has conceded the
3 point.

4 Back to the time line, please.

5 On October 14th Novell registers the copyrights
6 and this happens on November 18th, if we could highlight the
7 development on November the 18th.

8 This was a transcript of an interview with SCO's
9 C.F.O., Mr. Bench. In that transcript, publicly made
10 available, SCO said once we have the copyright issue
11 resolved, where we fully had clarity around the copyright
12 ownership on UNIX.

13 So what is happening, one more time back to the
14 time line, is Novell is acting privately and Novell is not
15 going public, but is repeatedly telling SCO we retain
16 ownership of the copyrights, and what Mr. McBride and others
17 at SCO are doing publicly is saying, no, you don't, and
18 suggesting that Novell was conceded the point.

19 With all of that brewing Novell then on December
20 22nd, if we could highlight December 22nd, did make a public
21 release. What was the form of the public release? Copies
22 of our correspondence and SCO's reply are available here.
23 Contrary to SCO's public statements, as demonstrated by this
24 correspondence, SCO has been well aware that Novell
25 continues to assert ownership of the UNIX copyrights. So

1 what it did was invite people, if you want to know what is
2 going on, if you want to see for yourself what the agreement
3 say, if you the consuming public want to know the answer, we
4 invite you to look at it. That is how Novell responded.

5 It is for that, making available to the public the
6 actual position by Novell, that there is a claim of slander
7 here. None of that comes close to any claim of
8 constitutional malice. First of all, because Novell has not
9 made a false statement. It did not transfer ownership of
10 the copyrights. Second of all, those who made the
11 statements did not believe at the time that they were false
12 statements. Third, they were not made with the requisite
13 level of malice.

14 Now, I would like to speak just for a minute or
15 two on the issue of damages. The suggestion has been made
16 somehow that Novell has done these atrocious acts and ought
17 to be held liable for damages, and one of the measures of
18 damages is what did the marketplace do in reaction to the
19 real world?

20 Well, if we could take a look at just a summary
21 then of what really happened in the real world. People
22 dispute to this day that Linux infringes UNIX. That has not
23 been proven, it has not been established, and the entire
24 damages analysis that you have heard in this court from Dr.
25 Botosan is premised on the notion that somehow there is

1 infringement. That hasn't been proven. It is hotly debated
2 and it is contested and users of Linux to this day reject
3 the notion that there is infringement.

4 There were indemnification programs offered, that
5 is software companies, Novell being one, Red Hat, another
6 large software company and others, told their users we do
7 not believe there is a problem here, but if you get into
8 trouble, we'll cover you.

9 There is the issue about the G.P.L. I don't have
10 time to explain that in-depth, but you heard that term, and
11 essentially what it means is that the general public license
12 under which Linux is used would provide protection for Linux
13 users.

14 You heard as well that Linux users could quickly
15 adapt and they could design around and that they would not
16 pay a licensing extraction fee to SCO. Instead, they would
17 just design around it. The suggestion of the price, and you
18 have heard about that, and people were not willing to pay
19 what SCO was charging and there was this tremendous public
20 anger.

21 That is not all. I will only make a brief
22 reference to this. The claim by the damages expert for SCO
23 has been that looking in a but-for abstract world what would
24 have happened? We have evidence from the real world, what
25 really happened, and we know that in 2004 in this litigation

1 a judicial ruling was issued that at a minimum raised a
2 serious question as to whether amendment number two
3 transferred copyright ownership to SCO. That was available
4 to the public, and consumers were able to look themselves at
5 the details of the ruling, and to read the rationale of the
6 Court and make their own decision based on that ruling that
7 called into question SCO's claims.

8 That was not all. On August 10th, 2007 in this
9 courthouse, not Judge Stewart but another judge, issued
10 summary judgment in favor of Novell, holding as a matter of
11 law that Novell did not transfer ownership of the copyrights
12 under the asset purchase agreement, including amendment
13 number two. So consumers in 2007 looking at the rulings of
14 a Federal District Judge concluded or could conclude that
15 there was no reason to buy a SCOsource license.

16 Was that determination reversed? Yes. That is
17 why we are here today. But the important rationale is what
18 were consumer thinking at the time when they were able to
19 look at the rulings being issued by a Federal District Court
20 judge?

21 THE COURT: Mr. Brennan, you have four minutes
22 left.

23 MR. BRENNAN: Thank you, Your Honor.

24 Now, there were many who rejected the claim that
25 Novell had any influence on buying decisions. This is one

1 of many. Let me use as an example H.P. It was put in front
2 of you the notion that somehow Hewlett-Packard did not take
3 a license and didn't enter into this agreement because of
4 Novell. I urge you to take a look at Exhibit D-20 when you
5 have a chance to retire to the jury room. You will see very
6 clearly why Hewlett-Packard for so many reasons, none of
7 which even reference Novell, decided not to enter into that
8 agreement that was suggested to you was a fait accompli. I
9 urge you to take a look at that.

10 Now, how do we conclude this? I would like to
11 show you another copy of the special verdict form in this
12 case. If we could take a quick look at it on the Elmo. The
13 first question asks did the amended asset purchase agreement
14 transfer the copyrights? No. How do you know that? You
15 can look at the agreements themselves. Look at the words.
16 Look at what they say. Look at the amendments. The
17 contract does not support the claim being made here.

18 If you answer that question no, as we suggest the
19 contract compels, then that really is the end of your
20 deliberation. The instruction suggests that you sign the
21 verdict form and turn it in. So my plea to you after
22 considering the evidence is mark it no.

23 Now, if it goes past there the question is whether
24 or not Novell slandered the title, and may I suggest this,
25 that if you get into the jury room and begin your

1 deliberations and there is an initial conference about what
2 has happened here, and if there is a question in the mind of
3 any of you, if any of you has some doubt in your mind
4 whether there was a transfer of copyrights, I submit that
5 you're reasonable people and if a reasonable person can
6 differ on that question how on earth could Novell have
7 committed this atrocious act of slander if reasonable jurors
8 would have a question in their own minds about whether the
9 contracts permitted it?

10 This constitutional standard is high. When you
11 walked into this courthouse you saw a beautiful painting on
12 the wall. That painting is a representation of the signing
13 of the Constitution. That Constitution protects us. It
14 protects people from spurious claims. It protects them
15 against making outrageous demands for money. It protects
16 you and me so that we in a free market and in a free economy
17 and a free country can state our position without fear.

18 Ladies and gentlemen of the jury, there may be a
19 difference of opinion, there may be a question of the legal
20 merits, but this contract supports Novell's claim and it was
21 entitled to rely on it and it was entitled to protect its
22 position.

23 We're very, very grateful for your time and
24 attention to these matters. Novell is not liable. It did
25 not slander title. It owns those copyrights. If there is a

1 reasonable difference of opinion, at the very least it did
2 not slander title. It and you and I are protected by this
3 beautiful Constitution.

4 Thank you, ladies and gentlemen.

5 THE COURT: Thank you, Mr. Brennan.

6 Ladies and gentlemen, why don't you stand up. You
7 have another 12 to 15 minutes here, and I want to make sure
8 that you have got some energy left for it.

9 (Standing recess.)

10 THE COURT: Go ahead, Mr. Singer.

11 MR. SINGER: Thank you, Your Honor.

12 Ladies and gentlemen, in 12 minutes I'm planning
13 to touch on only a few topics, but you will have the
14 opportunity back in deliberations to think about what you
15 heard, think about the credibility of the witnesses you
16 heard over three weeks, and think about the documents. I
17 would like to touch on a few points.

18 May I borrow that book that you had up here?

19 MR. BRENNAN: Certainly.

20 MR. SINGER: This repeatedly was told to you to be
21 the contract, the sanctity of the contract. The problem is
22 is that you won't find anywhere in this book amendment
23 number two, because that was entered into a year later.
24 That is what fixed the problem in this contract. It is part
25 of the account, and as you heard Judge Stewart instruct you,

1 it prevails over any inconsistent terms. We are not here
2 saying, well, there is some unwritten language that we are
3 relying on. This is the written agreement that controls.
4 That won't be found in this book, but it is the most
5 important part of the case. It is the most important part
6 because that with a few other things, which really aren't
7 disputed, proves that the copyrights transferred.

8 The language, as we have seen repeatedly through
9 this trial, says that the copyrights are excluded except for
10 those required for the UNIX and UnixWare business. Now,
11 there has been no denial of the two points of evidence that
12 clearly indicate that those were required. One was their
13 own admission on June the 6th. You can determine whether
14 that is just a casual admission, but with their general
15 counsel involved they say that it supports SCO's position.

16 The second point, which was not addressed at all
17 by Mr. Brennan, was the testimony of Ms. Amadia who
18 supposedly did draft that agreement. She started out in her
19 direct examination supporting Novell's position. But, as I
20 explained to you and showed you during my closing, under
21 Mr. Normand's cross-examination she admitted that if the
22 copyrights were required for the business, they transferred.
23 That is just the plain language of the agreement.

24 Then the question you have to ask yourself is
25 simply are the copyrights for the software business, the

1 prime intellectual property to UNIX and UnixWare operating
2 systems, required for that business? Virtually every
3 witness in here has said, yes, they are and that it is
4 obvious, that it would be absurd to have it without it.

5 Even if you could sell UnixWare products on a
6 license, and there is no express license in any of this,
7 there is only a license back to Novell, there is no license
8 to SCO, but even if you could do that, you could not protect
9 the intellectual property. That is a part of the business,
10 protecting the intellectual property.

11 That makes it clear and that is why Novell, when
12 confronted with this on June 6, 2003, admitted that we were
13 correct.

14 Now today in this court they say something
15 different. They tell you that we are trying to extract a
16 license fee, a term that you repeatedly heard from Mr.
17 Brennan. I suppose that when Novell licenses its
18 intellectual property it is not an extraction, and when
19 I.B.M. does that it is not an extraction. Well, it is not
20 an extraction for SCO either. It is a business. It is a
21 licensing business. You have a right to offer to consumers
22 the opportunity to purchase a SCOsource license. They can
23 make an intelligent decision, especially since we are
24 talking about sophisticated corporate consumers.

25 There is nothing wrong with that, except that as

1 Mr. Pisano told you, that program is no gone. It can't be
2 resurrected. The market has moved on. That program is
3 dead. That is why you need to consider that in terms of a
4 damage award, rather than SCO now being able to go into the
5 market years later and try to start selling SCOsource
6 licenses.

7 Then they come to us and they say, well, there
8 will be other litigation. Litigation, of course, is nothing
9 more than another constitutional right, a right to go to the
10 courts, a right that they tried to block. If SCO has proper
11 rights, we trust the courts to vindicate. That is no
12 different than any other citizen, corporate or individual
13 should have. It is, of course, the right that I.B.M. and
14 Novell have availed themselves of throughout this.

15 Then Mr. Brennan talked about the First Amendment.
16 There was a very interesting phrase he used when about near
17 two-thirds of the way through his closing he approached the
18 First Amendment. He said now we get to the important
19 question. I submit to you the reason he phrased it that way
20 is he knows that this is a case where copyright ownership in
21 fact is with SCO, and he knows that these statement were
22 false, and that the difficult question, relatively speaking,
23 the one that he is counting on is that you will find that
24 these statements were in fact not slanderous under the First
25 Amendment.

1 I would suggest to you to look at the jury
2 instruction that Judge Stewart provided on that subject of
3 constitutional malice, because it weighs the interests of
4 free speech against protecting people against slander. The
5 test is recklessness, and I went over what went on on May
6 28th that was reckless, not finding out whether that
7 amendment was signed, and then we have deliberate
8 publication and republication of the slanders, which is done
9 knowing that amendment number two has been signed, up to and
10 including March of 2004 when Chris Stone stands up and goes
11 so far as to say we still own UNIX. Those are slanders and
12 those are actionable and those are liable.

13 One more point before I turn to some of the
14 evidence. They also talk about these court decisions, and
15 those were reversed as Judge Stewart told you. Of course,
16 they have nothing to do with damages, because the damages
17 presume the slander never occurred and you would never have
18 any litigation and you would have these court decisions to
19 begin with. That is a little slight of hand I think from
20 Novell.

21 If we turn to what Novell has told you, they are
22 saying you only get an implied license. Mr. LaSala admitted
23 that. You will see under the instructions that an implied
24 license does not give you the rights of a copyright owner.
25 That does not give you what you need for this business. You

1 also had some discussion about the empty table with the
2 Brobeck Phleger firm, which they know, of course, is a firm
3 that no longer exists. They also should know that Brobeck
4 indicated its position on January 31, 1997, in this exhibit,
5 which was submitted to the European union where they stated
6 that SCO acquired the copyrights for UNIX. Maybe they
7 didn't testify here because the firm isn't here, but you
8 know what their position is.

9 Now, they also have raised that, well, we didn't
10 get all the rights from Santa Cruz Operation when that was
11 sold to Caldera. But the stipulated facts, the very first
12 thing, ladies and gentlemen, that you heard at the beginning
13 of the trial said that we have acquired all of the assets
14 that Santa Cruz acquired from Novell. That is a non-issue.
15 In fact, if you look at the document, it specifically
16 assigns all of the copyrights and it says the assigner has
17 the full power and authority and all rights necessary to
18 transfer those rights. This is what we call a red herring
19 issue.

20 Now, the issue on amendment number two is whether
21 the copyrights are required for the UNIX and UnixWare
22 business to protect it. You see a number of statements here
23 which indicate how strongly those are required, that it
24 would be ludicrous to operate the business without it,
25 equating it to oxygen, that the copyrights have to go with

1 it. We couldn't protect our software and we would be out of
2 business.

3 In response to that they point to Mr. McBride who
4 says, yes, we can try like these licensees to sell product,
5 but we can't protect the intellectual property without the
6 copyrights. Without the intellectual property being
7 protected the products soon become meaningless, because the
8 intellectual property in our products are out there, and if
9 they are in a free product, it is very hard to compete with
10 something that is being offered for free.

11 Now, they also suggested that what we could
12 protect was this box, the Lego on top of another Lego.
13 Except you'll recall Mr. Nagle saying that the UnixWare
14 system embraces almost entirely at the time of the sale,
15 UNIX. So it would be a very slivered, small sliver they
16 went to give us of intellectual property, and yet they want
17 to maintain all of the key intellectual property that gives
18 that strength, the intellectual property which if just
19 distributed widely would undermine the products that SCO was
20 seeking to sell.

21 That is why all of these people, including their
22 C.E.O. and other individuals agree, that you have to have
23 the copyrights, and that is why they transferred to us under
24 amendment number two.

25 Now, I would like to address a few other issues

1 that came up in the course of the closing. One of those was
2 a statement that there was an alleged term sheet from
3 Mattingly's garage. Now, it has been testified to, and
4 Mattingly was a Novell executive, and to be the term sheet
5 actually used before the board meeting at Novell on the 15th
6 of September to tell the executives what the summary of the
7 deal was. It didn't mention anything about retaining
8 copyrights.

9 You'll note that it was not produced for the first
10 time by Mr. Mattingly. Those two documents were produced by
11 Novell. They are SCO Exhibit 570 and SCO Exhibit 83, which
12 are also in evidence, and there is no question about these
13 being the actual term sheets. You heard Mr. Frankenberg say
14 that this was presented, and you heard Mr. Bradford admit
15 that he was not aware of any other term sheet.

16 Now, let's talk a little bit, if we might, about
17 the witnesses who testified. I don't think that anything
18 that Mr. Brennan said takes away from what we said a few
19 minutes ago, that you have to disbelieve ten different
20 witnesses, half of them are from Novell, to believe their
21 position that the intent of this deal was not to transfer
22 the copyrights.

23 Now, they have taken a lot of shots at witnesses,
24 including their own executives, and I would like to go
25 through some of them, those individuals.

1 THE COURT: You have two minutes.

2 MR. SINGER: Steve Sabbath, who testified that
3 this I.B.M. declaration was not his testimony. You heard
4 Kim Madsen, and she was not equivocal, and she told you what
5 was involved. Burt Levine, here is a gentlemen, it is true,
6 he reviewed the copyright exclusion language. What did he
7 say? It was intended to apply to NetWare. It would be
8 unethical to have excluded the UnixWare copyrights.

9 Michael DeFazio did talk about the need to
10 bulletproof a royalty stream. That was done by having
11 separate equitable interest in the royalties. You have the
12 draft language of amendment number two, but Ms. Amadia when
13 she testified on cross-examination admitted under the final
14 language, the approved language, that if the copyrights are
15 required, we get those.

16 Now, you also heard about Tor Braham and all these
17 handwritten notes which are true, and that is why something
18 like this done at the last minute didn't get corrected until
19 a year later. It got fixed. That is the agreement that you
20 have to interpret here.

21 The one person they really can't take shots at is
22 Bob Frankenberg. He has no interest in SCO. You know the
23 old saying, that is where the buck stops. He came in here,
24 and I don't have to look at slides, his testimony is recent
25 enough in your minds to know where he stands, that it was

1 clearly the intent to transfer these copyrights. That while
2 Mr. Bradford and Mr. Tolonen had important roles in the
3 company, they were not the individuals that he charged with
4 selling this business. Those were Mr. Thompson and
5 Mr. Chatlos and others. The deal they negotiated called for
6 the transfer of those copyrights.

7 Now, with respect to damages you have heard, I
8 think, two very credible witnesses, witnesses who if you put
9 on the scales against a witness who has been paid to testify
10 in over 200 cases, and was not a professor at Harvard, has
11 not done any surveys, only comes up with a zero number, I
12 think you'll find both Professors Botosan and Pisano very
13 persuasive and that their views are reasonable. You will
14 ultimately need to determine that.

15 I ask that you keep in mind the importance of this
16 case to SCO, given what it has had to go through for these
17 years, and to have to not have clear title to the crown
18 jewels of the business, the UNIX and UnixWare copyrights
19 that were a part of this transaction and which belonged to
20 them.

21 Again, on behalf of SCO and on behalf of my
22 colleagues and myself, thank you so very much for your
23 careful consideration.

24 Thank you.

25 THE COURT: Thank you, Mr. Singer. You can

1 breathe now.

2 MR. SINGER: I didn't want to go over your
3 deadline, Your Honor.

4 THE COURT: Ladies and gentlemen, as we began this
5 trial we selected 13 of you with one of you being an
6 alternate juror. Ms. Cooper, it will be you, which means
7 that you will be excused as soon as the jury is excused in
8 just a moment. You will not be allowed to deliberate with
9 the jury. That will perhaps be of some disappointment to
10 you. That means I don't have to give the rest of this
11 speech.

12 Upon reflection, if you think to yourself that
13 perhaps you are disappointed that you did not get to help
14 make the decision, I do want you to know that your being
15 involved the last three weeks was a very, very important
16 part of what we needed here. You will be excused with our
17 gratitude, as I said, as soon as the jury is excused as a
18 group in just a minute.

19 I do want to give an instruction to you, Ms.
20 Cooper, as well as all of the jurors, although I normally
21 would have given this at the end, as to whether or not you
22 discuss this with anyone, including the attorneys in this
23 case, or the media or anyone else, after the deliberations
24 are all completed and the verdict has been rendered, I will
25 leave up to you. You may or you may not. You are not

1 prohibited from doing so and that will be entirely your
2 decision.

3 With that, Ms. Malley, we need Mr. Jensen, I
4 suppose.

5 This is Ben Jensen and he is from the marshal's
6 office. He will have the responsibility to take care of you
7 during the course of these deliberations. I want you to
8 listen to the oath that he is about to take, because
9 although it is addressed to him, it will indicate to you as
10 jurors somewhat your conduct as well.

11 Mr. Jensen, if you would please come forward.

12 (WHEREUPON, an oath was administered.)

13 THE COURT: Ladies and gentlemen, you have now
14 heard all of the evidence and you have been instructed on
15 the law and you have heard the closing arguments, and you
16 will now be allowed to go back to the jury room and to begin
17 your deliberations.

18 Ms. Malley will be in shortly with a copy of the
19 jury instructions that I read to you earlier this morning,
20 as well as all of the exhibits admitted in this case.

21 Mr. Jensen, if you would please now assist the
22 injure into the jury room.

23 (WHEREUPON, the jury leaves the proceedings.)

24 THE COURT: Counsel, if you would please make
25 certain that Ms. Malley has telephone numbers to get ahold

1 of you. If a note comes from the jury that has any
2 substance to it, then I will ask you to come here and I will
3 have you approve my response to it.

4 If it is something very simple, for example, if
5 they should request a dictionary, the response to that will
6 be no, and instead of making everybody come over here, I
7 will simply say, yes, we agree it ought to be no, and we
8 will handle that by telephone. If there is anything more
9 than that, then I will ask one or more of you from each side
10 to be here to approve whatever response the Court may give.

11 I do want to say a couple of last things to you
12 all. I want to thank you on behalf of Mr. Copeland, because
13 you had not met your apparent quota of at least one motion
14 per day, he would have spent this last week as an aimless
15 wasteful soul wandering the streets of Salt Lake.

16 I also think that on behalf of the Court I have a
17 special expression of gratitude to Mr. Calvin and Mr. Lee,
18 because they have played an extraordinary role on behalf of
19 both sides as well as the Court's interest in this case, and
20 with the way they have applied the technology that federal
21 taxpayer dollars have recently paid to upgrade this
22 courtroom. They have really made this system almost seem
23 worthwhile.

24 I want to say one other thing, and that is that if
25 any of you have loud teenagers and you want to know where to

1 get this white noise, you can talk with Ms. Malley.

2 One last thing, counsel. I am very sincere when I
3 say this. In the ten years I have been a judge I have never
4 had a collection of such fine attorneys in this courtroom at
5 one time. I want to thank you not only for your competence
6 but in particular for your professionalism. The way that
7 you have treated one another and the way that you have dealt
8 with court personnel and the court has been genuinely
9 appreciated in a case that has been hotly contested and the
10 stakes are very high, and you have acquitted yourselves
11 extraordinarily well and you do have the sincere gratitude
12 of this Court. I wanted to make sure that you heard that.

13 We'll be in recess until we receive either a
14 verdict or a note.

15 (Recess)

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