IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation,

Plaintiff,

vs.

NOVELL, INC., a Delaware corporation,

Defendant.

AND RELATED COUNTERCLAIMS.

CASE NO. 2:04-CV-139TS

BEFORE THE HONORABLE TED STEWART

March 10, 2010

Jury Trial

Volume II

A P P E A R A N C E S

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March 10, 2010 8:30 a.m.

P R O C E E D I N G S

THE COURT: Good morning.

MR. ACKER: Good morning.

MR. SINGER: Good morning.

THE COURT: Counsel, let me deal with a couple of things, and then I know you have some things as well.

Did we get ahold of Mr. Hunsaker yesterday to determine whether or not he was familiar with or related to Thomas Hunsaker, juror number nine?

MR. HATCH: Your Honor, I did notice on the list that I read, that Mr. Hunsaker's name was on the list, although I have not been able to check the transcript to see if it was there. We did talk to Mr. Hunsaker, our witness, not the juror, and he indicated that he has no knowledge that this person is related to him in any way or does he know him, the Hunsaker that is the juror.

THE COURT: In light of that, Counsel, do you see any reason to pursue it, Mr. Acker?

MR. ACKER: No, Your Honor.

THE COURT: Thank you.

We had yesterday talked about the plaintiffs submitting their amended jury instructions to the Court tomorrow. I understand, Mr. Hatch, that you have requested

until Friday. The Court will give you until Friday, but I'm going to ask that the parties meet one more time between now and Friday to see if you cannot work out more of these instructions. The reason why is because it appears you're coming closer together, and I think a face-to-face meeting would probably be more helpful.

If that is not productive, then you go ahead and submit your jury instructions by Friday, but the Court will then not request anything further from the defendants, but rather we'll put together a package and give it to you next week and allow you both to respond to it, and then by the third week we will be able to give you a further revised package.

MR. HATCH: Thank you, Your Honor. That will be fine.

THE COURT: Okay.

I'm curious. We do have to deal with the opposition, not the opposition but the concerns with Mr. Messman's deposition. Any there other objections with any other deposition witnesses or are we down to Mr. Messman and --

MR. NORMAND: Your Honor, we have been handling these on sort of a rolling basis, and I think we are through six or seven.

THE COURT: Okay.

MR. NORMAND: What we are trying to do is take them day to day and get them to Your Honor two days in advance, at least a day and a half in advance, and take it from there.

THE COURT: Thank you. I was just hoping that the answer was, oh, we are done, but obviously my optimism is without foundation. I do appreciate what you're doing, Mr. Normand, and whoever is working on the defendant's side, and it is very helpful. I didn't want to seem ungrateful.

Do you want to argue the objection to Mr. Messman's deposition portions now, counsel? Do you want the Court simply to rule on it?

MR. NORMAND: Your Honor, we did, and you probably saw, we sent in a letter on the issue in which we summarized our objections. I am not sure there is much more to say, unless there is room for argument about whether the material that we regard as hearsay is coming in for some other purpose.

THE COURT: That is the Court's concern.

Who represents Novell on this?

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

THE COURT: Mr. Jacobs, let's deal with this quickly, if we could.

First of all, let's deal with the issue of the statement that Mr. Messman would testify to regarding the

David Bradley representation in a board meeting about what was and wasn't being conveyed by the original agreement. It would seem to me, Mr. Jacobs, that it would clearly be hearsay. It is certainly not a statement by a party opponent, so what would be the justification for allowing that portion of Mr. Messman's video deposition to be heard?

MR. JACOBS: Mr. Messman's state of mind, Your Honor. The plaintiff has placed the state of mind at issue and what did he know when Novell was issuing the statements that they challenge about ownership of the copyrights. Mr. Messman's recollection of what happened in the board meeting relates to that and to his state of mind.

THE COURT: So it is not being offered for the truth that Mr. Bradford represented that the copyrights were not being conveyed?

MR. JACOBS: That is correct.

THE COURT: Mr. Normand, do you wish to respond to that?

MR. NORMAND: Your Honor, we are fine with that so long as the jury is so instructed.

THE COURT: How do we make that instruction? Do we interrupt the video?

MR. NORMAND: I think there will be other points in other videos where we are interrupting to explain either a document that is coming in or for purposes of trying to

get an exhibit that is coming in admitted, so I don't think it is going to be unnatural to be stopping the video from time to time. We would propose to do that.

THE COURT: All right.

MR. JACOBS: This is a little peculiar, Your Honor, in that the jury has already seen minutes of this board meeting that account for the various statements that were made. I think if they got an instruction now, in the wake of Mr. Messman's testimony that this is not for the truth, but rather for his state of mind, I think that they could be quite confused.

On this particular issue, because of the record of what happened at the board meeting, I think an instruction would be overdoing the issue of the distinction between state of mind and what happened. There may be other cases in which the jury should be told you're going to hear about a lot of statements that were made out of court, and they are being offered for the following purposes.

THE COURT: Mr. Normand, go ahead.

MR. NORMAND: Well, Your Honor, there is the potential for confusion because of the cumulativeness or redundancy and --

THE COURT: Well, hold that point for just a minute, because I think that if I decide this on Mr. Bradford then I probably have to decide something

similar on another witness. Let's not decide that right now.

Let's go on. The next one would be the conversations with Mr. Messman with some SCO employees about this issue. What is the intent of that being offered? It is something that is clearly hearsay within hearsay.

MR. JACOBS: Actually, I believe what Mr. Messman is testifying to in the relevant passage is what he was told about the conversations his subordinates in the company had with SCO representatives, and so I think your characterization is correct.

Once, again, SCO is placing into question what did Mr. Messman know and what did he do before Novell released the statements it released over his name? So the fact that he was informed by his subordinates that SCO representatives were contacting Novell about the copyrights is directly relevant to his state of mind.

MR. NORMAND: Your Honor, built into this testimony is actually double hearsay. I suggest we would need a double instruction and there is a real potential for confusion here. The testimony is I think Chris Stone mentioned to me that Darl had approached him several times with regard to transferring the copyrights. In effect he is testifying that Chris Stone told me that Darl told him that he wanted the copyrights. It is double hearsay and it is

confusing.

THE COURT: I would agree. I will not allow it to be viewed by the jury. Okay.

The third one has to do, and now this is the plaintiffs trying to get in the Wall Street Journal article, which Mr. Messman apparently may have or may not have seen, and the question would be whether or not the plaintiffs should allow it to be heard by the jury, even though arguably we have the same issue here of whether it is being offered for the truth.

MR. NORMAND: Your Honor, Mr. Singer will speak to this.

THE COURT: Go ahead.

MR. SINGER: Your Honor, this issue is actually going to come up first with Mr. Thompson and I was going to raise it in advance of his testimony. This is being offered under the principle that the Wall Street Journal came out with an article after the deal was announced, which we think reports it in a way consistent with SCO's position, and that no one reacted and said that was wrong.

There is case law which indicates that when a party is aware of a published article but took no action to clarify it, then that is admissible evidence. Not for the truth of the matter, but their lack of reaction being put on notice that this is how the deal was being considered.

THE COURT: Mr. Jacobs.

MR. JACOBS: I have not seen that case law and it is a little peculiar. We have a newspaper article, and the issue right now is Mr. Messman's deposition, unless we want to convert it over to Duff Thompson.

THE COURT: Let's focus just on Mr. Messman's deposition.

MR. JACOBS: In Mr. Messman's deposition he is asked did you see the article? It was, what, 14 years before. He says I don't remember. Did Novell take any action? He says I don't know. To put in an article through a witness who says I don't remember and I don't know, that is hearsay, and it is irrelevant and lacks probative value.

THE COURT: Mr. Jacobs, I would have to respectfully disagree. I do believe it is relevant and relevant to the point that there was apparently no reaction to that article. As you just characterized, whether or not he saw it is not clear from his deposition testimony.

What I'm going to do is I'm going to permit both of those disputed portions to come in. It is not my intention right now to give an instruction to the jury, because I do not want to draw undue attention to this. Part of the reason for this, Counsel, is that Mr. Messman is going to be testifying, as I understand it, later. To the extent there has to be rehabilitation you're going to be

given the opportunity, both of you, to do it. I think it is better to let both of those disputed portions to come in, but with nothing special to draw attention to it. I will not allow the hearsay on hearsay portion. All right.

MR. JACOBS: Yes, Your Honor.

I would note that their basic theory of Mr. Messman's failure here, as evidenced in their opening statement, is the failure to investigate on his part. We're going to be addressing that as a matter of law through the jury instruction process, but before Mr. Messman's testimony and as this process has unfolded a little bit, I think we would like to talk to you again about whether he can describe the various steps that led him to his view that Novell retained ownership of the copyrights even if they represent in some sense hearsay.

THE COURT: Okay. You'll obviously bring that to my attention when you think the time is right?

MR. JACOBS: You bet, Your Honor.

THE COURT: Thank you, Mr. Jacobs.

One last thing, Counsel, from me. The court reporters have expressed concern with being able to follow the video depositions. There are occasions certainly in this courtroom in the past where that has been very difficult. However, Ms. Walker was given a demonstration of the deposition and she thinks it will not be difficult for

them to make a record from that.

If, however, that doesn't prove to be true, we may have to ask that you submit to the court reporters the written transcript of the video depositions so that they can use it to help correct what they may take.

MR. JACOBS: Yes, Your Honor.

Just to be clear on that point, we had a discussion about what the record would reflect with respect to deposition testimony, and it is our view that deposition testimony played in court is testimony, and I think the intent of Your Honor's comments is that the reporters will actually take it down word for word, and if they need to correct it based on a submission of the transcript, they would do so.

Is that correct?

THE COURT: That is correct.

MR. SINGER: That is fine.

THE COURT: It is not the intention, and let me make this clear, that we provide to the jury copies of either the written or video depositions.

Mr. Singer, do you have something?

MR. SINGER: Yes, Your Honor.

Overnight, of course, we got the daily transcript, and I have to say I was even more concerned about the whole line of questioning about Section 9.5, the integration

clause in connection with the matter of the jury instruction, which Novell has not agreed with.

If I might approach?

THE COURT: Yes.

MR. SINGER: I will submit what we proposed to Novell.

THE COURT: This is a jury instruction to be given immediately?

MR. SINGER: Yes, Your Honor.

THE COURT: All right.

MR. SINGER: Your Honor, our concern is that the reference to 9.5 has no relevance here other than to tell the jury that they shouldn't pay attention to exactly what they should pay attention to, the intent of the transaction. That has the risk of this jury now not paying attention to what is going to be very substantial amounts of testimony over the next days and weeks about what the parties said to each other about the intent of this deal, exactly what the Tenth Circuit said this trial is supposed to be about. That shouldn't have happened. 9.5 should not have been used to try to suggest to the jury that that type of evidence in this case is not relevant.

THE COURT: Mr. Jacobs.

MR. JACOBS: Yes, Your Honor.

Number one, we don't need an instruction now. At

best the jury should be told you're going to hear a lot of evidence and I will instruct you on the law to be applied to that evidence at the end of the trial. Keep an open mind.

Number two, is the cherry picking from the Tenth Circuit opinion, and proposing an instruction that would actually flip this whole topic away from the written agreement into what the parties were thinking.

The third point is the questioning was entirely appropriate. The questioning was about what this witness understood at the time, what Mr. Frankenberg understood the purpose of the written agreement was in documenting the parties intent. It was not questioning that went to ten years later do you think this Court and jury should be hearing -- 15 years later -- what you thought at the time. I think we are overdoing the objection to the testimony.

I would note, moreover, that Mr. Brennan backed away from further questioning under the Court's suggestion that if he proceeded we might be in an area that Novell --

THE COURT: Mr. Singer, I am concerned, and Mr. Jacobs has pointed out something that the Court has had concern with, and that is that if I were to do what you suggest, that would in effect undermine the Court's previous rulings on motions in limine, precluding the defendants from referring specifically to the Tenth Circuit's decision.

I believe Mr. Brennan came very close, however,

yesterday to raising it to the level where perhaps I may have to do what you have suggested, but I think he backed away.

I just have to caution the defendants that if they continue to pursue questioning of additional witnesses to the point where the Court believes that it is misrepresenting what ultimately the jury has to consider, then at that time I will revisit the issue, but I am not going to give this instruction now.

MR. SINGER: Thank you.

Your Honor, we do have one more issue that perhaps is appropriate to raise now before Mr. Thompson is on the stand.

THE COURT: All right.

MR. SINGER: That is while we don't propose to get into the interpretation of amendment number two with Mr. Thompson, since he didn't negotiate it, we do intend to get into the fact that he was on the SCO board of directors at the time when this was approved. He approved it. He has sufficient knowledge then for us to at least elicit that and have that provision read to the jury which is in evidence, that he was on the board at the time that that was approved. He has personal knowledge of that and we don't believe that that is in any way inconsistent with the Court's earlier ruling on the motion in limine.

We don't propose to get into how he would interpret the language or the negotiations because he did not participate in that part.

MR. ACKER: Your Honor's ruling on the motion in limine number 16 is clear that Mr. Thompson can't testify about amendment number two. Now, if they knew at the time that they wanted to put this testimony in, they should have raised that in the motion in limine, and the motion in limine lay out what Mr. Thompson knew or did not know about amendment number two, but the Court has ruled.

MR. SINGER: We did note in our opposition to the motion in limine that he had knowledge of the circumstances of amendment number two's passage. There were about eight or nine of these dealt with in one order, and I don't think that perhaps this specific part of his testimony was treated in that order.

THE COURT: If you're confining it to did he vote for -- that is what you are saying?

MR. SINGER: He was on the board.

THE COURT: He was on the board.

MR. SINGER: He does not recall whether he voted for or abstained, but he was on the board when this was considered.

MR. ACKER: It does not sound like he has much recollection about it at all, Your Honor.

THE COURT: I think I'm going to have to wait and see what foundation you lay. If you lay a proper foundation I will allow him to answer that very narrow question, but the Court will not allow you to ask anything that may lead him to be discussing what the amendment meant or anything to the merits of the amendment.

MR. SINGER: Yes.

The amendment is already in evidence and I would just intend, when laying the proper foundation, to have him read that section and ask if this is what came before you on the board at that time, which was an amendment to the A.P.A.

THE COURT: There is going to have to be some foundation that he remembers that.

MR. SINGER: Yes.

MR. ACKER: Just on one other point, the point that Mr. Singer raised yesterday, SCO Exhibit Number 1 is the A.P.A. with amendment one and amendment two attached. I'm going to use today Novell Exhibit 1 which is just the A.P.A. without one and two, because I want it to be very clear in response to Mr. Singer's objections yesterday what exhibit we're talking about and what the witness's testimony is about that specific document. I just want to make that clear that I am going to do that with Mr. Thompon today.

THE COURT: All right. The only concern I have is it is more paper for the jury to have.

MR. ACKER: I understand, Your Honor, but I think that it --

THE COURT: If you have to do it, you have to do it.

MR. ACKER: I think it is important because we are slicing it thin here.

THE COURT: I am speaking generally and I worry about us sending so much paper back there that the jury never makes its way through it.

MR. SINGER: May I be heard on that issue very briefly?

THE COURT: Go ahead.

MR. SINGER: The concern we have is not the extra paper, it is the concern that somehow this will be used with the jury to suggest that the real A.P.A. is this one without the amendment, Novell Number 1, rather than SCO Exhibit 1 which has the amendments. That is a concern which has come about through a number of things that have already occurred in the trial.

THE COURT: Let's see how it plays out today and then objections can be made, Mr. Singer, if you think they need to be.

MR. SINGER: Thank you.

THE COURT: Anything else?

MR. ACKER: No, Your Honor. Thank you.

THE COURT: Ms. Malley, please get the jury.

Is Mr. Thompson in the courtroom? Will you be sending someone for him so that we can move quickly?

MR. SINGER: Yes, we will.

(WHEREUPON, the jury enters the proceedings.)

THE COURT: Good morning, ladies and gentlemen of the jury. I want to apologize to you. As I indicated in one of the preliminary instructions, on occasion you may find yourselves waiting in the jury room while we deal with matters that we have to. We will try to keep those delays at a minimum, but it will happen from time to time during the course of the trial.

Again, I have to ask you, ladies and gentlemen, whether or not any of you violated the very specific instruction that you have been given in reference to your conduct, particularly that conduct outside of the courthouse?

All right. Once again, you passed the test.

Mr. Singer, would you like to call your next witness?

MR. SINGER: Thank you, Your Honor.

We would, and our next witness is Mr. Duff Thompson.

ROBERT DUFF THOMPSON

Having been duly sworn, was examined

and testified as follows:

THE WITNESS: Robert Duff, D-u-f-f, Thompson.

DIRECT EXAMINATION

BY MR. SINGER

Q. Mr. Thompon, do you generally respond to the name Duff?

A. Yes.

Q. If there are references to Duff that is generally referring to you?

A. Yes.

Q. Briefly summarize your educational background.

A. Undergraduate degree in economics, master's of business administration and a J.D.

Q. What institution?

A. Brigham Young University.

Q. All three?

A. Yes.

Q. Would you please summarize your employment after school.

A. I worked in the law firm of Moyle & Draper for a few years. I went to the firm of Callister Nebeker & McCullough. It was originally Greene Callister & Nebeker. I worked there for a number of years. Then I was hired as general counsel for Word Perfect Corporation.

Q. For how long were you at Word Perfect?

A. From 1986 until 1994.

Q. In 1994 was Word Perfect sold to Novell?
A. Yes.
Q. Did you move over at that time to become employed by Novell?
A. Yes.
Q. What were your responsibilities at Novell?
A. I was senior vice president of corporate development and strategic relations.
Q. What did that mean? What type of work did you do at the company?
A. It had to do principally with all of the transaction work that was going on in the company, dealing with various partners in the industry to make sure that Novell was doing that which they needed done, and that they were doing that which Novell needed them to do.
Q. Who did you report to?
A. Bob Frankenberg.
Q. Did there come a time when Mr. Frankenberg indicated that he wanted to sell the UNIX business?
A. Yes.
Q. Approximately when did that occur?
A. That happened, to the best of my recollection, somewhere in the April or May time frame of 1995.
Q. Did he indicate whether he wanted to sell part of the UNIX business or all of the business?

A. The indication to me was that he wanted to sell all of the UNIX business.
Q. What was your understanding of the reason that Novell wanted to sell UNIX?
A. Well, there were a number of reasons, but Novell had purchased UNIX in 1993, two years before, and they had been working on a product they called SuperNos, which was a combination of UNIX and NetWare. It was a very difficult process and it was a very expensive process. The cost just simply didn't justify continuing.

There were 400 people located on this out in New Jersey working on this project, and a number of people at Novell working on this project, and my understanding was that the revenue that they were generating just was not sufficient to justify all of the expense.
Q. Do you recall how much Novell had paid AT&T for the UNIX business?
A. I was not there at the time they purchased it, but I became aware that they had paid something in the neighborhood of $300 million.
Q. Did you anticipate getting as much in selling the UNIX business in 1995?
A. The price really was not an issue. At least my understanding from Mr. Frankenberg was that the price wasn't the issue. The determination had been to get rid of this

cost center, the 400 people, and so when I received my instructions they did not indicate to me any kind of a price threshold that had to be met in order to sell it.

Q. What role were you given by Mr. Frankenberg in connection with selling the UNIX business?

A. I was assigned to conduct the negotiations. My group was assigned to conduct the negotiations. It was not just me. It was a gentleman by the name of Ed Chatlos that worked for me, a gentleman by the name of Ty Mattingly that worked for me, and there were a number of other people that were a part of that team.

Q. Did you seek to identify an appropriate buyer for the business?

A. We did. This was over the course of a couple of months and we met with a number of industry players, specifically including Intel and Hewlett-Packard to get their input on who might be a good candidate for this.

Q. How did SCO come to your attention, Santa Cruz Operation?

A. I didn't know them prior to this time. I was introduced to them through the discussions we had with Intel and Hewlett-Packard.

Q. Who at Intel?

A. Well, the meetings there I remember fairly clearly. It was the only time I ever met Andy Grove, one of founders of

Intel. I met him and another gentleman by the name of -- I believe David House. We had meetings with them and with Hewlett-Packard, and over the course of time -- by the way, Ty Mattingly participated in these meetings and Bob Frankenberg participated in those meetings. It was suggested to us that SCO was a good candidate.

Q. What was your understanding of why SCO was a good candidate to buy the UNIX business?

MR. ACKER: I object. It is hearsay coming from H.P. and Intel if he doesn't have an understanding from another source. I would object. I think he needs to lay a foundation of where that understanding came from.

THE COURT: More foundation is required, Mr. Singer.

BY MR. SINGER

Q. You obtained information from a number of sources with respect to potential buyers; is that correct?

A. Yes.

Q. Did there come a point in time when you and the other Novell executives made a decision to approach SCO?

A. Yes.

Q. Why did you do that?

A. Well, there were a number of reasons. One of the reasons that they made a lot of sense, other than the fact that they were an acceptable party to Intel and

Hewlett-Packard and some of our other UNIX partners -- let me back up.

SCO had a worldwide channel of distribution. That was important in this discussion. It was important to find a company that had significant assets and significant sales reach, and this was a company that was roughly a $200 million a year company. It was a company that had 1,000 or 1,100 employees. They had an international channel of distribution. They were working in the UNIX area already. They were a good candidate in terms of the kind of product we were talking about.

Also, we had talked to a number of our other UNIX partners about this idea of creating a UNIX --

Q. Before you go on, Mr. Thompson, just so the record is clear, the company you were just describing with the number of employees and the worldwide distribution, you're referring to Santa Cruz Operation?

A. Yes.

Q. Please continue as to why you believed Santa Cruz was an appropriate candidate as a buyer.

A. The strategy that was articulated in the discussions internally, Bob Frankenberg, Ty Mattingly and myself and others in the company, was to find a candidate that was capable of putting together a Switzerland type version of UNIX.

You see, most of the UNIX partners that Novell had, especially the large hardware manufacturers like H.P. and IBM and Sun and others, had their own version of UNIX. The reason they had their own version of UNIX is it was built specifically for their type of hardware, and we were looking for someone that didn't have hardware, kind of a legacy set of hardware that they were trying to sell the product for. That is why H.P. was not a good candidate. They already had their own operating system, or their version of the UNIX operating system called Hewlett-Packard H.P.U.X.

No one would have trusted H.P. to take this because they were interested in selling their own hardware. We were looking for someone that would be acceptable in the industry that could design a form of UNIX on the Intel chip that then could be sold to any user and not specifically tied to any kind of hardware.

Q. So was it important to find a buyer that was not itself in the computer hardware business?

A. That was one of the criteria that became part of the decision to use SCO.

Q. Were there other buyers interested in purchasing the UNIX business other than Santa Cruz?

A. I can't answer the question as to whether anyone was interested. We couldn't find anyone that was interested in talking to us that was acceptable. There could have been

many parties that were interested, but they all had some specific agenda. IBM had its own operating system. H.P. had its own hardware and UNIX operating system. Sun had its own hardware and operating system, version of the UNIX operating system. None of them would have been good candidates for the rest of the industry. No one would have trusted them to be the seller of UNIX.

Q. During this summer of 1995 when you were negotiating this deal, did any other party come forward as another buyer to compete for the transaction?

A. Not to my knowledge.

Q. Going back now to the discussions with Santa Cruz Operation, did you personally have discussions with the executives of Santa Cruz?

A. Yes.

Q. Which individuals do you recall having those discussions with?

A. They had a team of people. A gentleman by the name of Alok Mohan was their C.E.O. A gentleman by the name of Jim Wilt was their head of corporate development and was my counterpart. A gentleman by the name of Jeff Seabrook participated in the discussions. Steve Sabbath was their general counsel and he participated in the discussions.

There were others. There were technology people, licensing people, people on both sides, but that is the core

team from SCO that I worked with.
Q. Over what length of time did those discussions occur?
A. Well, the negotiations -- sort of the beauty contest to decide who was a good candidate started in that May time frame. By June we had actually decided to now begin the discussions in earnest with SCO.
Q. At any time during the discussions with Santa Cruz Operation, did you on behalf of Novell say you were going to hold back the copyrights?
A. No.
Q. Would it have made any sense to you to sell a software business without the copyrights?
A. No. My instruction from Bob Frankenberg was to sell the whole business, the whole UNIX business.
Q. Did you participate then in negotiating the business deal through the summer of 1995?
A. Yes.
Q. What was the general nature of the proposed transaction that you came up with?
A. Well, there were several aspects to the transaction. The first was to transfer to them the UNIX business that was existing, the existing UNIX business. The second was to discuss with them a merged product, which was a merger of the product that SCO had been working on and the product that Novell had been working on, which was the UNIX version.

That was the second aspect.

The final aspect was that there would be some kind of a, quote, white box, which basically was that SCO would sell Novell's software through its channel.

I should be very clear. White box was their way of referring to the NetWare product. Novell referred to all their product as the red box, because their Novell Netware came in a red shrinkwrapped box. When they negotiated with other parties, such as previous to that time in the spring we had negotiated with IBM on some issues, we had talked about IBM selling a blue box, basically IBM's color, blue, and that they would sell NetWare through their channel.

Finally, in this instance it was the white box, which was SCO selling the NetWare software.

Q. Was this an important part of the deal to Novell?

A. To sell the white box?

Q. Yes.

A. Well, Novell had a sales model which was a leveraged model, meaning that if they could have any one party selling lots and lots of product through their channel, that was a good thing. Rather than develop their own sales channel of millions and millions of resellers, they wanted to use this leveraged model, and so the idea of having SCO sell product was a great idea.

Q. Now, was there a meeting in Palo Alto in the summer of

2005 with Santa Cruz representatives about the transaction?
A. Did you say 2005?
Q. I did. I meant 1995.
A. There were a series, a lot of meetings in the summer of 1995 between Novell and SCO in Palo Alto, Los Gatos, San Jose, all over the place in the bay area.
Q. Do you recall a meeting in Palo Alto with the Santa Cruz executives where you discussed what would Novell be selling to Santa Cruz?
A. Yes. I have in my mind a specific instance at the SCO counsel's offices. SCO was represented by a firm by the name Brobeck, and I remember meeting on the terrace of their offices with Alok Mohan and Jim Wilt and other members of our team to talk about the deal.
Q. At that time do you recall what you said regarding how much of the UNIX business was going to be sold to Santa Cruz?
A. Well, my recollection is exactly the same as I have given, that we're selling you all of the business, lock, stock and barrel, the whole thing.
Q. By the whole business, did that include both UNIX and UnixWare?
A. Yes.
Q. What was your understanding as to whether the copyrights were also being sold?

A. Well, it was the whole business. We were giving them source code, all of the manuals, the customer lists, we were giving them the whole business. I assumed and I understood that we were giving them the copyrights as well.
Q. Would holding back the copyrights have been consistent with your instructions from Mr. Frankenberg, the CEO?
A. I received no instructions from Bob Frankenberg to hold back the copyrights. Indeed, I never heard anyone in the course of those negotiations for several months talk about holding back the copyrights.
Q. Did you in turn ever instruct anyone on the deal to hold back the copyrights?
A. I did not.
Q. What was Mr. Ed Chatlos' role in the transaction?
A. Well, Ed was the primary negotiator. Ed actually lived back in New Jersey. He had worked with AT&T back in the '80s and had worked with USL, when it became USL, and then moved over to Novell when Novell purchased USL. Ed had been part of the AT&T and USL and Novell world for years and years and years.
It turns out, when I was given my assignment as the head of corporate development, Ed was part of my staff located in New Jersey. Ed was the natural individual to be the chief negotiator for this transaction. By chief negotiator, I mean I expected Ed to be on that case every

day. That was his project. He had no other assignments during that period of time other than to work with this deal.

Q. He reported to you?

A. Yes.

Q. What was Mr. Bradford's, the general counsel of Novell, responsibility in connection with this deal?

A. Well, he was the general counsel of the company. As general counsel he would have had the responsibility to review and to manage all of the legal team and all of the issues that came up through the legal team.

Q. Did he have the responsibility to negotiate the deal?

A. Well, he didn't negotiate the deal. He was not in the meetings negotiating with SCO.

Q. Did you ever ask Mr. Bradford or anyone who was working in the legal department for Mr. Bradford, or any outside counsel who was working with Mr. Bradford, to recut any parts of the deal with you and Mr. Chatlos on behalf of Novell, negotiated with Santa Cruz?

A. To recut any elements of the deal?

Q. Yes.

A. All the time. Every time there was a negotiation session we would come back with notes and issues that had been worked out in the business sessions. We would come back and deliver that set of new data to the legal team.

Q. Let me be more precise.
Did you ever ask Mr. Bradford to change the deal so that the copyrights wouldn't be going over to Santa Cruz?
A. No.
Q. What was the role of outside counsel from Wilson & Sonsini, including MR. Tor Braham on the transaction?
A. Well, Wilson Sonsini was outside counsel to Novell in that deal and in many others, and they had a team who were working with their counterparts at Brobeck to represent our interests, the Novell interests.
Q. Were they given the responsibility to change elements of the deal that you and Mr. Chatlos had negotiated with the Santa Cruz representatives?
A. Well, they were given the responsibility to document the deal that we negotiated.
Q. Were they given the responsibility or would it be within their authority to have gone out and withdrawn the copyrights as one of the assets that Santa Cruz was buying?
A. Well, I don't think it was in their job description to change the deal that we had negotiated without at least telling us that they were changing the deal that we had negotiated so that we could communicate that to the parties with whom we dealing at SCO.
Q. Did that ever happen with respect to the copyrights?
A. Not with respect to the copyrights. There were a lot

of issues, and we got feedback all the time from the lawyers. They would come back and say we have to do this with respect to tax. We have to do this with respect to the registration of the securities. We have to do this with respect to the human resources issues. There was a lot of interplay between the legal team and the business team, and we bounced things backs and forth all the time, but there was never an instance that I'm aware of that they would make a change and simply not talk to us about that.

Q. Specifically, did anyone on the Novell side ever tell you that they had negotiated to hold back the copyrights?

A. No.

Q. Did anyone tell you from the Novell side that they were going to put in language to hold back the copyrights and simply not tell Santa Cruz about it?

A. No.

Q. Was there an issue with Santa Cruz having enough cash money to pay for the business?

A. We knew going in, and as a part of the baiting of SCO as a potential candidate, we were aware of the fact that they were a $200 million company and not a $200 billion company. That would have been nice if they were a $200 billion a year company, but they weren't. They were a $200 million a year company. So we understood what they could do and what they couldn't do in terms of a cash purchase.

Q. How did that lead to the payment terms which you understood were to be the compensation to Novell for selling the business?
A. Well, we just had to come up with a different way to pay for the deal.
Q. What did you come up with?
A. Well, in the initial days there was some discussion about taking a larger percentage of stock from SCO. The CFO at Novell was a gentleman named Jim Tolonen. Jim Tolonen and his team were clear with us that they did not want to own anymore than, I believe, 19 percent of the company. Because if they owned more than 19 percent of SCO, took more than 19 percent of their stock, they would actually have to do some kind of an accounting procedure called consolidated statements, which would change the way that Novell reported its activities. They didn't want to do that.

We were instructed to take no more than 19 percent of the company as part of this transaction, which is what we did. Six million and 100 some odd thousand shares represented something south of 19 percent of stock of the company and that was the stock element of the deal.

The second element of the deal was that this new merged product, this new product that SCO would go out and develop and then sell, Novell had a participation right in the revenues that came from that. There were certain targets

and limits and so forth, and they wouldn't participate until SCO reached a certain number of units sold, and then they participated at a certain rate. If they sold more than that, they participated at a higher rate, et cetera, et cetera. So they had participation in this new product.

The final element was that we would keep the revenues from the existing licenses, the UNIX SVRX licenses, that Novell would keep that revenue as part of the money coming back. I mean, Novell had spent 300 and some odd million dollars buying this, and selling this business now for a smaller number would be perceived as being a big mistake. Novell didn't want it put out in the press that they bought something for 300 million in '93 and sold it for 50 million in '95. We had a way of showing that we had gotten reasonable value out of the sale of the business.

Q. Now, that value would be money which would come in over a period of years?

A. The royalties would, yes.

Well, actually the stock value was set at six million and 100 something thousand shares. The participation revenue would only come at the time the sales started to occur, and the royalty revenue would just be coming in every quarter.

Q. Could you protect the right to that royalty income as a source of payment while still selling the copyrights?

A. Sure. I mean, that was the purpose of the A.P.A.
Q. Was Santa Cruz --
A. The A.P.A. is the asset purchase agreement. We began to refer to it as the A.P.A.
Q. Was Santa Cruz to receive the entire UNIX business except the royalties on these licenses -- that was not well phrased.
When you decided on this payment mechanism, did that change the fact that you were going to sell the entire UNIX business to Santa Cruz?
A. When we decided on the payment system?
Q. Yes.
A. No. The transaction never changed. Sell the business was the order of the day. That was our instruction, sell the business. We were just trying to figure out how to pay Novell and its shareholders a reasonable value for the sale of this business.
Q. Now, were you personally involved in the transaction up to the date that the A.P.A. was signed?
A. Yes.
Q. In fact, beyond that, to the date it was closed in December --
A. Yes.
Q. -- of 1995?
A. Yes.

Q. I would like to give you a book of exhibits.

Mr. Thompson, Exhibit 1 which is already in evidence is the asset purchase agreement, the so-called A.P.A. Just so that we have some identification of what is in Exhibit 1, do you see on the first page you have the asset purchase agreement that is before you?

A. Yes.

Q. Then if we go to page 49, do you see Mr. Mohan's signature on behalf of Santa Cruz Operation and the signature of Bob Frankenberg on behalf of Novell?

A. Yes.

Q. Then after that there are certain schedules of assets.

Do you see that?

A. Yes.

Q. Then after that --

A. Yes, lots of schedules, actually.

Q. After that there are two amendments to the back of the agreement.

Do you see that?

A. There is amendment one.

Q. At the very end, the last couple of pages, there will be amendment number two.

A. Okay. Yes, there is amendment two.

Q. Going back to the A.P.A., you are familiar with this document as the person in charge of selling the company?

A. Yes.
Q. Would you turn to the list of the assets being sold on Schedule 1.1A.
A. Yes.
Q. If we blow up that schedule on the screen here so that it is a little more visible, do you understand this to be, subject to the exclusions which we will talk about in a moment, the assets which were being sold as a part of the transaction?
A. Did you say that they were subject to the exclusions?
Q. Well, we'll turn to the schedule separately of the excluded assets, but did you understand that this schedule of 1.1A were the assets that were being sold?
A. Yes. These are all the included assets, yes.
Q. Did you understand this to represent the entire UNIX and UnixWare business?
A. I did.
Q. Was it your understanding that the copyrights were included in this sale of the UNIX and UnixWare business?
A. I understood that ownership of UNIX was the ownership of the code, the ownership of UNIX, ownership of the business, ownership of the clients, ownership of the accounts, all of those things were what we were transferring to SCO.
Q. That pertained both to the current UnixWare, the source

code as well as the older products of UNIX?
A. We called out UNIX and UnixWare. Paragraph one, UNIX and UnixWare.
Q. Could we now turn to Section 1.1B.
Were there certain assets which you understood Novell was intent on retaining from the transaction --
A. Yes.
Q. -- and not selling?
A. Yes.
Q. What was your understanding of what those were supposed to be?
A. The NetWare and other related Novell technologies. NetWare was the crown jewel of Novell. In this transaction we wanted to make sure that it was clear that even if there were some bits and pieces of the NetWare code that were going over as a part of the new merged product or any of those sorts of things, there was absolutely no question but that Novell was retaining the rights to the ownership of that. They were keeping that and reserving that back in this deal.
Q. If we look at the items on the first page of this schedule, do most of those concern NetWare?
A. Well, yes, all with the exception of Tuxedo were NetWare items.
Q. Was Tuxedo also not being sold?

A. Tuxedo was not being sold. That was a Novell item.
Q. On the next page of this list of excluded assets, referring now to the old language on Section 5A before it was changed, where it says all copyrights and trademarks, was it consistent with your understanding of the deal that the UNIX copyrights would be excluded?
A. No. My understanding of the use of this phrase here was the NetWare copyrights and trademarks.
Q. That is based on the deal which you negotiated?
A. Yes.
Q. And what the other people that reported to you negotiated?
A. Yes.
Q. At the time that this was drafted, did any of the lawyers come to you and say, Mr. Thompson, we have decided to put in language in this schedule to hold back the UNIX copyrights?
A. No. That did not happen.
Q. Without the UNIX copyrights would Santa Cruz be able to operate the software business that they were buying?
MR. ACKER: Objection, calls for a legal conclusion, Your Honor.
THE COURT: I'll overrule the objection.
THE WITNESS: It is hard for me to imagine any instance in which we are selling them the entire business,

to go forward with this business in the future, without giving them the underlying intellectual property rights that they needed to do so.

BY MR. SINGER

Q. I would like you to tell me, if you recall, if there was any license to Santa Cruz that was negotiated as a part of the A.P.A., so that instead of owning the copyrights they would just be given a license through this agreement to make use of them?

A. To the UNIX products?

Q. Yes.

A. There was no such license. This was a sale. We referred to it as an acquisition, not a license. There was to be a license back for the NetWare technology, but not for the UNIX technology.

Let me be clear. There was to be a license back from Novell to SCO to be able to use the NetWare technology in the future, but there was no such license for the UNIX software and copyrights to SCO. It was a sale. We were selling it to SCO.

Q. Was there a license back from Santa Cruz to Novell so that Novell would have certain rights to use the UNIX assets that were being sold to Santa Cruz?

A. Yes. We contemplated at the time the sale took place, we contemplated that there would be a need inside Novell --

and, by the way, this is just good practice, that when you're selling something to make sure that you retain some internal license to keep it and use it.

We knew, we, being Novell, knew that we might need to use that to develop some of our products, and we had used it to develop products. So we understood and contemplated in the A.P.A. that there would be a technology license agreement back from SCO. Once we had made this sale, that we would have this technology license agreement back from SCO back to Novell, to use those rights for internal purposes and for some other limited purposes.

Q. Could we look at Section 1.6 of the asset purchase agreement which appears on page 5.

MR. SINGER: Mr. Calvin, blow up Section 1.6 to make it a little easier.

BY MR. SINGER

Q. Is this the provision that you're referring to where SCO would license back the technology that it was buying, back to Novell so Novell could use it after the transaction?

A. Yes. That is the provision in the A.P.A. that makes reference to that at the time of the closing we would sign a license back to Novell. Rather, that SCO would sign a license back to Novell.

Q. Did this provision make sense to you if the UNIX copyrights were being retained by Novell?

A. No.
Q. I would like now to look at the next document in your book which is SCO Exhibit 162, the technology licensing agreement which is in evidence.
Is this the technology licensing agreement that was called for by that provision of the contract?
A. Yes.
Q. Does this, in fact, have your signature on it on behalf of Novell?
A. Yes.
Q. Turn to page 3 of that document.
MR. SINGER: Mr. Calvin, blow up the section, ownership.
BY MR. SINGER
Q. Would you read out loud, Mr. Thompson, what it says with respect to ownership of the licensed technology.
A. As between Novell and SCO, sub one, ownership of licensed technology shall reside in SCO.
Q. Sub two.
A. Ownership of any modifications made to licensed technology pursuant to licenses specified in section two above shall reside in Novell.
Q. So if Novell used this license to improve their own product, would they own those modifications?
A. That is correct.

Q. But the licensed technology itself that you were getting at the time of the sale, that Santa Cruz was getting, would that be what is referred to in item one that the ownership shall reside in SCO?
A. That was the intent and meaning of that provision.
Q. I would like to talk now about Section 4.16 of the asset purchase agreement.
Now, do you understand this provision deals with something called SVRX licenses?
A. Yes.
Q. Do you have an understanding of what was meant by SVRX royalties, which are referred to in Section 4.16A?
A. Yes, I do.
Q. Can you tell the jury what that understanding is?
A. Well, over the years many, many, many licenses had been entered into on many, many, many different UNIX products, product versions. That occurred over the space of 20 years, 15 or 20 years. As a result, all of these royalty agreements existed, or all these royalty schedules had been entered into that provided multiple millions of dollars a year in royalties for this UNIX software.
Part of our transaction was that we would transfer the business, this business to SCO, to manage the clients and to manage all of these things, but Novell was going to keep those royalty revenues. That relates to all kinds of

versions of UNIX. SVRX. S is the system. V is version, revision is the R, and then X just means which version it was. The versions went all the way from -- 2.0 was the earliest one I ever say, and all the way up to 4.2 is the last one I think I ever saw. There were royalties attached to each one of those things.

Q. Did this include the current UnixWare product offering?

A. Well, no. Well, let's see. No, I don't think so. This provision relates to the items identified in Schedule 1.1A. There are actually a number of products listed there that are all UNIX system releases, SVRX version licenses.

Q. You're referring to the language which says as listed in detail under item six of Schedule 1.1A?

A. Right.

Q. Can we turn to that provision?

A. Yes. That is what I am looking at. There are 15, 20, 25 different products identified there. There are royalty schedules that apply to different companies, lots of different companies. Remember, there were a lot of these people, and it had been going on for years and years and years, and they had licensed these technologies over time and they were paying royalties on these various items.

Q. We're looking now at this item six that is in the schedule of included assets that was referred to in Section 4.16.

A. Yes.
Q. Are these licenses that are listed here or are these products?
A. Those are actually products. See, the UNIX licenses were made up of multiple parts. There was what you would refer to as the master software agreement, and then there were the sublicensing agreements which included these little product schedules for every product that they happen to license. You would have a master software agreement as a customer of AT&T or USL or Novell, and then you would have, depending on which versions that you had licensed, you would have all these separate schedules. You might have 2.0, 3.0, 3.2, 4.0, and you would have this list of schedules, and you would have your own separate revenue schedule coming in for each one of those.
Q. What were those called?
A. What were what called?
I think they were called product schedules that were part of the sublicense agreements.
Q. Were these the royalties which Novell was going to get as a part of the transaction?
A. Yes.
Q. Now, if we turn back to Section 4.16B, can you explain what your understanding was of the purpose of this language with respect to the buyer not amending any rights regarding

these SVRX licenses without prior consent of the seller, and then the seller's actions as set forth in that provision?
A. Well, it is pretty clear. Novell was interested in making sure that it got those royalties. It did not want SCO to go out and do anything to disrupt that royalty stream. I don't have the exact numbers in my mind, but my recollection is it was something like $50 million a year in royalties. It wasn't just, you know, a couple hundred thousand dollars. It was $50 million a year of royalties. Novell did not want them disrupting any of this royalty income.

So they wanted to make sure that SCO, even though we had transferred the business to SCO, the restriction was to say, listen, we're relying on this revenue stream as a part of this transaction. Don't do anything to upset this royalty stream. In fact, we're going to restrict you so that you can't do anything to undo or limit or disrupt this royalty stream. That is at least my understanding of what 4.16B was for.

Q. Could you turn now back to the schedule of assets that we were looking at, the assets that were being sold.

Is one of the items, item two, Roman numeral two?
A. Right. Yes, that is right. All of seller's claims arising after the closing date against any parties relating to any right, property or asset included in the business.

Q. Was this part of the assets being sold to Santa Cruz?
A. Yes.
Q. Claims, would that include legal claims?
A. Yes.
Q. Arising after the closing date, and that refers to the date when the UNIX business is going over to Santa Cruz?
A. Yes. That was my understanding.
Q. So all of those claims would be going over with the business; is that correct?
A. Yes.
MR. ACKER: Objection, leading. A question that ends with is that correct is usually a leading question.
THE COURT: I will sustain the objection.
BY MR. SINGER
Q. Was one of the assets that the seller was getting -- let me rephrase that.
Did Santa Cruz's purchase include legal claims that it would have against parties that were connected with the business?
A. It was the intent of the parties as part of the negotiations that post-closing, once the closing had occurred, that all of these claims would now be SCO's claims.
Q. Look at Roman numeral three.
A. Okay.

Q. Was this also part of the assets being sold to Santa Cruz, all of sellers rights pertaining to UNIX and UnixWare under any software development contract, licenses and other contracts to which seller is a party, or by which it is bound and which pertain to the business, to the extent such contracts are assignable, including without limitation -- then there are a number of things that are listed underneath that.

A. That is right. Our intent in that particular provision was to try to enumerate all of the things that we were trying to sell them as part of the business.

Q. Are you aware that there were agreements for software development with companies that went back all the way to the AT&T days, that had gone from AT&T to Novell and now from Novell to SCO?

A. I was aware of that.

Q. Are you aware that one of those were agreements that allowed IBM to have access to the UNIX source code for its development work?

A. I was aware of that.

Q. Do you have an understanding as to whether or not that agreement would be one of the ones under this section, Roman numeral three?

A. Yes, that would be one of the agreements. It was one of the -- I mean, if you want to look specifically, and if

you look down at item L, under paragraph three look down at item L, it specifically refers to software and sublicensing agreements, including source code sublicensing agreements seller has with its OEMs.

Q. OEM means?

A. Original equipment manufacturers. I don't know why they use that phrase, but that is how they refer to them.

Q. Was it your understanding that Novell retained the right after the closing to stop Santa Cruz from pursuing litigation, if they thought it justified, against IBM under its authority under this Section 4.16 that we looked at before?

A. No. The restriction on bringing an action relates to the royalty stream -- upsetting the IBM royalty stream, not the master software license.

Q. Now, after the transaction was -- I would like to actually look at Exhibit 133, which is the next document in your book.

This is not yet admitted into evidence. I would like to ask --

MR. ACKER: Then it shouldn't be displayed.

MR. SINGER: I don't think it is displayed yet.

THE CLERK: The jury can't see it.

MR. ACKER: Okay.

BY MR. SINGER

Q. Do you have this Wall Street Journal article before you?
A. I do.
Q. Are you familiar with this as an article that appeared in the Wall Street Journal, September 20th, 1995, the day after the asset purchase agreement was signed?
A. Yes. I remember seeing it at the time.
Q. Do you recall anyone after this was published on September 20th, 1995 at Novell ever saying the Wall Street journal got it wrong?
THE COURT: Mr. Singer, it is either going to be admitted or not admitted before you are allowed to ask questions regarding it.
MR. SINGER: I move the admission of Exhibit 133.
MR. ACKER: No objection given the Court's prior ruling.
THE COURT: It will be admitted.
(Plaintiff's Exhibit 133 was received into evidence.)
BY MR. SINGER
Q. Mr. Thompon, would you please take a look at Exhibit 133. This is the Wall Street Journal article at the time when the sale was announced; is that correct?
A. Yes.
Q. Could you read it out loud, and hopefully we will be

able to get a little better picture up on the screen. There we go.

Mr. Thompon, can you read the first paragraph?

A. Novell, Inc. today is expected to announce plans to relinquish control of the widely used UNIX operating system to Santa Cruz Operation and Hewlett-Packard.

Q. Can you tell us what part or what aspect of control was going to Hewlett-Packard?

A. Well, yes. That is a good point. That negotiation had been going on at the same time we were negotiating with SCO. The idea there was that the parties had worked together, Novell, SCO and Hewlett-Packard, in developing a -- I will use a technical term here -- a 64-bit version of UNIX on the Intel processor.

Now, 64-bit is just a way to refer to the new, higher powered Intel chips that were going to be coming out over the next couple of years. The idea was that Hewlett-Packard, who had a tremendous development team in the UNIX world, highly respected -- in fact, at the time of the transaction there were a number of employees that formerly worked for Novell that went to work for Hewlett-Packard to help work on this. The rest of the employees, to my knowledge, then went to SCO to help work on the SCO side.

They were working on a 64-bit version of UNIX, which

they could then sell as a network operating system, or as a UNIX operating system in a shrinkwrapped box that just goes out and works on people's P.C.s.

At that time Microsoft pretty much owned the market for P.C. operating system software, and this was an attempt to compete with them.

Q. Was this happening at the same time?

A. Same time.

Q. The next paragraph, could you read that out loud, please.

A. The deal includes the purchase by Santa Cruz Operation of most trademarks and intellectual property associated with the UNIX software. One person familiar with the situation said he expects SCO to pay about $140 million, some of which will be shares of SCO, a Santa Cruz, California company that sells its own version of UNIX.

Q. When you read this, did you understand intellectual product to include the copyrights in UNIX?

A. I did.

Q. Did anyone, after this was published in The Wall Street Journal, at Novell come to you and say this is wrong, that we held back the copyrights?

A. No. No one commented on that at all.

Q. I would like to turn back to the asset purchase agreement and turn to amendment number one which is in

evidence. It appears on the screen. It is near the end of the documents in your book.

Turn to the signature page of amendment number one.

A. Okay.

Q. Is this your signature on behalf of Novell on December 6, 1995?

A. Yes.

Q. At the time of amendment one had any issue arisen requiring clarification in amendment number one regarding the ownership of the copyrights in UNIX?

A. Not to me. No one had mentioned anything to me about a change.

Q. Was there any request made at the time of amendment number one to clarify any language that appeared in the asset purchase agreement regarding the ownership of the UNIX and UnixWare copyrights?

A. No.

Q. Now, also on December 6, 1995, was there a bill of sale which was prepared as a part of the closing?

A. Yes, I believe so.

Q. Is that typical in a transaction?

A. It is typical when you are transferring assets, tangible and intangible assets, to have a bill of sale.

Q. I am referring to SCO Exhibit 90.

MR. SINGER: I would like to move this into

evidence. I don't recall if this has been --

THE CLERK: No.

MR. ACKER: No objection.

THE COURT: Exhibit 90 will be admitted.

(Plaintiff's Exhibit 90 was received into evidence.)

BY MR. SINGER

Q. Did you sign the bill of sale on behalf of Novell on this same day, December 6, 1995?

A. Yes.

Q. When you signed the bill of sale, was it your understanding that you were on behalf of Novell conveying the UNIX and UnixWare copyrights to Santa Cruz along with the rest of the business?

A. That was my understanding.

Q. This does not have a separate list of assets, this references back to the asset in the purchase agreement?

A. 1.1A.

Q. Now, after the sale closed in December of 1995, did you became a member of the Santa Cruz Operation board of directors?

A. Yes. One of the provisions in the A.P.A. was that Novell could appoint, as a result of its stock ownership in SCO, had the right to appoint a director to their board of directors. I was selected to be the individual to be the

director.
Q. Would it be fair to consider you as the Novell representative on the board?
A. Yes.
Q. Did your employment with Novell change at some point in 1996?
A. Yes. I left Novell in 1996.
Q. Did you leave Novell voluntarily?
A. Yes.
Q. Had you announced earlier in 1995 as to whether you would leave Novell?
A. Yes.
Q. Did Novell want you to stay?
A. Well, my announcement was to Bob Frankenberg. I had indicated to him early in 1995 that as a result of some of the decisions that were being made that I felt it was best if I left. I am referring specifically to the fact that they had decided to sell the Word perfect applications division, which was the entity that I worked for before. They had decided to sell that.

Given the fact that this was only a year after we had done the merger, and now within basically ten or 11 months of making the acquisition the company had made the decision, Bob had made the decision that it was time to get rid of the applications division, I thought it was probably time for me

to leave. This was not the Novell that I had signed up for, essentially.
Q. In 1996 did you became a consultant for Novell after you formally stopped --
A. Yes. For a period of time after I left my employment I was a consultant to Bob.
Q. While on the Santa Cruz board of directors in 1996, did you become familiar with the dispute involving Novell's attempt to do a buy out of these royalties with IBM?
A. Yes, I did.
Q. What is your understanding of that dispute?
MR. ACKER: I object without more foundation, Your Honor.
BY MR. SINGER
Q. Did you gain an understanding of that dispute from serving on the board of directors of Santa Cruz Operation?
A. Yes.
Q. Did you see correspondence relating to that dispute?
A. Well, actually it was not correspondence. Actually Alok Mohan just simply confronted me at a board meeting and said what is going on? They had just discovered that Novell had --
Q. Pause for a moment. When you say he confronted you, was he confronting you in the sense that you were still a Novell representative, that you were a consultant or

employed with Novell?
A. I think it was his view that he understood that somehow I had some connections to Novell and, as a result, I had knowledge that this buy out had taken place.
Q. Can you now explain your understanding of what the issue was that arose at that point where you were being asked to get involved?
A. I understand that the OEM group, the licensing group of Novell had gone to IBM to get a buy out of their royalty payment on these licenses that we talked about earlier.
Q. Explain how a buy out operates and what that means in the context of a stream of royalties.
A. It is instead of paying the royalty payment for the next umpteen years, we'll just simply give you a one-time payment. Here you go. Here is one check. Now I don't have to make those payments anymore.
Q. What was your understanding of what caused the dispute between Santa Cruz and Novell over that issue?
A. Alok was angry because no one from Novell had talked to him about this prior to Novell doing it.
Q. Now, did you become actively involved in seeking to resolve that dispute?
A. Alok asked me to contact Bob Frankenberg and find out what was going on. It was clear to me that this was something that Alok had to talk to Bob about. I called Bob.

I don't remember if I spoke to him directly on that occasion or left a message for him, but I am aware that the two of them started to talk and have a dialogue on this issue.
Q. What was your next involvement, if any, with the issue?
A. My next involvement, as I recall, is at a subsequent board meeting where there were letters that were discussed that had been sent back and forth, and I think finally at another board meeting, SCO board meeting, where they had entered into an amendment to the A.P.A.
Q. Are you referring to what is called amendment number two?
A. Yes.
Q. Were you present for the board meeting at which that was considered?
A. Yes.
Q. Do you recall how you voted on that particular amendment?
A. They didn't permit me to vote.
Q. But you were present during the consideration?
A. Well, what I should say is, I was aware of the amendment and I saw it. I saw that it had Jim Tolonen's signature on it, which is frankly the reason I remember it, because I thought it was odd that it was Jim Tolonen's signature as the C.F.O. not some other businessperson in the company.

I was actually asked to step out while the board discussed all of the issues and took the vote. I was not an impartial director and they understood that, and so I was asked to step out while that was voted upon.

Q. Because you still had an association with Novell?

A. That is right. And Novell still had its stock in SCO.

Q. You reviewed amendment number two, though, in connection with that?

A. Yes. It had been shown to me. That is right.

Q. Take a look at what is in evidence as part of SCO Exhibit 1, amendment number two.

Is this the document which you saw at that time?

A. Yes, it is.

Q. Do you know whether after you returned to the board meeting, after stepping out, whether this had been approved?

A. It had been approved.

Q. There are several parts of this amendment; is that correct?

A. Yes. I see four separate paragraphs.

MR. SINGER: If we could blow this up on the screen.

BY MR. SINGER

Q. Just read point A --

MR. ACKER: I object to further questioning of this witness on this amendment given his testimony to date.

THE COURT: I'll sustain the objection.
BY MR. SINGER
Q. After this amendment was -- well, let me ask this. During the time of this dispute, and I am not talking about this amendment, but did anyone ever suggest in your presence that Novell had retained the copyrights to the UNIX and UnixWare operating system?
A. No. I wasn't aware of any assertion by Novell of that position.
Q. Are you aware of any requests being made by Santa Cruz to Novell in connection with this dispute that they now at this point wanted a transfer of the copyrights to them?
A. No.
Q. Are you aware after this amendment being passed, did Novell ever seek to unilaterally deal with IBM again on revisions to a UNIX license?
MR. ACKER: Objection, calls for speculation. He was not at Novell any longer.
THE COURT: I'm sorry?
MR. ACKER: He was not at Novell. He is going to have to speculate to answer that question.
MR. SINGER: He was at Santa Cruz.
MR. ACKER: You asked him about Novell.
THE COURT: Ask the question again.
BY MR. SINGER

Q. As a member of the board of directors of Santa Cruz, did you ever became aware of any activity by Novell to deal unilaterally with IBM up until the events of 2003?

MR. ACKER: Same objection.

THE COURT: Overruled.

THE WITNESS: The IBM incident was the only one that I was ever informed of and the only one of which I'm aware.

BY MR. SINGER

Q. Did Novell, either at the time you were at Novell or at Santa Cruz, ever to your knowledge assert the right to use any provision of the asset purchase agreement, including this Section 4.16 that we have looked at earlier, to say that it had the right to control what Santa Cruz did with respect to IBM?

A. What period of time are you referring to?

Q. Up until March of 2003.

A. Well, they didn't ever assert that while I was at Novell. To my knowledge, other than the situation with IBM, I am not aware that they ever asserted that right, as a member of the SCO board. I was never informed that they ever asserted that right again.

THE COURT: How long did you remain on the SCO board?

THE WITNESS: I was on the SCO board until the

sale to Sun, just prior to the sale to Sun, which was 2003 or four. 2002 or three, something like that.

MR. ACKER: Your Honor, I don't want to interrupt the questioning, but there may be some confusion with the jury, and Mr. Singer can clear that up.

BY MR. SINGER

Q. Did there come a time in 2001 when the UNIX business that Santa Cruz had was sold to a company called Caldera?

A. Yes.

Q. Did Caldera subsequently change its name to the SCO Group, Inc.?

A. Yes.

Q. That is the plaintiff in this lawsuit?

A. Yes.

Q. Did you also became a member of Caldera's board of directors?

A. Yes. It was a similar situation, the --

THE COURT: Mr. Thompson, there is no question posed. I want you to just answer the question that is asked. Thank you.

THE WITNESS: Yes.

BY MR. SINGER

Q. Explain how you became a member of the Caldera board.

A. Yes. The original Santa Cruz Operations company was located in Santa Cruz, California, and ultimately changed

its name to Tarantella, and decided to sell the UNIX business. The strategy that they had entered into in 1995 with Novell had not panned out as they had planned. They decided to sell that business and sold it to actually a Utah company, a company located here in Utah called Caldera.

As a part of that sale, it was kind of a similar deal, they had the right to appoint two directors to the Caldera board, the Tarantella board. Alok Mohan, who was the president of Tarantella, the old Santa Cruz Operation, and I were appointed to the board of Caldera.

Q. Caldera is what is now known as the SCO Group, Inc.?

A. That is right.

Q. That was the name change?

A. Yes.

Q. Did you also serve for a while until 2002 or 2023 on the Tarantella board?

A. Yes. Well, I continued to serve on that board after the transaction with Caldera, that is right.

Q. Now, from 1996 to 2003, did you ever hear Novell assert any ownership of the copyrights in UNIX or UnixWare?

A. I did hear in 2003, but prior to that time I hadn't heard that.

Q. When you joined the board of directors of Caldera, which became SCO, did you also became a shareholder of SCO?

A. Of Caldera?

Q. Of Caldera.
A. Well, I was on their board and we received stock option grants from time to time as members of the board.
Q. As you sit here today, have you exercised certain options on stock of the SCO Group, Inc?
A. Yes.
Q. How much did you spend to exercise those options?
A. I spend roughly 12,000 and some odd dollars to exercise 110,000 options.
Q. Do you know as of today approximately how much those 110,000 shares of SCO Group, Inc. stock are worth?
A. I think they are worth somewhere in the neighborhood of eighty to $90,000.
Q. Is this the same as the options that were made available to other directors on the SCO board?
A. Yes.
Q. Have you been on the board of SCO, from that time when the assets were sold and you were appointed to Caldera which became SCO, to the present?
A. Well, that is two different boards.
Q. Okay. Can you explain that.
A. I was on the Santa Cruz Operation board from 1996 until -- I am not sure if the appointment was in 1995 or 1996, but after the transaction closed with SCO, I was appointed to their board either late that year or early the

next year. I was on that board, including through its name change to Tarantella until 2002 or three. I don't have that date clear in my mind.

Q. I am not asking anymore about that board. That was the Tarantella business?

A. In 2000 or 2001, and I forget which year, I think it was 2001, the sale of the UNIX business to Caldera occurred. I joined that board and have served on that board since I think it was around June or July of 2001.

Q. You serve on that board today; is that correct?

A. Not today.

Q. Up until recently?

A. Yes, up until recently.

Q. Can you tell me whether there was a time during which you were on the board in May of 2003 that you became aware of a press release that Novell issued on that date of May 28, 2003?

A. Yes, I did became aware of a press release.

Q. I would like you to turn to Exhibit 669.

This is in the form of a letter from Mr. Messman at Novell to Mr. McBride at the SCO Group.

Are you familiar with this?

A. Yes.

Q. Are you aware of whether this was also issued as a press release?

A. I don't know if the whole letter was issued as a press release. I'm aware that there was a press release at the same time.

MR. SINGER: I would move the admission of Exhibit 669.

MR. ACKER: No objection.

THE COURT: And the objection?

MR. ACKER: No objection.

BY MR. SINGER

Q. Did you become aware of --

THE COURT: One second. Let me do my formality here. 669 will be admitted.

(Plaintiff's Exhibit 669 was received into evidence.)

MR. SINGER: Thank you, Your Honor.

BY MR. SINGER

Q. Now, this is a letter from Jack Messman to Darl McBride, Jack Messman being the CEO of Novell and Mr. McBride being the president and CEO of the SCO Group; is that correct?

A. Yes.

Q. How was this letter brought to your attention?

A. I actually received an e-mail from Doug Michaels who was one of the people at the old Santa Cruz Operation, and he became aware of this through some of his press friends.

He e-mailed a group of us, not just me, a group of us and said you're not going to believe what Novell is claiming, and I didn't.

Q. When you are referring to what Novell is claiming, what are you talking about?

A. That they owned the copyrights.

Q. Would you turn to the last paragraph on the second page of the letter.

A. Okay.

Q. Take a moment and read that to yourself.

Is this statement that SCO is not the owner of the UNIX copyrights what you're referring to?

A. Yes.

Q. Is it your understanding this was put out in a press release?

A. Yes.

Q. What was your reaction to hearing this from Mr. Michaels and seeing the letter and the press release?

A. Twofold. I was shocked and upset.

Q. Why were you shocked and upset?

A. Well, I was shocked because this was not my understanding of the transaction that I had participated in in 1995. I was upset because if that were true it means that I essentially misled SCO in the negotiations.

Q. Did you believe this to be true?

A. I did not.
Q. Eight days later did you become aware of another press released by Novell on June 6th, 2003?
A. I became aware of the fact that Novell had been given some information and that they were now retracting this letter.
Q. Before we turn to that, is May 28, 2003, the date that SCO group issued an earnings release?
A. I don't know if it was exactly that day. If it wasn't that day it was very close to that day.
Q. Could you turn to Exhibit 254.
Do you recognize this to be a press release by SCO on May 28, 2003?
A. Yes.
MR. SINGER: I would like to move the admission of SCO Exhibit 254.
MR. ACKER: No objection.
THE COURT: It will be admitted.
(Plaintiff's Exhibit 254 was received into evidence.)
MR. SINGER: Can we blow up the first part of this document?
BY MR. SINGER
Q. First of all, does this refresh your recollection that May 28, 2003 was the date of SCO's earnings release for the

quarter?
A. Yes. I see the date on the top.
Q. You have been a member of the board of directors of SCO Group, the public company?
A. Yes.
Q. Can you explain the importance of earnings releases for a public company such as the SCO Group?
A. Well, you're always concerned about being able to show value to your shareholders, and if you have good earnings the stock price usually goes up. If you have good news about what is going on in the company the public views it as a reason to buy the stock and usually the stock price will go up.
Q. Do you recall whether on May 28, 2003 SCO had good news to report?
A. It had good news.
Q. Is that reflected in this press release?
A. Yes.
Q. The net income was $4.5 million for that quarter on revenue of $21.4 million and a reversal from a loss in prior periods?
A. That is correct.
Q. Was this the same day that Mr. Messman's letter and the Novell press release occurred?
A. Yes, it appears to be the same day.

Q. Now, eight days later are you aware of Novell issuing another press release?
A. Yes.
Q. I would like you to refer to Exhibit 97.
Is this that press release?
A. Yes.
MR. SINGER: I move Exhibit 97 into evidence.
MR. ACKER: No objection.
THE COURT: It will be admitted.
(Plaintiff's Exhibit 97 was received into evidence.)
MR. SINGER: Can we blow up this first part of this document?
BY MR. SINGER
Q. I am going to read this out loud.
In a May 28th letter to SCO, Novell challenged SCO's claim that the UNIX patent and copyright ownership and demanded that SCO substantiate its allegations that Linux infringes SCO's intellectual property rights. Amendment number two to the 1995 SCO Novell asset purchase agreement was sent to Novell last night by SCO. To Novell's knowledge, this amendment is not present in Novell's files. The amendment appears to support SCO's claim that ownership of certain copyrights for UNIX did transfer to SCO in 1996. The amendment does not address ownership of patents,

however, which clearly remain with Novell.

Did you read that?

A. Yes.

Q. Just so we are complete, there is a line in the press release that is not in the box here, and it says Novell reiterates its request to SCO to address its fundamental issue Novell raised in its May 28 letter of SCO's still unsubstantiated claims against the Linux community.

That is the entirety of the press release other than some promotional information about Novell, correct?

A. Correct.

Q. What was your reaction to this press release?

A. Okay. Great. They understand what I understood.

THE COURT: Mr. Singer, how much more do you have?

MR. SINGER: Very little. I would say five minutes or so.

THE COURT: All right.

BY MR. SINGER

Q. Did you ever learn that Novell went back to reasserting claims of ownership to the UNIX copyrights after this June 6, 2003 press release?

A. I understand that they essentially retracted that statement and indicated that, no, they decided again that they did own the copyrights.

Q. Could you look at the last document in your book,

Exhibit 517.

MR. SINGER: I move the admission of Exhibit 517.

THE COURT: Let him identify it.

BY MR. SINGER

Q. Tell us what this is.

A. This is a Novell press release dated December 22nd, 2003.

Q. Did you see this press release at the time it was issued?

A. I don't know if I saw it at exactly the time it was issued, but close to the time it was issued.

MR. SINGER: I move the admission of Exhibit 517.

MR. ACKER: No objection.

THE COURT: It will be admitted.

(Plaintiff's Exhibit 571 was received into evidence.)

BY MR. SINGER

Q. Can you read for the jury what this press release by Novell on December 22nd says?

A. Novell believes it owns the copyrights in UNIX, and has applied for and received` copyright registrations pertaining to UNIX consistent with that position. Novell detailed the basis for its ownership position in correspondence with SCO. Copies of our correspondence and SCO's reply are available here. Contrary to SCO's public statements, as demonstrated

by this correspondence, SCO has been well aware that Novell continues to assert ownership of the UNIX copyrights.
Q. Mr. Thompson, are you aware of whether December 22nd, 2003 also was a date on which SCO was announcing its earnings, this time for the period ending in December?
A. I don't remember the exact date, but it was in or near this date.
Q. Are you aware of continued assertions of ownership to UNIX copyrights by Novell to this very day?
A. Yes.
Q. Now, were you the person in charge of the sale of UNIX to Santa Cruz?
A. Yes. I was given that charge by Bob Frankenberg.
Q. Based on your knowledge of that transaction, Mr. Thompson, was the statement by Novell in May of 2003 that they owned the UNIX copyrights true or false?
A. It is false. It is not consistent with the transaction that we conducted.
Q. Based on your knowledge of that transaction, was the statement by Novell on December 22nd, 2003 continuing to assert ownership of the UNIX copyrights, was that true or false?
A. I believe it is false.
MR. SINGER: Thank you.
That concludes my direct examination.

THE COURT: Thank you, Mr. Singer.

We'll take a break and come back for the cross-examination.

Ms. Malley.

THE CLERK: All rise for the jury.

(WHEREUPON, the jury leaves the proceedings.)

THE COURT: We'll take 15 minutes, counsel.

(Recess)