

1 THE COURT: Anything, counsel, before we bring the  
2 jury in?

3 MR. ACKER: No, Your Honor.

4 MR. SINGER: Not from us, Your Honor.

5 (Jury present)

6 THE COURT: Go ahead, Mr. Acker.

7 BY MR. ACKER:

8 Q Let me show you one more letter, Dr. Pisano.

9 Sir, you see this is a letter from Morgan Stanley to  
10 SCO on March 24th, 2004, again, regarding the SCOSource  
11 licensing program? Do you see that?

12 A Yes.

13 MR. ACKER: I move for admission M-27, Your Honor.

14 MR. SINGER: No objection.

15 THE COURT: It will be admitted.

16 (Defendant's Exhibit M-27 was received into  
17 evidence.)

18 MR. ACKER: Mr. Lee, go to the second paragraph,  
19 please.

20 BY MR. ACKER:

21 Q Morgan Stanley wrote to SCO in March of 2004, in our  
22 December 19th, 2003 and January 22nd, 2004 letters to you,  
23 we requested information to enable us to assess the  
24 intellectual property and other rights referred to in SCO's  
25 letters. To date, we have not received the information we

1 requested. Although your earlier correspondence referenced  
2 ABI code that had allegedly been copied into Linux, you did  
3 not respond to our request, contained in our January 22nd  
4 letter, for more details relating to that allegation.  
5 Moreover, the AutoZone complaint does not provide us with  
6 the information we requested; it simply lists copyright  
7 registrations for items allegedly owned by SCO, the  
8 complaint does not identify any of the specific instances of  
9 SCO's code allegedly contained within Linux.

10 Do you see that?

11 A Yes, sir.

12 Q Have you ever seen this letter before?

13 A No.

14 Q Let me show you one more document, what has been  
15 admitted as Q-22. It is a large document, sir, but I'll be  
16 pointing you to a specific portion. Feel free to look at  
17 any portion you like.

18 You are familiar with what a form 10-K is, correct,  
19 sir?

20 A Yes.

21 Q What is your understanding of what that document is?

22 A This is a detailed annual disclosure of financial  
23 information a company makes to the SEC every year.

24 Q What is the purpose for such disclosures to the  
25 Securities and Exchange Commission?

1 A It's for -- really for investors to make sure that the  
2 material information about the company is out there in  
3 public hands.

4 Q When you say the material information about the  
5 company, what is material information?

6 A Information about the company's business, how it's  
7 doing, its financial state, so income statements and pending  
8 litigation, other things that could affect the fortunes of  
9 the company.

10 Q Do you believe that Novell's allegedly slanderous  
11 statements regarding ownership of the UNIX copyrights would  
12 have been material statements to SCO in 2003?

13 A In 2003. You know, again, depends on the timing  
14 because -- sorry. You stood up.

15 MR. SINGER: That's okay. I don't have an  
16 objection.

17 MR. ACKER: Do you want to say something to Mr.  
18 Singer?

19 THE WITNESS: He stood up. I thought there was an  
20 objection.

21 THE COURT: You did the right thing.

22 THE WITNESS: I slowed down for once.

23 You know, it's potentially material at that point.  
24 Again, it's tricky because there are statements on May 28th  
25 and then there are retractions. This document is for the

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1 fiscal year ended October 31st, 2003, so unclear at that  
2 point.

3 BY MR. ACKER:

4 Q Well, you are aware of a letter written August 4th,  
5 2003 by general counsel, Mr. Joseph LaSala, of Novell to Mr.  
6 McBride saying that Novell owns the UNIX copyrights? You  
7 were provided that document, weren't you?

8 A Yes.

9 Q Do you believe that that is a material fact to SCO?

10 MR. SINGER: Way outside the scope, and  
11 irrelevant.

12 THE COURT: Overruled.

13 THE WITNESS: Again, I am not so -- again, my  
14 background is an economist. I don't do accounting. That's  
15 a whole separate area about what goes into the SEC, what's  
16 appropriate. There's a whole body of regulation. But what  
17 is considered material, I gave you kind of a general, in  
18 some sense, layman's term of material. There is a whole  
19 series of rules and regulations around that about what goes  
20 in, et cetera. So I really don't feel comfortable answering  
21 that.

22 BY MR. ACKER:

23 Q Let me ask you as an economist. In your expert opinion  
24 that you've offered here today, do you believe the fact that  
25 Mr. LaSala had told Mr. McBride on August the 4th, 2003 that

1 Novell still owned the copyrights, do you believe that's  
2 material, from an economic standpoint?

3 A I think it's -- material to what?

4 Q To SCO's business.

5 A I think at that point it's hard to say. You know,  
6 again, use of the term material as it's used for statements  
7 is how the business is going to be from a very specific  
8 regulatory point of view. Was that important? I'm sure it  
9 was something important for them. But when they got the  
10 letter, I'm sure it raised potentially to certainly  
11 important.

12 Q As an economist offering an opinion about the effect of  
13 allegedly slanderous statements by Novell, do you believe  
14 that Mr. LaSala's August 4th, 2003 letter to Mr. McBride  
15 saying Novell still owns the copyrights, do you believe that  
16 was a material fact?

17 MR. SINGER: Your Honor, I object. This has  
18 nothing to do with his testimony.

19 THE COURT: Well, I allowed the first question  
20 because I thought that perhaps you might be able to lay a  
21 foundation that he had unique qualifications to testify as  
22 to this. But you have not laid that foundation, so I'm  
23 going to sustain this objection.

24 MR. ACKER: Okay.

25 //

1 BY MR. ACKER:

2 Q Sir, if you could take a look at what you have in front  
3 of you, page 36 of 87. The numbers I'm referring to are on  
4 bottom left of the document.

5 A Yes, I see them.

6 MR. ACKER: And if we could highlight the last  
7 sentence of the paragraph, Mr. Lee, that is headed our  
8 future SCOSource licensing revenue is uncertain. The  
9 sentence begins with additionally.

10 THE WITNESS: I'm going to take a sec to read the  
11 paragraph, if I may?

12 MR. ACKER: Sure.

13 THE WITNESS: Again, you wanted me to focus on the  
14 sentence additionally, the success, that sentence, sir?

15 BY MR. ACKER:

16 Q I'm going to ask you a question, and I want you to be  
17 fully prepared for it.

18 A Okay.

19 Q Now in the phone survey that you -- let's first start  
20 with the sentence. You see the sentence -- the last  
21 sentence reads, additionally, the success of this initiative  
22 may depend on the strength of our intellectual property  
23 rights and contractual claims regarding UNIX, including the  
24 strength of our claim that unauthorized UNIX source code and  
25 derivative works are prevalent in Linux. Do you see that?

1 A Yes.

2 Q So this is SCO telling the federal government that the  
3 success of SCOSource may depend on whether or not we can  
4 prove there actually is protected UNIX source code that is  
5 prevalent in Linux?

6 A Yes. Absolutely.

7 Q During the phone survey that you relied on, were any of  
8 the respondents told, in deciding whether or not they would  
9 take a license or request indemnification, that the person  
10 offering the indemnification didn't know whether or not they  
11 could prove any infringement?

12 A Sir, I just want to clarify, it was not a phone survey.  
13 It was a Web-based survey. But within the follow-up,  
14 they -- again, if a party is looking -- thinking about --  
15 somebody is thinking about do I want indemnification, they  
16 are thinking about the risk. If they think there is a low  
17 chance of infringement ever being claimed, they are not  
18 going to be interested in indemnification. If they think --  
19 or they are just willing to take the risk. They are just  
20 willing to take the risk. Let's see what happens. It may  
21 be possibly later, but let's just take the risk. They are  
22 not going to be interested.

23 Q My question was were any of the respondents, either by  
24 phone or by electronic methods, told that the person  
25 offering indemnification or the person that poses the threat

1 of which you would want indemnification doesn't think they  
2 can prove infringement? Were they told that?

3 A No, they didn't need to be.

4 Q Let me ask about that. How much would it cost to do a  
5 survey on your own that you believe would be something that  
6 you could rely upon? What would be the dollar amount?

7 A If I were to do the survey?

8 Q You or somebody you hired.

9 A Ten to \$20,000, depending on the size and method.

10 Q And so you think a survey could be completed for ten to  
11 \$20,000 that you would find acceptable?

12 A Yes.

13 Q So that's about one-twentieth of what you have been  
14 paid to offer your opinion in this case, correct?

15 A Yes.

16 Q And so SCO and its lawyers could have had you for  
17 \$20,000 actually conduct a phone survey and ask -- or online  
18 survey, and ask respondents are you interested, what is your  
19 interest in taking the SCOSource license? That could have  
20 been done?

21 A That would have been absolutely flawed methodology.  
22 I'm doing this study in 2007. To try to go back and ask  
23 people about their demands during a previous time frame  
24 would be -- you would get all sorts of what we call  
25 retrospective bias. You're asking people what would you

1 have done then. It would have been a very, very flawed  
2 methodology. That would not have passed scrutiny in peer  
3 review journals.

4 Q This lawsuit was filed in 2004, wasn't it, sir?

5 A That's true, but I was doing my study in 2007.

6 Q So you weren't asked to do it in 2007, but this lawsuit  
7 has been pending since 2004, correct?

8 A Yes, that's true.

9 Q So a survey could have been conducted by SCO and its  
10 lawyers at the same time as these Yankee studies that you've  
11 relied on, correct?

12 A Then they would presumably -- I mean, ethically  
13 disclose who they are, what they are representing. Now you  
14 have the first -- remember the first criteria I cited for  
15 trusting a survey, does the party have an incentive to be  
16 unbiased. If you have a survey sponsored by SCO or SCO's  
17 lawyers asking them questions that pertain to this case,  
18 personally, if I were just looking at that survey from the  
19 outside, that does not meet my first criteria. So I don't  
20 think they were in a good position to do that.

21 Q They certainly could have obtained somebody that they  
22 considered to be unbiased, somebody like yourself, correct?

23 A Actually, if you look at the Yankee and Forrester, they  
24 make a big deal about the fact they are unsponsored surveys.

25 Q Do you think you are biased here today being paid by

1 SCO?

2 A Nope.

3 Q Do you think you could have conducted an unbiased  
4 survey if you had been asked to that in 2004 and actually  
5 told people on the phone or via e-mail I want to know your  
6 interest in taking a SCOSource license?

7 A But then you have to disclose to those people the  
8 purpose you are doing it, and they may have their own biases  
9 about SCO and opinions about SCO, et cetera. You could get  
10 very biased answers because actually respondents are  
11 affected by the outcome of the case. If somebody is  
12 planning on, you know, not taking the license and they are  
13 taking the risk of infringing, gosh, they have a real  
14 incentive to see things come out in a different direction.  
15 I think that methodology would be very problematic.

16 Q So is it your opinion that it would have been  
17 impossible for a survey to be conducted to actually ask the  
18 question how interested you are in taking a SCOSource  
19 license in 2004?

20 A At that point, remember, that's post slander. So  
21 that's post the fact that people knew the product was  
22 worthless because the ownership claims are not there.  
23 There's too much -- you can do that survey, but I don't know  
24 what you would get out of it.

25 Q You're saying the survey would be worthless because

1 it's post slander?

2 A It would be problematic because the product, post  
3 slander -- the product was ruined by the slander. And,  
4 therefore, if you were to ask people what is your interest  
5 in taking a SCO RTU post slander, they are going to tell you  
6 exactly what the market is, I don't want this, it's  
7 worthless. These guys, I don't know if they own the  
8 copyrights, so why would I pay them. That's what you would  
9 learn. You would learn exactly what the market told you,  
10 not much interest.

11 MR. ACKER: Let's put up X-23.

12 BY MR. ACKER:

13 Q You've seen this document before, correct?

14 A Yes.

15 Q You realize that on December 22nd, because Mr. McBride  
16 was still in the marketplace saying that SCO owned the UNIX  
17 copyrights, Novell decided to put onto its Web site the  
18 correspondence that had been going back and forth between  
19 the companies as well as the actual contractual documents,  
20 the APA, Amendment 1 and Amendment 2. Are you aware of  
21 that?

22 THE COURT: Mr. Singer.

23 MR. SINGER: I object. This is counsel testifying  
24 about why Novell did it. The form of the question is  
25 objectionable.

1 THE COURT: I will sustain the objection.

2 BY MR. ACKER:

3 Q You are aware that placed onto Novell's Web site was  
4 all of the correspondence back and forth between the parties  
5 as well as the contracts that were at issue, right?

6 A Yes.

7 Q And you would agree with me that once that material was  
8 out in the marketplace, those in the market could make up  
9 their own mind regarding the contract dispute, correct?

10 A Well, yes. I mean, they could make up their own mind.  
11 Again, as I mentioned earlier, Novell's statement are pretty  
12 powerful and quite credible. And if there is uncertainty  
13 over ownership, it's just -- the license is a non-starter.

14 Q And the reason that you would have trouble with that is  
15 because, as you just said, Novell's statements are very  
16 powerful and quite credible, correct?

17 A Yeah. Because, as I mentioned before, they were first  
18 party to the transaction. That's what makes them powerful.  
19 They weren't some third party saying, hey, wait a minute  
20 here, it's looks like the one who sold the assets in the  
21 first place.

22 Q The surveys that you relied on, did they, in any way,  
23 tell the respondents in the surveys, here is the contract at  
24 issue, here's the APA, here's Amendment 1, here's Amendment  
25 2, here are the different arguments, and then ask them how

1 likely or how interested they would be in asking for  
2 indemnification?

3 A No, certainly didn't ask that specifically.

4 MR. ACKER: Nothing else, Your Honor.

5 THE COURT: Mr. Singer.

6 REDIRECT EXAMINATION

7 BY MR. SINGER:

8 Q Mr. Pisano -- Professor Pisano, are surveys generally  
9 more reliable if conducted specifically for litigation or if  
10 they are designed and conducted for a non-litigation  
11 purpose?

12 A For a non-litigation purpose.

13 Q Were the surveys that you relied on here conducted for  
14 a litigation purpose?

15 A No.

16 Q If Novell thought that a survey was the right way to  
17 measure the effect of the slander at issue in this case,  
18 could they have conducted their own survey?

19 A Sure.

20 Q Now you have been shown a lot of letters -- a number of  
21 letters, and are they taking into account people who might  
22 write those letters, in your methodology?

23 A Sure, absolutely.

24 Q Would those be in the 55 percent who if in fact they  
25 weren't interested in the product?

1 A Yeah. The residual group, the 55 to 81 percent, they  
2 would be in that group.

3 Q Now you mentioned at one point in your testimony that  
4 you looked at a series of letters that Novell's expert,  
5 Mr. Musika, had identified?

6 A That's correct.

7 Q Were you shown all of those letters here in  
8 cross-examination?

9 A No.

10 Q Did you determine whether a certain amount of those 32  
11 letters, in fact, referenced Novell's copyright allegations  
12 as a reason for not buying the license?

13 A Yes. As I mentioned before, eight out of 32 referenced  
14 it.

15 Q That would be almost 25 percent of a group of letters  
16 that Novell's expert identified?

17 A That's correct.

18 Q Now, in addition, in your rebuttal report, did you  
19 identify letters from a variety of customers which Novell  
20 has not shown you here today?

21 A I believe so, yes.

22 MR. SINGER: Could we put on the screen SCO  
23 Exhibit 227, a letter from Ford. Let Professor Pisano see  
24 the next page of that.

25

1 BY MR. SINGER:

2 Q Are you aware of this letter from Ford?

3 A Yes.

4 MR. SINGER: Can we look at Sherwin Williams, SCO  
5 Exhibit 187.

6 THE COURT: Are you going to ask for the admission  
7 of any of these?

8 MR. SINGER: I was going to ask for them after the  
9 witness was seeing all four of them.

10 THE COURT: All right.

11 BY MR. SINGER:

12 Q Could we look at SCO Exhibit 187, the letter from  
13 Sherwin Williams; is that correct?

14 A Yes.

15 Q And can we look at Exhibit 188, and this is a letter  
16 from Morgan Stanley?

17 A Yes.

18 MR. SINGER: I would like to move into evidence  
19 Exhibit 188.

20 MR. ACKER: No objection, Your Honor.

21 THE COURT: 188 --

22 MR. ACKER: May already be in.

23 MR. SINGER: If you go, Mr. Calvin, to the third  
24 paragraph of the letter.

25 //

1 BY MR. SINGER:

2 Q And in this, is this a situation where, in addition to  
3 other information, Morgan Stanley was asking, in January of  
4 2004, for documents or information that disproved press  
5 reports that questioned SCO's claim of ownership of relevant  
6 UNIX code?

7 A Yes.

8 THE COURT: Do you move for 188?

9 MR. SINGER: Yes.

10 THE COURT: There is no objection, correct?

11 MR. ACKER: No objection, Your Honor.

12 THE COURT: It will be admitted.

13 (Plaintiff's Exhibit 188 was received into  
14 evidence.)

15 MR. SINGER: I would like to move for 227 and 187  
16 as well.

17 MR. ACKER: That's fine.

18 THE COURT: They will both be admitted.

19 (Plaintiff's Exhibits 187 and 227 were received  
20 into evidence.)

21 BY MR. SINGER:

22 Q Now in connection with these letters that you were  
23 shown in cross-examination, is it surprising that companies  
24 who are asked to buy a license for something which they  
25 thought they were getting for free might push back?

1 A Absolutely. It's no different than my office coffee  
2 used to be free and now you have to start paying 25 cents.  
3 Wait a minute, it used to be free. So there is a little bit  
4 of psychology here that comes into play. It's like this was  
5 ours, we assumed it was ours to use, how dare you. And I  
6 think there is a little bit of that.

7 Q Did it surprise you that IT directors and lawyers at  
8 some of these companies would push back an allegation that  
9 they owe a license fee rather than just write a check?

10 A It's not surprising at all.

11 Q And in your "but for world", Professor Pisano, where no  
12 slander has occurred, you wouldn't have statements then made  
13 by Novell calling into the question of copyrights; is that  
14 right?

15 A That's correct.

16 MR. ACKER: Objection, leading, Your Honor.

17 THE COURT: Sustained.

18 BY MR. SINGER:

19 Q In your but for world of no slander, would there have  
20 been any statements by Novell questioning copyrights?

21 A No.

22 Q And do you think when the prior seller of UNIX, Novell,  
23 says SCO doesn't even own the copyrights, do you think that  
24 may have an effect on the substance and the tone of the  
25 letters which are then being written back to SCO that you've

1 seen here?

2 A Yes.

3 MR. ACKER: Objection, calls for speculation, Your  
4 Honor.

5 THE COURT: Overruled.

6 THE WITNESS: Yes, it would have a big impact.

7 BY MR. SINGER:

8 Q Now do any of those letters matter in your analysis of  
9 the "but for world" which occurs if the slander hadn't taken  
10 place at all?

11 A No, because the letters I think would look very  
12 different.

13 Q Has anything that you've seen here today in the  
14 cross-examination changed any of your conclusions as to the  
15 effect of the slander on SCO's business?

16 A No, not at all.

17 MR. SINGER: Thank you very much.

18 THE COURT: Mr. Acker.

19 MR. ACKER: Nothing further for Dr. Pisano.

20 THE COURT: May this witness, then, be excused?

21 MR. ACKER: Yes, Your Honor.

22 MR. SINGER: Yes.

23 THE COURT: That means you may return to Harvard,  
24 if you want to. After this experience, you may want to  
25 charge more next time, at least what you have to do in the

1 courtroom, all right.

2 Thank you, Dr. Pisano. We do appreciate it.

3 MR. HATCH: Your Honor, we call Dr. Christine  
4 Botosan.

5 CHRISTINE A. BOTOSAN,  
6 Having been duly sworn, was examined  
7 and testified as follows:

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

10 THE WITNESS: Christine A. Botosan, spelled  
11 C-h-r-i-s-t-i-n-e, Botosan is B-o-t-o-s-a-n.

12 DIRECT EXAMINATION

13 BY MR. HATCH:

14 Q Good afternoon, Dr. Botosan.

15 A Good afternoon.

16 Q I was hoping we would say good morning.

17 Where do you work presently?

18 A I work at the University of Utah.

19 Q How did you come to be at the University of Utah?

20 A I started my career in public accounting. And after a  
21 few years in public accounting decided to pursue my dream of  
22 becoming a professor. So I went to the University of  
23 Michigan and I earned a Ph.D. in accounting. Then I took my  
24 first job as a faculty member at Washington University in  
25 St. Louis. I was there for five years.

1           Then the opportunity came along to move to the  
2 University of Utah. At the time I thought it looked like a  
3 great opportunity, rewarding career, but also the  
4 opportunity to have some balance in my life and have a happy  
5 family life. At that point in my life I had been married 17  
6 years, I wanted to make 18, and also had two children, so we  
7 decided to come to the University of Utah. I have been here  
8 11 years and happy to report I will soon be celebrating my  
9 29th wedding anniversary, so that worked out okay.

10 Q    Let me give you what we've marked as SCO Exhibit 749.

11 A    Thank you.

12 Q    Is this a copy of your current resume?

13 A    It is.

14                   MR. HATCH: Your Honor, I move that Exhibit 749 be  
15 admitted.

16                   MR. BRENNAN: I have no objection, Your Honor.

17                   THE COURT: It will be admitted.

18                   (Plaintiff's Exhibit 749 was received into  
19 evidence.)

20 BY MR. HATCH:

21 Q    On top of the resume it gives -- is that your current  
22 position at the university?

23 A    It is.

24 Q    It says the George S. and Dolores Dore Eccles  
25 presidential endowed chair in ethical financial reporting,

1 correct?

2 A That's correct.

3 Q How did you get that position?

4 A So that is a chaired position. I think, as Dr. Pisano  
5 mentioned earlier, that's the highest rank of a faculty  
6 member, so you have to move up through the ranks from  
7 assistant professor to associate professor with tenure to  
8 full professor, finally to chair professor. It's based on,  
9 you know, your accomplishments.

10 Q Great. Do you have an area of particular specialty?

11 A I do. My areas of specialty are in financial  
12 accounting and financial statement analysis.

13 Q How much of your professional life is devoted to giving  
14 expert testimony in litigation?

15 A Very little really. As I said before, I'm employed  
16 full-time as an accounting professor, and I have a demanding  
17 family life. I've got three boys to take care of. I  
18 include my husband in that. And so the time that I do have  
19 to devote to work is really committed to service to my  
20 institution, research, and I'm teaching my students how to  
21 read and analyze financial statements. So I spend more time  
22 teaching others to apply the skills and techniques that I've  
23 learned to bear when I do chose to do an expert witness  
24 engagement than actually doing them.

25 MR. HATCH: Mr. Calvin, if you would show us pages

1 2 and 3. Start with page 2. At the top it says  
2 publications and accepted papers.

3 BY MR. HATCH:

4 Q So I take it you have written extensively in your area  
5 of expertise?

6 A I have.

7 MR. HATCH: If you go through the second page, Mr.  
8 Calvin.

9 BY MR. HATCH:

10 Q It looks like -- I have 23 articles or papers that  
11 you're written?

12 A That's correct.

13 Q Then the next page you have working papers. How are  
14 those different from the other papers we saw?

15 A Those are projects that I'm currently working on. So  
16 they have not yet been published, but hopefully some day  
17 will be published.

18 Q Have you received any awards or honors other than, of  
19 course, your chair?

20 A I have. So I've received teaching awards. I have also  
21 received research awards. So one of my papers won what's  
22 referred to as competitive manuscript award, which is a  
23 competitive award from my national -- from the American  
24 Academy Association, which is an organization of academics,  
25 accounting academics. We have about 8,000 members. That

1 paper also won the notable contributions to accounting  
2 literature award because it was deemed to open up an entire  
3 area of research.

4 Q Do you have any experience in evaluating and analyzing  
5 corporate profits?

6 A I do. Quite a bit. As I said before, I started my  
7 career in public accounting, so it was a regular part of my  
8 job to prepare corporate financial statements, including  
9 income statements that report corporate profits. And since  
10 then, for the last 20 plus years, I've been teaching  
11 financial accounting courses that focus on the measurement  
12 and assessment and analysis of corporate profits.

13 Q Have you served as a financial expert in any other  
14 matters?

15 A I have served on probably about seven expert witness  
16 cases over the last ten years.

17 Q Do you do any consulting work outside of serving as an  
18 expert witness in litigation?

19 A I do. I also will sometimes work with financial  
20 analysts. So these are individuals that work for investment  
21 banks that are going to be forecasting future profits for  
22 the firm or perhaps providing a buy, sell or hold  
23 recommendation on the stock, and they want to make their  
24 recommendations or their forecasts based on the maximum  
25 amount of information that they can gather.

1           So sometimes they will come to someone such as myself  
2 and they will say, can you go through and do an in-depth  
3 analysis of the financial statements of this company that  
4 I'm interested in and flag -- hence, the name red flag  
5 report -- any of the issues that I need to be aware of that  
6 I might need to ask management about or that I should take  
7 into consideration in preparing my forecast of corporate  
8 profits and assess what the effect of that issue would be.  
9 So I write that up in a report and then that goes back to  
10 the analysts and they use it in their assessments.

11 Q     In addition to your teaching and your research and  
12 consulting work, are you involved in any other academic  
13 pursuits?

14 A     So another big part of an academic's job is service,  
15 service to the academic community at large as well as  
16 service to their home institution. And so as part of my  
17 service commitments to the academic community, I am  
18 currently the associate editor of Accounting Horizons, which  
19 is one of our premier practitioner oriented journals in my  
20 field. I'm an incoming associate editor of Contemporary  
21 Accounting Research, which is one of our top academic  
22 journals. And then I was just recently elected the vice  
23 president of publications for the American Accounting  
24 Association. Again, that organization I mentioned a moment  
25 ago. And my primary role as the vice president of

1 publications for that organization will be to chair the  
2 committee that will choose the editors for several of our  
3 top academic journals.

4       Also for the American Accounting Association, I, in the  
5 past, served as the chair of the Financial Accounting  
6 Standards Committee, and that was a committee that I really  
7 enjoyed working on because it had potentially a lot of  
8 impact. That is the committee that would respond to  
9 standard setters when they want to change the standards. So  
10 what we did is we wrote a response to the standard setters  
11 to say, well, based on the research, we think this is a good  
12 or a not so good proposal. While I chaired and worked on  
13 that committee, I co-authored -- I think it was eight  
14 responses to the Securities and Exchange Commission, the  
15 Financial Accounting Standards Board, and also the  
16 International Accounting Standards Board.

17       From a more sort of local perspective, my service to  
18 the University of Utah, I have served on a large number of  
19 different committees over the years. But currently the two  
20 things that are taking up most of my time are chairing the  
21 Strategic Planning Committee for the business school, and  
22 I'm also the director of our Ph.D. program for the school of  
23 accounting. So I work very close with my Ph.D. students.

24 Q       When did you first begin to work on this case?

25 A       January of 2007.

1 Q What were you asked to do?

2 A I was asked to compute the amount of damages, if any,  
3 that SCO sustained as a result of Novell's harmful acts.

4 Q Were you asked to make any assumptions?

5 A I was asked to assume that SCO did, in deed, own the  
6 copyrights. But I was also asked to assume that we were in  
7 a "but for world" where Novell did not claim ownership of  
8 those copyrights.

9 Q In your work, were you able to determine damages to a  
10 reasonable degree of certainty?

11 A Yes, I was.

12 Q What did you consider in doing your work?

13 A I considered -- I considered external analyst forecasts  
14 of sales revenues. I considered internal forecasts as well.  
15 I also considered evidence that was available of what  
16 Novell's actions had been.

17 Q What is your estimate of the damages SCO suffered as a  
18 result of Novell?

19 A I have a range. So at the low end, the number that I  
20 computed was \$114 million, and at the high end it's \$215  
21 million.

22 Q Now how did you arrive at your damages estimate?

23 A I did what is referred to as a lost profits analysis.

24 Q What does that involve?

25 A It involves, first of all, determining the amount of

1 sales that the plaintiff, in this case SCO, suffered as a  
2 result of the defendant Novell's harmful acts. And then  
3 deducting from those lost revenues or lost sales, the costs  
4 that they would have incurred in generating those sales to  
5 arrive at lost profits or the amount of profit that the  
6 company lost as a result of the bad behavior.

7 Q You said the first prong of that is to determine the  
8 lost revenues. What types of revenues did you consider that  
9 SCO lost as a result of Novell's actions?

10 A The revenues that I considered were all under the  
11 SCOSource division and there were two streams of revenue  
12 within that division, the vendor license revenues and also  
13 the right to use, or RTU, license revenues.

14 Q The jury has been here for a week and a half. Let's  
15 make sure we are on the same page. Can you tell us what you  
16 understand vendor licenses to be?

17 A Certainly. So vendor license revenues were revenues  
18 that were derived from licenses that were signed with  
19 large -- the UNIX vendors. And in return for an up-front  
20 fee, what SCO provided to the vendor was the right to use  
21 their UNIX and UnixWare intellectual property in the  
22 development of their own products.

23 And at the time that all of this was being discussed,  
24 SCO's management and external analysts projected that there  
25 would be up to 15 -- potentially 15 of these types of deals,

1 and that they would generate \$10 million per deal on  
2 average.

3 The other type of revenue I think was --

4 Q There were two. What was the second one?

5 A Right. The second one was the right to use licenses.

6 And the right to use licenses were licenses that would be  
7 signed with Linux end users. So, in that case, the up-front  
8 fee was being received in return for SCO's giving a right to  
9 use their intellectual property embedded in Linux to the end  
10 user.

11 And at the time that all of this was being discussed,  
12 external analysts predicted there would be hundreds of  
13 thousands of those sorts of licenses and that they would  
14 sell for between \$100 and \$300.

15 Q Now did you consider how successful SCO had been in the  
16 vendor license program before Novell's acts complained of  
17 here?

18 A I did, yes.

19 Q What did you find?

20 A I found that the program was announced in January of  
21 2003, and by February of 2003 they had negotiated an  
22 agreement with Sun which ultimately generated about \$9  
23 million in revenue for SCO. And then several months later,  
24 in April of 2003, they negotiated another agreement with  
25 Microsoft, and that agreement generated about \$16 million in

1 revenue.

2 Q Your understanding was that was from the SCOSource  
3 division?

4 A Yes.

5 Q How did you determine, going forward, the amount of  
6 losses to SCO from vendor license revenues?

7 A So I had to try to re-create how much revenue SCO would  
8 have earned if Novell had not claimed ownership of the  
9 copyrights. And so a well accepted methodology for doing  
10 that is to look at pre-litigation forecasts of what the  
11 revenues were expected to be. And so that's what I did in  
12 the case of the vendor license revenues.

13 Q Are you able to show those calculations?

14 A I am.

15 MR. HATCH: Your Honor, I would like to put up  
16 some boards. I promised the jury in the opening that we  
17 would calculate this for them. If you would give us a  
18 second?

19 THE COURT: Go ahead.

20 MR. HATCH: Thanks.

21 BY MR. HATCH:

22 Q Dr. Botosan, I'm going to put up a couple boards for  
23 you. I provided some erase dry markers here for you to use.

24 THE COURT: Mr. Brennan, if you need to move,  
25 don't hesitate.

1           MR. BRENNAN: Thank you. I appreciate that, Your  
2 Honor. With the Court's permission, I think I will go to  
3 the other side of the courtroom?

4           THE COURT: Yes.

5           Mr. Brennan, we can move a chair up here for you  
6 if that's better for you.

7           MR. BRENNAN: I think I'm fine here, if it's  
8 acceptable to Your Honor. Thank you.

9 BY MR. HATCH:

10 Q Dr. Botosan, I think right now we're talking about  
11 vendor licenses, right?

12 A Uh-huh. (Affirmative)

13 Q If you could show us how you came to do your  
14 calculations for us.

15 A Sure. So for the vendor license revenues -- what I'll  
16 do first is I'll just write down the numbers by year that I  
17 determined and then I will explain where the numbers are  
18 coming from.

19           So for 2003, the amount of revenue that I determined  
20 that SCO would have earned but for Novell's harmful acts was  
21 27,250,000. And for 2004 -- this is in millions -- was  
22 30 million. For 2005, was ten million. And 2006, ten  
23 million. And 2007, was ten million. For a total of  
24 87,250,000.

25           Now, as I said a moment ago, to come up with these

1 numbers, I relied on pre-litigation forecasts. And I had  
2 two sources of forecasts. Internal SCO forecasts, so these  
3 would be forecasts that management generated themselves, and  
4 then also external forecasts that were prepared by financial  
5 analysts that worked for investment banks.

6 Now given the opportunity to use both of those, if I  
7 had forecasts from both sources, my preference would be to  
8 use an external analyst forecast because they are going to  
9 be more objective. Management tends to be optimistic about  
10 things. And if you think about an analyst who's external to  
11 the company, they don't have any dog in the fight. They  
12 want to try to do the best job they can to forecast because  
13 they are providing information to their clients that are  
14 making investment decisions. The way an analyst is going to  
15 build their own reputation in the market is to do a good job  
16 of forecasting.

17 So my preference would be to use a pre-litigation  
18 forecast from an external source when it's available. The  
19 only year that I didn't have an external forecast available  
20 was for 2003. So, in 2003, this number came from an  
21 internal forecast from SCO's management. But it just so  
22 happens that in 2003, almost all of these revenues were  
23 actually realized. So as we'll see in a moment, 2003  
24 ultimately contributes very little to my lost profits  
25 analysis. It only contributes about one percent of the

1 total because most of these sales were, in fact, not lost.

2 Most of these were, in fact, earned by SCO.

3 Q So you are just estimating the revenues?

4 A I'm estimating the revenues.

5 Q Do you consider -- you used the word optimistic in a

6 certain circumstance. Are these optimistic or are these

7 conservative estimates?

8 A These are conservative estimates of what the

9 revenues -- what the revenues would be.

10 Q Well, tell the jury why you view them as conservative.

11 A Okay. So I said a little while ago that at the time

12 that they were discussing the program, SCO had projected

13 that they thought there were going to do 15 of these \$10

14 million deals that would be available. So, in total, they

15 were anticipating 15 deals at \$10 million a piece.

16 And those beliefs were confirmed in an external

17 forecast that I had available from Deutsche Bank. The

18 Deutsche Bank analyst also said in his analysis that he

19 agreed that there were 15 potential deals and that the

20 amount of revenue that would be generated by each of these

21 deals might range between five million and \$20 million. So

22 he gave quite a broad range between five and 20 million. So

23 at the end of the day, in doing his own forecasts, he also

24 said I think \$10 million is the most likely amount.

25 Q Tell us for a second, if you would -- you say you

1    relied on Deutsche Bank.  What is Deutsche Bank?

2    A    Deutsche Bank is a very large investment bank.  They  
3    have an excellent reputation.  They've been around since  
4    1870, so they are a very well established firm.  They have  
5    over 80,000 employees.  They operate in 70 countries.  So  
6    they are well known for providing this sort of information  
7    to their clients.

8    Q    Were they independent or are they related to SCO in any  
9    way?

10   A    Totally independent.  So they also confirmed that they  
11   felt these numbers were reasonable.

12            So if you take 15 contracts at \$10 million a piece,  
13   that would imply there was a potential for up to  
14   \$180 million in vendor license revenues if I had taken into  
15   consideration all 15 of the deals at \$10 million a piece.  
16   So it's on that basis that I would say 87,250,000 is not  
17   conservative.  It was close to half.  It's a little more  
18   than half, or it could have been if I used the 15.

19   Q    So when the jury is considering the damages to SCO is  
20   87,250,000, the number they should use for the losses is  
21   vendor licenses?

22   A    No.  No.  That is a measure of how much revenue in  
23   total I would have expected SCO to be able to generate in  
24   the "but for world".  So that number represents -- I'm going  
25   to have to squeeze it in here -- expected revenue.  From

1 that number, I have to subtract off the actual revenue  
2 because, obviously, if they sold it, they didn't lose it.  
3 So from that 87,250,000, I deducted their actual revenue  
4 that they didn't lose, which was 25,846,000. And that  
5 brought me down to a lost revenue on the vendor license  
6 revenue side of 61 million for '04. That's the lost revenue  
7 for that stream.

8 Q So that's the lost revenues. Before we go any further  
9 with that, did you determine what the lost revenues would be  
10 for the RTU, the right to use license stream?

11 A I did.

12 Q Can you show us how you calculated that?

13 A I can. I'm going to go over to that board. It's going  
14 to get too crowded.

15 There were two different ways that I went about  
16 calculating the lost revenues for the RTU stream. One of  
17 the approaches that I took was the same as what I did for  
18 the vendor license revenue. Once again, I went and looked  
19 at pre-litigation forecasts to see what people believed SCO  
20 was going to do in that market before the litigation, and  
21 that is my best estimate of what their revenues would have  
22 been in the "but for world". So that was one approach.

23 The second approach that I used was relying on the  
24 analysis that Dr. Pisano described to you earlier today, the  
25 size of the market and the market penetration to come up

1 with numbers of licenses that they would have been able to  
2 sell. So I did the analysis for right to use using both  
3 approaches, and then said, well, you know, I do get kind of  
4 the same answer using those approaches.

5 Q So could you show us how you did that for the first  
6 approach you did?

7 A Sure. So for the right to use licenses, this is based  
8 on the forecasts. Again, I'll just put down the numbers and  
9 then I will explain where they are coming from. So for  
10 2003, there was no amount of RTU revenues really expected  
11 for 2003 because the program was announced so late in the  
12 year that nobody really anticipated there were going to be  
13 substantial amounts of RTU licenses sold in 2003. The  
14 program was expected to really get off the ground and  
15 substantial revenues start to be generated in 2004. So for  
16 2004, the revenues were 23 million; 2005, 42 million; 2006,  
17 42 million; 2007, 42,000,000. For a total of 149 million.

18 Q I notice that you have the exact same numbers for 2005  
19 and 2007. Why is that?

20 A So in this case, I have access to forecasts for 2004  
21 and 2005, and those are the only years that anybody  
22 forecasted RTU license revenues for. So I had those two  
23 numbers from an external source, but I didn't have any  
24 forecasts for 2006 and 2007. So, instead, what I did was  
25 make the assumption that there was going to be zero-percent

1 growth in the sales over those two time periods, which I  
2 considered to be a conservative assumption, so I was  
3 comfortable.

4 Q Why is that?

5 A For a couple of reasons. First of all, if you can just  
6 look at these two numbers, the analysts that did the  
7 forecasts for '04 and '05 assumed that there was going to be  
8 83-percent growth in sales between those two years. So one  
9 of the ways that we sort of try to project forward is to  
10 look at the past. And it would be atypical -- it would be  
11 possible, but it would be atypical for a company to generate  
12 83-percent growth in one year and zero percent for the next.  
13 Normally you might expect some stepping down in the growth  
14 rate.

15 The other reason why I could have supported a positive  
16 growth rate here instead of zero percent was based on Dr.  
17 Pisano's analysis of what was going on with Linux. And what  
18 he found in his analysis was that more and more people were  
19 using Linux. And so over this time period, SCO's market,  
20 the size of the market to SCO was getting bigger each year.  
21 So on the basis of the fact that more people are using  
22 Linux, you could make the argument that they are going to  
23 sell more SCOSource licenses as the market grows.

24 Q So over here you indicated you relied on an independent  
25 analyst, Deutsche Bank. Is that who you relied upon here?

1 A So here I relied on Deutsche Bank for those two  
2 numbers, and then my growth assumption of zero percent.

3 Q All right. So the ultimate number you got there was  
4 how much? What was that?

5 A 149 million.

6 Q Did you consider that, like on the vendor licenses, to  
7 be a conservative or an aggressive, optimistic number?

8 A So I considered that number to be conservative as well.  
9 I've already indicated that I felt that the growth rate that  
10 I was assuming was conservative. But I had other evidence  
11 that provided me with comfort that this was -- this was a  
12 reasonable number as well.

13 In the Deutsche Bank forecast, what sort of underlies  
14 these two numbers, because these two numbers came from the  
15 Deutsche Bank forecast, is an assumption that what SCO was  
16 going to be able to do was sell 650,000 licenses at \$100 a  
17 piece. So that is where -- that is where this \$65 million  
18 worth of revenues is coming from.

19 In that same forecast, what the analysts did was they  
20 said, you know -- and they state in their report -- we think  
21 this is conservative. We think there are some scenarios in  
22 which SCO would do better than that. And so they described  
23 what they refer to as a best case scenario. You know, if  
24 they are firing on all cylinders, how well could they do.  
25 So they said if under the best case scenario, we think they

1 could sell two million of these licenses at \$200 a piece,  
2 that would have generated \$400 million worth of revenues in  
3 those two years. So that was the best case scenario.

4 Q You say that's just for two years?

5 A That would be for those two years.

6 Q Which two years?

7 A 2004 and 2005.

8 Q So that would be -- all right. Go ahead.

9 A Okay. Then in between sort of this best case scenario  
10 and the scenario that they described as reasonable but  
11 conservative was another scenario where they said, well, you  
12 know, it's also possible in between there that they would  
13 sell 900,000 licenses at \$100 a piece, in which case we  
14 would end up with \$90 million worth of revenues in 2004 and  
15 2005.

16 So while those numbers were out there, I felt that it  
17 was more appropriate for me to be prudent and use the number  
18 that the analyst described as conservative and also the  
19 number that the analyst himself placed the most reliance  
20 upon. And so I used the 650,000 times 100, relying on this  
21 here, to get the \$65 million worth of revenue there.

22 And then by virtue of applying a zero-percent growth  
23 rate, what is really happening, I'm sort of building  
24 conservatism on top of conservatism. I'm starting with a  
25 low base and I'm not letting it grow. So there are two

1 levels of conservatism kind of buried in those numbers. So  
2 at the end of the day I felt quite comfortable with that  
3 number.

4 Q I'm trying to ask what would happen if you had used,  
5 you know, kind of the best case scenario where the  
6 percentage of growth would have been increased each year?

7 A So if I used a positive rate of growth, then this  
8 number would be bigger obviously. If I had used, let's say,  
9 a \$200 price, which the analyst actually described as the  
10 most likely price -- they thought out of the range of one to  
11 \$300, \$200 was the most likely price, so I could have said,  
12 well, the analyst says that's the most likely price, so I'm  
13 going to do the calculations using 200. If I had done that,  
14 that alone would double that number, right, because embedded  
15 in that is an assumption \$100, which would have gotten us to  
16 close to \$300 million.

17 Q Dr. Botosan, do you recall I asked you if the  
18 87 million was the final number you took out of actual  
19 sales. Did you do a similar analysis with the 149 million?

20 A I did. So in this case, the actual sales -- so this is  
21 the amount that I would expect them to be able to generate  
22 over this time period, and then from that I took the actual  
23 sales, which was \$1,214,000, which gave me lost revenues,  
24 then, of 147,786,000. So that was my loss, 147,786,000.

25 Q It's thousand or millions?

1 A 147,786,000.

2 Q My apologies. Now you said you used a two-prong  
3 approach. Did you look at it from using different  
4 information?

5 A I did. So the other analysis that I did was based on  
6 the market analysis approach, and both of these are well  
7 accepted methods, the forecast approach and using a market  
8 analysis. So in this case, since I am not an expert in the  
9 same field that Dr. Pisano is an expert in, I'm an  
10 accountant, so I'm good at accounting, I'm not going to be  
11 the type of person that would go out and analyze the market.  
12 But, luckily, I had access to Dr. Pisano's analysis. And so  
13 he used his expertise and, as you've heard earlier, came to  
14 the conclusion that at a lower bound -- so he had a range,  
15 lower number, and at a lower bound, Dr. Pisano estimated  
16 that SCO lost -- so these were lost RTU licenses, so this is  
17 in units, at a lower bound, one million --

18 Q Dr. Botosan, when you say units, I want to make it  
19 clear, this is dollars up here?

20 A Yeah, this is in dollars.

21 Q Put dollars on that.

22 Then when you say the analysis you are now doing is  
23 units, tell the jury what that means.

24 A That these are actual licenses. This is the number of  
25 licenses that Dr. Pisano estimated SCO lost as a result of

1 Novell's conduct.

2 So at the lower bound, it was 1,478,000 licenses, where  
3 at the upper bound it was 3,325,000 licenses.

4 So I took his estimate of how many licenses they lost  
5 and then I multiplied that. So, again, to be conservative,  
6 I looked at the range that the analysts were talking about,  
7 \$100 to \$300, and said, okay, I'm going to choose the bottom  
8 of that range, \$100. I took that price of \$100 per license,  
9 multiplied it by the number of licenses that Dr. Pisano  
10 estimated SCO lost, and came up with another way of  
11 estimating the lost RTU revenues. And that gave me  
12 147,800,000 at the lower bound, and 332,500,000 at the upper  
13 bound.

14 Q So using Dr. Pisano's numbers, that would be the range  
15 of damages using a market analysis study?

16 A That would be the range of lost revenues.

17 Q Lost revenues.

18 A For damages we still need to take off cost.

19 Q So when you compare the two forecasts, the forecast way  
20 of coming at the lost revenues and market analysis, what are  
21 the differences?

22 A So I took a lot of comfort from this analysis because  
23 his lower bound number gave a lot of support to the number  
24 that I had come to using entirely different methodology.  
25 Remember, I'm using the analysts' forecasts where they are

1 projecting what the revenues are going to be. Dr. Pisano is  
2 looking at surveys of, you know, how many people are willing  
3 to buy indemnification and how many Linux deployments there  
4 were. So he's doing an entirely different analysis. Yet,  
5 we came back to very similar numbers at the lower bound.

6 So I felt a lot of comfort in that because it told me  
7 that what I would expect the analysts to be doing up here  
8 when they were projecting things out repeated exactly the  
9 kind of analysis that Dr. Pisano ultimately did except they  
10 should do it in real time. They should also be asking the  
11 question how big is the market and how much do we think SCO  
12 could sell. That provided me with a lot of comfort.

13 Q When you talked about the range of prices, 100 to \$300,  
14 you picked 100 because that was very conservative, right?

15 A Yes.

16 MR. BRENNAN: Objection, leading the witness, Your  
17 Honor.

18 THE COURT: Sustained.

19 BY MR. HATCH:

20 Q Why did you pick \$100?

21 A I picked it because it was the lower bound of the range  
22 100 to 300, because I wanted to be conservative.

23 Q When the independent analysts were talking about the  
24 price per unit, what did they say the best number to use  
25 was?

1 A They said that the range would be 100 to 300, but they  
2 felt 200 would be the most likely price.

3 Q So you picked a more conservative. If you use the  
4 number the independent analysts would have used, what would  
5 the numbers be on both of those -- what would the numbers  
6 be?

7 A The answer to that question, I want to be a little  
8 careful, because they said 200 was the most likely price,  
9 but in forming their forecasts up here, remember, they  
10 themselves used 100, so they also were being conservative.

11 And so if I had, instead of using 100 like the analysts  
12 did and been conservative like the analysts did, instead  
13 said I'm going to go with what the most likely price is,  
14 then I would have used 200, and that would have doubled both  
15 of those numbers. So roughly 300 million to 600 million  
16 would have been the numbers if I used 200.

17 Q Now we've identified two different streams of revenue,  
18 correct?

19 A Correct.

20 Q Can you combine those two for us?

21 A So what I did on my next step --

22 Q Do I need a third chart?

23 A No. I think I'm going to be able to squeeze it in  
24 here, depending on how many more questions you have.

25 So what I did next is I took the lost revenue for the

1371

1 vendor license -- I'm going to say VL for now, short for  
2 vendor license, lost revenue, so that number was 61,404,000.  
3 And then I took the RTU lost revenue, based on my forecast  
4 analysis was 147,786,000. And I added those together, and  
5 it came up to \$209,190,000 as total lost SCOSource revenues  
6 because, you remember, SCOSource has both components  
7 comprising it.

8 Q So is that the damages then?

9 A No.

10 Q What do we have to do -- what do you have to do to -- I  
11 mean, what's next?

12 A Okay. So that is revenue --

13 Q I guess I should ask, why wouldn't that be your  
14 damages?

15 A Because they are going to incur costs. So, you know,  
16 like any business, it takes -- you incur costs in generating  
17 revenue. So if you think about the kind of product that SCO  
18 was selling here, marketing costs are going to be probably  
19 one of the biggest components of costs they are going to  
20 incur. So I had to deduct from this number an estimate of  
21 costs.

22 Q Why did you pick those types of costs?

23 A Well, actually, I ended up going with three different  
24 big categories of costs, cost of goods sold, marketing  
25 costs, and selling general administrative costs. I picked

1 those categories because those are the three categories of  
2 costs that SCO traditionally incurred in selling their  
3 products. So I used -- I just looked at, you know, what  
4 types of costs do they have, and I stuck with kind of what  
5 costs they had incurred traditionally in their business.

6 Q So you took these there types of costs, how did you  
7 work that into your calculations?

8 A So what I needed to do next was I needed to figure out  
9 for every dollar of revenue that SCO generated, how much  
10 cost would they have incurred in the "but for world" again.  
11 And so I used a very standard technique. It's a technique  
12 that we see used in expert witness engagements. It's also a  
13 technique that a company might use internal to their own  
14 operations if they are trying to figure out, you know, how  
15 much cost am I going to incur for an incremental dollar of  
16 revenue that I'm going to generate. For every dollar of  
17 revenue, how much cost am I going to have.

18 So the technique that I used was a regression analysis.  
19 I won't go into the boring details of that. Basically what  
20 it does is it just relates costs to sales. And based on  
21 that analysis, I determined that SCO would incur 46 cents in  
22 costs for every dollar of sales.

23 Q And is that a conservative number?

24 A Again, I felt that was a very conservative -- a very  
25 conservative estimate of their costs.

1 Q Can you explain to us why?

2 A One reason why is because if you think about the nature  
3 of the product that SCO was selling, there wasn't  
4 development that was going to be associated with this  
5 product, which is kind of different from, you know, their  
6 typical cost structure where they might have had some  
7 development. I came to that number by virtue of looking at  
8 SCO's kind of existing cost structure development costs.

9 And then there is not going to be delivery costs  
10 associated with this product because you are just providing  
11 them with the right to use. So that is one reason why I  
12 feel this is a conservative number.

13 I also went back working with those independent  
14 analysts reports because they talked a lot about the  
15 SCOSource business and how they -- you know, how it was  
16 going to work. And the analysts inferred frequently in  
17 their discussions that one of the great things about this  
18 SCOSource product for SCO was that it was going to generate  
19 revenues at a very low cost. In fact, some of them even  
20 implied in their discussion there might be close to no cost  
21 associated with generating SCOSource revenues. One of the  
22 analyst's quotes was to the effect of and the revenue will  
23 go directly to the bottom line.

24 So I've got 46 cents, which is basically taking 46  
25 percent of this number away, which was pretty generous.

1 Q So did you use that number in the calculation to  
2 determine the actual cost that you needed to reduce the  
3 revenues by?

4 A So I took 209,190,000 times 46 cents to get the costs,  
5 which was 95,211,000, and I subtracted those off to arrive  
6 at the lost profits number of 113,979,000, which was that  
7 lower bound number that I referenced at the beginning of our  
8 discussion when I said at a lower bound their damages were  
9 114 million. That's where that number is coming from.

10 Q All right. So is that the number or do we have to go  
11 another step?

12 A No. We're done.

13 Q Well, I'm not going to let you down yet -- or up yet.

14 I think you indicated -- at the beginning of the  
15 testimony you indicated an upper bound of your estimates. I  
16 think you said that was the lower bound. You said an upper  
17 bound was 215 million. Where does that number come from?

18 A Where that number came from was using Dr. Pisano's --  
19 the number implied by Dr. Pisano's upper bound of the lost  
20 units. So if I take the \$332,500,000 of lost revenues on  
21 the RTUs, so instead of using 147,786,000, using that upper  
22 bound number of 332, and then adding in these vendor license  
23 revenues -- of course they are not incorporated into Dr.  
24 Pisano's numbers. He was just focused on RTU.

25 Q Is there room you can write this down?

1 A I don't think I can squeeze it all in. But, basically,  
2 if I take those two numbers, add them together, subtract off  
3 the costs, which is going to be a higher amount of costs  
4 obviously, then I came down to -- I will just write this  
5 number down here in red, 214,000 -- well, actually closer to  
6 215 million. Sorry. So that was my upper bound number.

7 Q Okay. Just so we're clear, you have taken that revenue  
8 number, you reduced it by costs, and what did we get?

9 MR. BRENNAN: Your Honor, I'm not sure we have a  
10 question here at this juncture.

11 THE COURT: We don't.

12 MR. HATCH: You don't have a problem if she writes  
13 it down, do you, Your Honor?

14 THE COURT: What?

15 MR. HATCH: I wanted her to write down so she had  
16 this here, so they could see how the numbers came out.

17 MR. BRENNAN: Your Honor, again, I'm not sure we  
18 have a question.

19 THE COURT: I'm not sure of the question.

20 BY MR. HATCH:

21 Q Do you have the ability to make the same calculation  
22 for the upper bound as you did the lower bound?

23 A I do.

24 Q Could you do that for us?

25 A 61,404,000, and then adding in the 332,500,000, which

1 will give me the total lost revenues. And off the top of my  
2 head, I actually can't remember what that number was.

3 Subtract off the cost, then that comes to \$215 million.

4 Q All right. I think you can go back to your seat.

5 A Thank you.

6 Q I think we've run out of board.

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

8 MR. HATCH: I'm just about done, Your Honor.

9 THE COURT: All right. Go ahead.

10 BY MR. HATCH:

11 Q All right. So are your numbers -- your numbers are all  
12 based on conservative numbers?

13 MR. BRENNAN: Objection, that's leading the  
14 witness.

15 MR. HATCH: It is leading, Your Honor. I will be  
16 happy to ask it again.

17 BY MR. HATCH:

18 Q Tell us the level of confidence you have in these  
19 numbers after having done your study?

20 A I'm extremely confident in the numbers, the  
21 conservative nature of the numbers.

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

23 THE COURT: All right. We'll recess for the  
24 afternoon. When we start tomorrow, we'll go to the  
25 cross-examination of Dr. Botosan.

1 (Jury excused)

2 THE COURT: Mr. Singer, what do we have tomorrow?

3 MR. SINGER: Your Honor, this is the lineup which  
4 will take us through the conclusion of our case except for  
5 the witnesses who will be appearing the following week. We  
6 have the continuation of Ms. Botosan, cross-examination and  
7 redirect.

8 THE COURT: Dr. Botosan, you don't need to wait  
9 here unless you want to. This may take a minute.

10 THE WITNESS: That sounds great. Thank you.

11 MR. SINGER: We would then put on the deposition  
12 of the salespeople whose depositions the Court has ruled can  
13 be used. Those are very short. I think collectively about  
14 15 to 20 minutes, not long.

15 THE COURT: Are there any issues with the  
16 designation?

17 MR. SINGER: I would have to defer to Mr. Normand  
18 on that issue.

19 MR. NORMAND: I missed the question, Your Honor.

20 THE COURT: Are there any issues over the  
21 designation of the deposition testimony of the three --

22 MR. NORMAND: Nothing comes to mind. We'll speak  
23 about that and we'll get them to the Court in the next few  
24 hours. If there are issues, I think they will be very  
25 limited.

1           MR. SINGER: We did plan to call Mr. Maciaszek and  
2 Mr. Nagle. Those should not be lengthy testimonies. They  
3 cover certain points. We would then call Mr. Stone,  
4 adverse, as a witness. I don't expect that to be too long  
5 either. We would then play Ms. O'Gara's deposition  
6 testimony, and then we wind up with Mr. Tibbitts.

7           I am hopeful we can get that all in. It depends a  
8 lot on the cross-examination.

9           MR. ACKER: If I just might inquire, Mr. Stone has  
10 some scheduling issues in the morning, it's a board meeting  
11 he would like to attend. If there is a time certain we  
12 could have his testimony, that would be helpful.

13           MR. SINGER: Is there an estimate on how long Mr.  
14 Brennan's cross-examination of Ms. Botosan might take?

15           MR. BRENNAN: Longer than the direct.

16           MR. SINGER: I would say probably 11:30 might be a  
17 good estimate.

18           THE COURT: Counsel, let me make you aware that  
19 tomorrow I have a meeting I have to attend during the lunch  
20 hour. So we'll recess about five minutes to 12:00 and it  
21 will be at least a half hour lunch tomorrow.

22           MR. ACKER: Same schedule, to 1:30, Your Honor?

23           THE COURT: Yes.

24           MR. SINGER: I believe 11:30 is an estimate. We  
25 could take him after the -- I take it we would be resuming

1 at 12:30 to 1:30?

2 THE COURT: Yes.

3 MR. ACKER: Have him come at 12:30?

4 MR. SINGER: I think that would probably work out.

5 THE COURT: Let's plan on that, even if we have to  
6 interrupt the middle of another witness at that time.

7 MR. ACKER: I appreciate that, Your Honor.

8 THE COURT: Anything else, counsel, before we  
9 recess?

10 MR. BRENNAN: Just a housekeeping measure. I  
11 assume that the demonstratives will be maintained without  
12 disturbance?

13 THE COURT: Yes. We do not have hearings this  
14 afternoon, so you don't have to move everything.

15 MR. BRENNAN: Thank you, Your Honor.

16 THE COURT: If there is nothing else, we'll be in  
17 recess.

18 (Whereupon, the trial was continued to Thursday,  
19 March 18, 2010 at 8:30 a.m.)

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