

1 IN THE UNITED STATES DISTRICT COURT
2 DISTRICT OF UTAH
3 CENTRAL DIVISION

4
5 THE SCO GROUP, INC., a)
6 Delaware corporation,)
7 Plaintiff,)
8 vs.) CASE NO. 2:04-CV-139TS
9 NOVELL, INC., a Delaware)
10 corporation,)
11 Defendant.)
12 _____)
13 AND RELATED COUNTERCLAIMS.)
14 _____)

15
16 BEFORE THE HONORABLE TED STEWART
17 -----
18 March 18, 2010

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21 Jury Trial
22 Volume IX

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1 March 18, 2010 8:30 a.m.

2 P R O C E E D I N G S

3

4 THE COURT: Good morning, counsel.

5 MR. BRENNAN: Good morning, Your Honor.

6 MR. SINGER: Good morning.

7 THE COURT: Somebody has to be tired. I was
8 informed by Mr. Copeland that the jury instructions were
9 filed at 4:00 a.m. this morning. So whoever is responsible
10 for that, I want you to raise your hand and you can go take
11 a nap. The Court wants to express its gratitude to you for
12 the efforts that you have made.

13 I do have one question. It appears that the
14 parties have abandoned the litigation privilege in the jury
15 instructions. Is it correct that you are no longer seeking
16 an instruction on that particular privilege?

17 Mr. Normand?

18 MR. NORMAND: Your Honor, it was Novell who had
19 primarily asserted that privilege, and my understanding is
20 that they are not asserting it anymore. That came out of a
21 meeting that we had over last weekend, and it was confirmed
22 in the writing from the last couple of days.

23 THE COURT: Mr. Jacobs, is that true?

24 MR. JACOBS: I will double-check what happened
25 last night to be sure, and that in the wee hours there was

1 not some change, Your Honor, and I will advise the Court.

2 THE COURT: Thank you.

3 Counsel, the Court wishes to address Novell's
4 renewed motion regarding the prior District Court rulings.

5 Mr. Hatch or Mr. Singer, do either of you wish to
6 respond to that?

7 MR. SINGER: Yes, Your Honor.

8 I will be brief, because this was filed late last
9 night and this is something the Court has dealt with
10 repeatedly in the trial. I don't believe that we have
11 opened any doors. I think this is more of an attempt by
12 Novell to construct a door that they can open themselves.
13 We have insidiously followed the Court's ruling that we not
14 talk about the Internet site that has been up or to make any
15 comments about that, which was the basis for the issue
16 before.

17 The expert testimony of Dr. Pisano and Dr. Botosan
18 is all based on the but-for world. In that but-for world
19 there is no issue as to copyright ownership and it rests
20 with SCO. There is no slander of that title. There is no
21 litigation and there are no rulings. Therefore, there is no
22 reason why any rulings by Judge Kimball come in.

23 The surveys which Professor Pisano relied upon
24 were in 2004 and 2005 and before the summary judgment ruling
25 of Judge Kimball in 2007. It is as Professor Pisano said, a

1 good proxy for what would have happened in that but-for
2 world. If they wanted to raise that in connection with
3 Professor Pisano also, the time to have done so was
4 yesterday.

5 With respect to Professor Botosano, and Mr. Hatch
6 can elaborate on it, it is certainly apparent to the Court
7 that her testimony is based on a but-for world with
8 assumptions that the slander is never made and that you,
9 therefore, never have any litigation and you, therefore,
10 never have any of these court ruling. There is absolutely
11 no reason why this should come in at this time.

12 The one issue which they had raised that came
13 close to this issue is the event study which talked about
14 the effect of the events in the real world. We have stayed
15 away from that and we have dropped the event study in its
16 entirety. This highly prejudicial information, which the
17 Court has recognized in repeated rulings, should not be
18 introduced.

19 THE COURT: Thank you, Mr. Singer.

20 Mr. Brennan.

21 MR. BRENNAN: Yes. Thank you, Your Honor. Just A
22 couple of points. I think most of them are set forth in the
23 written submissions, but I do wish to highlight some
24 important matters.

25 First of all, the suggestion that this is merely a

1 but-for world construction both misstates the testimony that
2 is proffered and that upon which the two experts have
3 premised their testimony.

4 First of all, as we heard yesterday, Dr. Botosan's
5 entire analysis rests upon stock analyst reports. As we
6 will see today, those very analyst reports are premised upon
7 a litigation strategy. The litigation strategy that is
8 announced in the stock analyst reports is pursuit of
9 litigation relative to the UNIX copyrights at issue in this
10 case. As we will see today, the stock analyst reports, that
11 are the entire foundation for Dr. Botosan's testimony,
12 suggest that if the litigation strategy does not work that
13 SCO will fail. So the suggestion that we are in a but-for
14 world is truly a mischaracterization.

15 What will be put in front of the jury I expect
16 today, because Dr. Botosan chose to avoid mentioning it, is
17 prognostications premised on a litigation strategy.

18 Second of all, the fact that the testimony may
19 have been crafted in a way to suggest an abstract world, the
20 reality is that there is a reality, and on cross-examination
21 we should be able to indicate both to the jury, and to show
22 the weaknesses in both Dr. Botosan's and Dr. Pisano's
23 presentations, by asking questions about the real world, and
24 in a real world where one would measure the intent and
25 thought processes of potential licensees. That is what is

1 significant here in a slander title case.

2 There are potential licensees who in the real
3 world rejected SCOsource licenses because, among other
4 things, rulings by the District Court. First, in 2004 the
5 Court, Judge Kimball presiding, expressly debunked many of
6 the theories that are now being advanced. Then, of course,
7 in 2007 with the summary judgment ruling.

8 We should be entitled to explore the real world,
9 because the numbers that I saw put up yesterday were real
10 numbers. Well over \$200 million in damages are being
11 claimed. It is highly prejudicial for Novell in an effort
12 to defend against that sort of gargantuan claim, not to be
13 able to indicate to Dr. Botosan real world events.

14 In fact, Your Honor, as we'll also see today, in
15 her expert report she indicated that in forming her
16 conclusions she relied upon real world events. For example,
17 in her expert report she said that she considered and relied
18 upon the motion for summary judgment. It was filed by
19 Novell and granted by Judge Kimball. She considered and
20 relied upon the second amended complaint filed by SCO, and
21 Novell's answer to the second amended complaint and
22 counterclaims.

23 She had within the selected menu of materials the
24 pleadings in this case. She issued her report after the
25 summary judgment motion had been filed. She proffered a

1 declaration to the Court after Judge Kimball had issued his
2 rulings. For all those reasons, Your Honor, they have
3 broadly opened the door.

4 Now, it is absolutely true that from the very
5 beginning we have repeatedly asked for authorization to
6 present to the jury information regarding two things. First
7 of all, the mind-set of Novell, and that is relevant to a
8 slander title case that turns on intent. We have also
9 asked, and we repeat the request, that we be entitled to
10 show what is the mind-set of these potential licensees.
11 That is the whole justification for a damages award. The
12 argument that has gone to the jury is that licensees passed
13 on SCO licenses solely for this but-for proposition that
14 Novell slandered the title. There are other considerations.
15 There were litigation considerations. They play it
16 selectively.

17 So, Your Honor, I think for all of the reasons
18 that we have indicated, and those that are set forth in the
19 papers and prior submissions, and the extraordinary
20 prejudice that Novell bears, that we ought to be able to
21 indicate through Dr. Botosan that there were real world
22 events, and those real world events are directly contrary to
23 the testimony that she is proffering, and also to elicit
24 testimony that if she were to take into account real world
25 events, that that would lead to a different conclusion.

1 The final point in that regard, Your Honor, is,
2 again, she relies and she said yesterday that her damages
3 calculations were premised on two basic points. One,
4 Deutsche Bank prognostications. As we'll see, as I have
5 mentioned, those prognostications are litigation driven. As
6 we look at the risk factors that are identified in the
7 report, they specifically identify litigation factors.

8 In addition, Dr. Botosan mentioned that in her
9 estimation the costs of pursuing the SCOSource program would
10 be relatively negligible in terms of legal expense. We know
11 that is not true. We know, for example, that with the two
12 license agreements that also form the foundation for her
13 prognostications, the Microsoft agreement and the Sun Micro
14 Systems agreement, that the Boies Schiller firm was entitled
15 to 20 percent of the revenues generated by that. That was
16 entirely ignored.

17 So we have a situation where the real world has
18 Boies Schiller involved from the very beginning entitled to
19 massive fees, over \$30 million, and entitled to a cut of
20 these revenues, and there is continuing activity, but the
21 witness yesterday got up and said, well, in my estimation
22 and I have run a regression, I don't expect there to be any
23 real significant expense. That is directly contrary to
24 reality. We ought to be able to present all of that, Your
25 Honor.

1 One last point, and I appreciate your patience,
2 but we are mindful of the Court's comments regarding perhaps
3 the need to inform the Court that there was a ruling by the
4 Tenth Circuit. We have proffered to the Court at least a
5 suggestion as to how to deal with that at this juncture.

6 Thank you.

7 THE COURT: Thank you, Mr. Brennan.

8 Mr. Singer, do you wish to reply?

9 MR. SINGER: Well, what has been raised in these
10 papers is specifically talking about this litigation, about
11 a slander of title litigation and rulings in this
12 litigation, not pursuit of legal remedies in general but
13 this litigation. The whole point of a damages analysis, as
14 these experts have indicated, is you construct an
15 alternative world in which liability is assumed, first of
16 all, and the slander has not occurred. In that case there
17 is no litigation and there are no rulings.

18 Is there a need to pursue litigation against
19 copyright infringers? Perhaps. That has nothing to do with
20 introducing a 2007 decision or any other decision in the
21 course of this litigation when that would never have
22 occurred if the slander had not occurred.

23 The last point which was raised by Mr. Brennan is
24 an entirely new aspect of this, that somehow he should be
25 allowed to get into the contingency fee arrangement with

1 Boies Schiller, because some of the money that SCO pays will
2 ultimately be used to pay its lawyers. Well, if that were
3 true, in every case the contingency fees would be an element
4 of cross-examination. Obviously that is an obligation of
5 the plaintiff, if they are able to make recoveries, and it
6 has nothing to do with the issue of liability or damages to
7 which the plaintiff is entitled and is just another attempt
8 to prejudice the jury.

9 The Court has had this right and consistently
10 right throughout all of these issues and it should stay with
11 the rulings it has made consistently.

12 THE COURT: Counsel, the Court is going to grant
13 Novell's request and allow cross-examination to include
14 reference to appropriate decisions in the District Court.
15 The Court is going to read to the jury the following
16 instruction after. Ladies and gentlemen, you may be
17 wondering why, in view of the evidence, you have heard of
18 prior court rulings. You have been called to jury service
19 on the issues in this lawsuit. SCO appealed the District
20 Court rulings that you have heard about and the Court of
21 Appeals reversed those decisions and determined that a jury
22 should decide the issues in this case. That is why you are
23 here.

24 MR. SINGER: Your Honor, may I address the Court?

25 THE COURT: Yes.

1 MR. SINGER: This motion, which would call for a
2 reversal of the Court's consistent rulings which have been
3 on this subject for weeks now, came in last night.

4 Ms. Botosan is local, and may we have an
5 opportunity to brief this for Your Honor and Ms. Botosan
6 could be re-called if necessary to pursue this line of
7 questioning? We think this is highly prejudicial.

8 In the alternative, to at least explore this issue
9 with Ms. Botosan outside the presence of the jury first, and
10 see what type of evidence would be elicited, and then make a
11 decision as to whether or not that should be something heard
12 by the jury. We really are, you know, responding to this on
13 the basis of something filed late last night, without having
14 filed written memorandum, and we think it is a very
15 important issue. We would like an opportunity, if we could,
16 to further brief this point or to explore it in a manner
17 which the jury does not hear it until the Judge, Your Honor,
18 has been able to hear exactly what Mr. Brennan hopes to
19 elicit.

20 THE COURT: How would you propose that happen?

21 MR. SINGER: Well, with respect to the first --

22 THE COURT: I am not going to delay the testimony.
23 That is not going to happen.

24 MR. SINGER: With respect to the second request,
25 just like a Daubert type hearing, that line of

1 cross-examination be heard first outside of the presence of
2 the jury, and we can argue as to whether or not it is
3 probative. The Court can see whether or not it is probative
4 and then make a ruling. If the Court says that should come
5 in, then it would be presented in front of the jury, if it
6 does not, then it shouldn't.

7 THE COURT: Mr. Singer, I am not going to do
8 either. I am going to allow the cross-examination to
9 proceed. I will count on Mr. Hatch to make appropriate
10 objections if he thinks a question is inappropriate and the
11 Court will rule on a question by question basis.

12 MR. SINGER: Your Honor, may I understand the
13 scope of the ruling? The only point which can be elicited
14 is the 2007 summary judgment, and then the Court would
15 instruct the jury that that was reversed and that is why
16 they are here listening to this case?

17 THE COURT: I believe Mr. Brennan wants to ask
18 about the 2004 ruling by Judge Kimball.

19 MR. BRENNAN: That is correct, Your Honor.

20 MR. SINGER: The 2004 ruling was in the course of
21 a denial of a motion to dismiss. I take it that is
22 something that could then be explored on redirect, that that
23 motion was denied and that the grounds on which it was
24 raised by the --

25 THE COURT: Of course it will, Mr. Singer. Of

1 course it will.

2 MR. SINGER: Yes.

3 Your Honor, we think -- obviously the Court has
4 ruled on this matter, but we believe that this is really
5 completely unrelated to the but-for world which these
6 witnesses are presenting testimony on. It does not relate
7 to any of the assumptions of the damage analysis here, since
8 these decisions would not have occurred if the slander had
9 not occurred, and the projections are based on studies which
10 are measuring what would have happened --

11 THE COURT: Mr. Singer, I have the feeling that
12 your witness is able to answer the questions instead of you
13 continuing to argue it here. Okay.

14 Anything else before we bring the jury in?

15 MR. BRENNAN: No. Thank you.

16 MR. HATCH: Your Honor, the only other thing is we
17 also late last night, and I saw it for the first time this
18 morning, and I didn't count them up, but there are a number
19 of new documents that I don't believe we have seen before
20 that Mr. Brennan apparently intends to use. Many of them
21 would be objectionable, because they are now dealing with
22 Boies Schiller contingency fees and things of that nature,
23 but they have had this report for over three years and we
24 get this many new documents, and both the quantity and the
25 quality of these things, and I just don't think they are

1 appropriate and I object to these.

2 MR. BRENNAN: Just so the Court will be mindful,
3 there are two species of documents that we sent over. One
4 are A.K. filings, S.E.C. A.K. filings by SCO to the
5 Securities and Exchange Commission, and the second --

6 THE COURT: Mr. Brennan, you have been aware of
7 Dr. Botosan's testimony for a long time. I am not aware of
8 anything that was elicited yesterday on direct that was
9 outside of the scope of that, and there is certainly no
10 objection to that extend, so the Court is not going to allow
11 any additional new exhibits at this point in the trial.

12 MR. BRENNAN: Very well. Thank you, Your Honor.

13 MR. HATCH: Your Honor, also, I think Mr. Brennan
14 mentioned the issue about the fees. I don't think that
15 should be game, but --

16 THE COURT: Let's see what his question is and you
17 can object to it and the Court will make a ruling at the
18 appropriate time.

19 MR. HATCH: Thank you.

20 THE COURT: Put the charts up and everything back
21 up before we bring the jury in so that we don't waste any
22 time.

23 MR. BRENNAN: With your permission, my intention
24 was to use this one early on, and then I wanted to take it
25 down so that I have a line of sight.

1 THE COURT: That will be fine.

2 (WHEREUPON, the jury enters the proceedings.)

3 THE COURT: Dr. Botosan? Where did she go?

4 Dr. Botosan, I will remind you that you're still
5 under oath.

6 THE WITNESS: Thank you.

7 CROSS-EXAMINATION

8 MR. BRENNAN: May it please the Court?

9 THE COURT: Go ahead.

10 BY MR. BRENNAN

11 Q. Good morning, Dr. Botosan.

12 Let me introduce myself. I am Sterling Brennan, one of
13 the attorneys who is representing Novell on this matter. I
14 do have a number of questions for you this morning, and I
15 hope you'll be patient as I ask them of you.

16 Let me start by asking you this. When did SCO's
17 attorneys first approach you and ask you to help them with
18 this case?

19 A. January of 2007.

20 Q. How much did they agree to pay you per hour for the
21 work that you do in connection with this case?

22 A. So my hourly rate is \$450 an hour, which I know sounds
23 like a big number, and it seems like a big number to me, as
24 well, but I think it is really important for the jury to
25 understand why those numbers are so large and --

1 MR. BRENNAN: Your Honor, I wonder if --

2 THE COURT: Dr. Botosan, I will instruct you to
3 answer the questions posed directly. If there is something
4 that your counsel believes needs to be brought out in
5 addition to the answer that you provide, he will do that by
6 way of redirect.

7 THE WITNESS: Okay.

8 THE COURT: Just try to be as concise as possible
9 in answer to the questions.

10 THE WITNESS: Okay. Sorry.

11 MR. BRENNAN: Thank you.

12 BY MR. BRENNAN

13 Q. Dr. Botosan, this \$450 per hour, that is substantially
14 more than you are paid by you employer, the University of
15 Utah, correct?

16 A. Yes. On an hourly basis, yes.

17 Q. What would be the hourly rate, if your were able to
18 calculate it, that you're paid for your work by the
19 University of Utah?

20 A. Off the top of my head I have no idea.

21 Q. Substantially less than \$450 per hour?

22 A. Yeah, it is, but the other consulting work that I do is
23 similar.

24 Q. How much time have you spent working on this matter for
25 SCO's attorneys since they first approached you in February

1 of 2007?

2 A. I have spent -- I think it works out to an average of
3 about a week a year out of the four years, so about a total
4 of four weeks in total for the four years I have been on the
5 case.

6 Q. Would that be a 40 hour week multiplied by four?

7 A. No. I wish my weeks were 40 hours. It is about 50
8 hour weeks.

9 Q. Your estimation, if my calculations are right, is you
10 spent about 200 hours on this so far?

11 A. That is correct.

12 Q. That has been 200 hours, roughly, times \$450 per hour?

13 A. That is correct.

14 Q. So that is just under \$100,000?

15 A. Roughly.

16 Q. Now, when SCO's attorneys first hired you, they asked
17 you to make certain assumptions and they gave you specific
18 instructions, correct?

19 A. We discussed the case and what the but-for world would
20 look like. I was instructed about the but-for world and
21 what assumptions I would make with that, but beyond that I
22 was not given instructions.

23 Q. For example, in this but-for world you were given
24 specific parameters that you were to consider to be true,
25 right?

1 A. Correct. I was to assume that Novell had in fact
2 slandered the title.

3 Q. So when SCO's attorneys came to you, they instructed
4 you that you were to assume that Novell was liable, right?

5 A. Correct.

6 Q. You have not made any independent evaluation of whether
7 Novell is liable, have you?

8 A. I have not.

9 Q. So what you presented to the jury yesterday was
10 premised and dependent upon the instruction that SCO's
11 attorneys gave you when they first approached you in
12 February of 2007 that Novell had slandered title, right?

13 A. Correct.

14 It is typical in these sorts of damages analyses that
15 we are to assume that the bad act happened. Then we're
16 asked to compute what damages would be under that
17 assumption. I mean, ultimately it is up to the court to
18 decide.

19 Q. SCO's attorneys also came to you and asked you to
20 follow their instructions and then reach certain
21 conclusions, correct?

22 A. I'm sorry. Repeat that question.

23 Q. I would be happy to.

24 When SCO's attorneys first came to you, they asked you
25 to follow their instructions, to assume certain matters, and

1 then to reach conclusions that you put in a written report,
2 correct?

3 A. Well, no. What they asked me to do was they asked me
4 to examine the available evidence, and then using my
5 expertise to come up with an independent assessment of what
6 I felt the damages were from Novell's wrongful acts. That
7 is what I did.

8 Q. You put that in a written report, correct?

9 A. That is correct. I did write a report.

10 Q. The first report that was prepared was dated May 23rd,
11 2007; is that right?

12 A. That is correct.

13 Q. I believe if you will look in the black binder that is
14 in front of you, you'll find a copy of the written report
15 dated May 23rd, 2007.

16 Now, SCO's attorneys helped you write that report,
17 correct?

18 A. No, they did not.

19 Q. They played no role whatsoever in its preparation?

20 A. No, they did not.

21 Q. Well, for example, SCO's attorneys provided you certain
22 documents to review, correct?

23 A. They provided me some documents that they had
24 discovered, and then I was also given access to the database
25 of documents. I went through a training session on how to

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1 access that database so that I could do key word searches on
2 my own.

3 Q. And this database did it include all of the various
4 pleadings and filings in the litigation?

5 A. Yes.

6 Q. And the database that you were given access to included
7 orders and decisions made by this Court, correct?

8 A. I assume so.

9 Q. Did you review those?

10 A. I reviewed the ones that dealt with the case.

11 Q. The ones that you reviewed, were those ones that were
12 selected for you by SCO's attorneys?

13 A. Not that I recall.

14 Q. So you in your review had full access to all of the
15 rulings and orders in this case when you prepared your
16 report; is that correct?

17 A. Yes.

18 With that said, I do want to make the point that I am
19 not a lawyer. So, you know, I read the complaint, for
20 example, and I read depositions and --

21 Q. Now, when you were hired by SCO's attorneys and they
22 gave you their instructions, one of the instructions that
23 you were given was as follows. If you have any question
24 about it, you can follow along with me from your report.
25 Again, that is the May 23, 2007 report. I'm going to read

1 from page 2, paragraph 5.

2 One of the assumptions that you were asked to make and
3 an instruction that you were given was as follows: That,
4 quote, the asset purchase agreement and bill of sale
5 transferred the entire UNIX and UnixWare business to SCO,
6 including the copyrights, and amendment number two confirmed
7 that the transfer had in fact occurred, end quote.

8 That is one of the instructions that you were given,
9 right?

10 A. That is true. I mean, I think as we have already
11 established, my understanding was that I was supposed to
12 assume that there were harmful acts on the part of Novell
13 and that SCO owned its copyrights.

14 Q. One of the other instructions that you were given is
15 that you were to calculate damages based on, quote, SCO's
16 lost profits due to Novell's public claims that SCO does not
17 own the copyrights to the UNIX source code associated with
18 the UNIX and UnixWare business, right? I'm reading from
19 your report, page 1, paragraph 1.

20 Do you see that?

21 It is on the screen, if that would help you.

22 A. Thank you.

23 That is correct. That is what I was asked to do.

24 Q. So SCO's attorneys told you what the measure of damages
25 should be, right?

1 A. Again, it is typical with an expert witness to discuss
2 with the lawyers what the appropriate measures of damages
3 are. Not being a lawyer, it is important for me to
4 understand from the legal team what the appropriate damage
5 measures are.

6 Q. My question, perhaps, called for a more abbreviated
7 response.

8 A. Okay.

9 Q. The question is SCO's attorneys gave you the
10 instruction as to what your measure of damages calculation
11 should be, right?

12 A. I think my answer was that that is typical, yes.

13 Q. In fact, without SCO's attorneys' instructions you
14 wouldn't know what the measure of damages should be, right?

15 A. So my role in this is to compute the amount of damages.
16 My role is not to act as the lawyers to determine the degree
17 of the case, for example.

18 Q. Let me ask the question. Without the instructions that
19 you were given by SCO's attorneys, you wouldn't even know
20 what measure of damages to calculate, right?

21 A. I would rely on the experts, the lawyers, to determine
22 the appropriate measure of damages, and then my job as the
23 expert is to measure those damages, which is what I did.

24 Q. Now, you don't have any independent basis to determine,
25 for example, whether Novell transferred the UNIX copyrights

1 to Santa Cruz Operation, do you?

2 A. I have seen the documents, but that is not -- I am not
3 a contract expert. I relied on the instruction that I
4 received and the assumptions that I was supposed to make and
5 proceeded from there.

6 Q. Essentially what you were doing is following the
7 instructions given by SCO's attorneys in reaching the
8 information that you presented to the jury yesterday, right?

9 A. I would agree with that statement, but only to the
10 extent that it was appropriate for me to follow their
11 instruction.

12 Q. Just as you don't have any independent basis to know or
13 to determine whether or not Novell transferred ownership of
14 the UNIX copyrights to Santa Cruz Operation, you don't have
15 any independent basis to determine whether or not SCO
16 claimed title to those UNIX copyrights was slandered by
17 Novell's public statement, do you?

18 A. So I was to assume that SCO owned the copyrights and
19 that Novell had harmed SCO. That was the assumption and I
20 started my work from there.

21 Q. Now, if the instructions and assumptions given you by
22 SCO turned out to be inaccurate, that would significantly
23 impact the damages calculations you made, right?

24 A. Well, if the court or the jury decides that SCO does
25 not have a case then, yeah, there won't be any damages.

1 Q. Just so we are clear, if it is determined that the UNIX
2 copyrights did not transfer to Santa Cruz Operation under
3 the asset purchase agreement, then you would agree that
4 there would be no damages, right?

5 A. So my damages were calculated in a world where SCO owns
6 the copyrights and Novell harmed them. So if you want to
7 get outside of that world then, you know, we are not in the
8 world that I calculated damages.

9 Q. Let me ask the question again. If it is determined
10 that the UNIX copyrights did not transfer to Santa Cruz
11 Operation, then you would agree that SCO has no damages,
12 right?

13 A. Well, SCO would not own the copyrights in that case, if
14 that is what you're telling me.

15 Q. Just so we are clear, you would agree that SCO had
16 suffered no damages, right?

17 A. Well, if they don't own the copyrights, then they
18 wouldn't incur damages.

19 Q. Now, your written report that you prepared in May of
20 2007 includes additional conclusions that you didn't present
21 yesterday, right?

22 A. Repeat that again.

23 Q. I would be happy to.

24 Your May 23rd, 2007 report that you prepared almost
25 three years ago, included various conclusions that you

1 reached that you did not share with the jury yesterday,
2 right?

3 A. I was told that we were going to be discussing the
4 damages, and that is the portion of the report that I was
5 asked about.

6 Q. In fact, either yesterday or the day before, SCO's
7 attorneys told you not to present information other than
8 what you shared yesterday, right?

9 MR. HATCH: Your Honor, objection.

10 THE COURT: Sustained.

11 BY MR. BRENNAN

12 Q. Now, I am going to ask you to help me, if you might,
13 with a calculation.

14 Would you mind coming down to the board as you did
15 yesterday?

16 A. Sure.

17 Q. I have left a marker out front. You'll see the green
18 marker. I'm going to ask you to perform a calculation.
19 Just so that we are clear, what is before us is a summary of
20 the testimony that you provided yesterday, correct?

21 A. Correct.

22 MR. HATCH: May I move to where I can see?

23 THE COURT: Yes.

24 THE WITNESS: Except for the material on the other
25 board.

1 BY MR. BRENNAN

2 Q. Just so we are clear, if the instruction that you were
3 given and the assumption that you made by SCO's attorneys,
4 namely that Novell had slandered SCO's title, isn't
5 accurate, then what number would you put on this board in
6 terms of the amount of damages that SCO would have suffered?

7 A. So you're saying if the assumption is that Novell did
8 not slander the title --

9 Q. Slightly different. If the instruction that you were
10 given and the assumption that you were asked to make is not
11 true, that is that Novell transferred ownership of the
12 copyrights, and Novell slandered title, if either of those
13 turns out not to be accurate, what would your calculation
14 number be for damages suffered by SCO?

15 A. Okay. I just want to make sure that --

16 Q. Please.

17 A. You're asking me to assume that SCO does not own the
18 copyrights and Novell did not slander the title? Is that
19 what you're saying?

20 Q. Let me say it a third time and I apologize.

21 A. Yes. I'm having a hard time.

22 Q. I will try to do better.

23 You have been asked to assume by SCO's attorneys that
24 the copyrights to UNIX transferred to Santa Cruz Operation,
25 right?

1 A. Yes.

2 Q. That is assumption number one.

3 A. Correct. What do you want me to assume from that one?

4 Q. Just listen to me for a minute, if you would.

5 That is the first instruction you were given, right?

6 A. Right.

7 Q. The second instruction that you were given is that

8 Novell slandered SCO's title to the UNIX copyrights,

9 correct?

10 A. Correct.

11 Q. Now, if either of those assumptions and instructions

12 turns out to be inaccurate, what is the amount of damages

13 that you would write down on this board suffered by SCO?

14 A. Again, I mean, it sounds to me like what you're saying

15 is that if you want me to assume that the copyrights did not

16 transfer, okay, and Novell did not slander the title --

17 Q. Either one of those.

18 A. Either one. Do you want to do all the different

19 scenarios?

20 Q. Well, let's start first with this. If the UNIX

21 copyrights did not transfer to Santa Cruz Operation, what is

22 the amount of damages that SCO suffered in this case?

23 A. So if we knew for sure -- does the entire market know

24 for sure?

25 Q. I'm just asking you to --

1 A. But you have to give me some context for this new
2 but-for world. Are you telling me that not only does SCO
3 and Novell know that the copyrights didn't transfer, but the
4 entire world knows that the copyrights didn't --

5 Q. Let's make that assumption.

6 A. If you want to make that assumption, then it is the
7 same problem that we have after Novell slandered the title,
8 which is a company can't charge a licensing fee for an asset
9 that they don't own. In that case, if that is the world
10 that you want to create which, of course, is not the world
11 that we are living in, but if you want to create that world,
12 then they don't own the copyrights, no one would want to
13 buy a SCOsource license, in which case there wouldn't be any
14 damages, but we also wouldn't be sitting in court discussing
15 this.

16 Q. So what is the number you would put down assuming the
17 assumptions that I just gave you? What would the damage
18 number be?

19 A. It would be zero in that case.

20 Q. Do you mind writing that down so that we can make sure
21 that we have that.

22 Thank you.

23 That is the only calculation I needed you to do at this
24 juncture.

25 MR. BRENNAN: Your Honor, with your permission may

1 I move the easel?

2 THE COURT: Yes.

3 MR. BRENNAN: Thank you.

4 BY MR. BRENNAN

5 Q. Just so that we can understand what we have just been
6 talking about, the conclusions that you have reached and
7 presented to the jury are functions of the assumption that
8 you are asked to make, right?

9 A. As is typical in damages analysis, if you're going to
10 compute damages you have to assume that something bad
11 happened. So, yes, it is definitely a function of that
12 assumption that a bad thing did happen.

13 Q. And without that assumption you would not be able to
14 reach the conclusion that you presented to the jury,
15 correct?

16 A. Well, if nothing bad happened then there wouldn't be
17 any damages. That seems fairly obvious.

18 Q. Now, you were asked by Mr. Hatch yesterday some
19 questions about your qualifications, and I would like to
20 follow up with you a bit about some of those. You told us
21 yesterday, if I heard correctly, that your areas of
22 specialty are financial statement analyses and corporate
23 reporting strategy, correct?

24 A. That is correct. Well, financial reporting and
25 financial statement analysis, yes.

1 Q. Mr. Hatch showed to us yesterday your curriculum vitae.

2 I think he used C.V.

3 Do you remember that?

4 A. Yes.

5 Q. You understand that is short for curriculum vitae?

6 A. Yes.

7 Q. I think that is Latin for life story, something like
8 that?

9 A. Could be.

10 Q. Maybe that is another word for resume, right?

11 A. Uh-huh.

12 Q. Correct?

13 A. Yes.

14 Q. In your curriculum vitae, and based upon what you told
15 us yesterday, is it correct that most of your time in an
16 academic environment is spent with issues of financial
17 statement analyses and corporate reporting strategies?

18 A. That is correct.

19 Q. Now, to your knowledge in this case there is not an
20 issue about financial statement analyses, correct?

21 A. Well, no, that is not true. I mean, my expertise in
22 financial statement analyses is critically important in my
23 ability to do the lost profits analysis, because to do a
24 lost profits analysis you need to be able to analyze
25 financial information and model financial outcomes. Those

1 are all skills that are within that realm of financial
2 statement analysis expertise.

3 Q. Let me see if I understand this correctly. You
4 essentially relied on two sorts of documents in reaching
5 your conclusions. One were stock market trader analyst
6 reports, right?

7 A. I did rely on analyst reports, that is correct.

8 Q. The other were internal projections by SCO, right?

9 A. Those are two of the very small subset of documents
10 that I had to rely on and use in coming up with my
11 recommendations, yes.

12 Q. Would you agree that the stock trader analyst reports
13 are not financial statements?

14 A. Actually I would disagree to -- with financial
15 statement analysis, that name is a bit of a misnomer.
16 Really it is financial information analysis, might be a
17 better way of describing what that area of expertise is. I
18 don't limit myself, you know, and if it is financial
19 information, and it just does not happen to be written on
20 the face of the balance sheet, that does not mean that I
21 wouldn't understand that information.

22 The analyst report that I examined was chock full of
23 financial information and I analyzed it.

24 Q. I think my question might have been a little different.
25 Let me try it again.

1 You know what a financial statement is, right?

2 A. I definitely do.

3 Q. The stock market analyst report is not a financial
4 statement, is it?

5 A. It is a document that conveys financial information.
6 Within that document there were financial statements. There
7 was also additional information.

8 Q. Were the stock market analyst reports audited financial
9 statements?

10 A. No.

11 Q. The SCO projections, those were not financial
12 statements, were they?

13 A. Again, you know, none of this is relevant. They are
14 definitely -- they are not financial statements by
15 definition. They are projections. They are financial
16 information.

17 Q. You also mentioned that the other area of expertise
18 that you have is corporate reporting strategies, right?

19 A. That is correct.

20 Q. That would include things like filings with the
21 Securities and Exchange Commission?

22 A. That would include filings with the Securities and
23 Exchange Commission.

24 Q. And you're aware that publicly traded corporations that
25 may be regulated by the United States Securities and

1 Exchange Commission are required by law to file an annual
2 report with the S.E.C., correct?

3 A. That is correct.

4 Q. Those are called, in short terms, a 10-K, right?

5 A. That is correct.

6 Q. You're also aware that publicly traded corporations are
7 also required by law to submit quarterly reports to the
8 S.E.C., and those are called 10-Qs, correct?

9 A. That is correct.

10 Q. You're aware as well that if there is a material
11 development effecting a publicly traded corporation, that by
12 rule and regulation from the Securities and Exchange
13 Commission that publicly traded corporations are required to
14 submit within a certain time period after the material
15 development a form that the S.E.C. calls an 8-K, correct?

16 A. That is correct.

17 Q. And in your work dealing with corporate reporting
18 strategies, you're familiar with those sorts of S.E.C.
19 filings, correct?

20 A. I am.

21 Q. Have you reviewed the S.E.C. filings whether 10-Ks or
22 10-Qs or 8-Ks made by SCO Group, Inc.?

23 A. I did examine the 10-Ks. I examined the 10-Qs. I am
24 not at this point, three years later, I don't recall if I
25 looked at every single 8-K that they filed.

1 Q. For what time period did you review either the 10-K,
2 which is the annual report, or the quarterly 10-Q reports,
3 or periodic 8-K reports for SCO?

4 A. For SCO I know that I looked at the 10-Qs from at least
5 2001 through 2004. For the 10-Ks, I looked at quite a few
6 years of those as well. I can't say I read every single
7 one, which is this big, from cover to cover, but I did use
8 parts of them.

9 Q. Now, yesterday when you made your presentation to the
10 jury, you included damage amounts for each of the years of
11 2003, 2004, 2005, 2006 and 2007, right?

12 A. That is correct.

13 Q. Did you look at SCO's public filings whether 10-Ks or
14 10-Qs or 8-Ks for each of those five year?

15 A. I believe that I looked all of the 10-Ks from all of
16 those years. I am not sure that I looked at all the
17 quarters from all of those years.

18 Q. As you sit here in court today, you have had the
19 benefit of looking at least at the annual reports filed by
20 SCO in connection with the years 2003 through 2007?

21 A. I have.

22 Q. Have you, to your knowledge, looked at most of the
23 quarterly or 10-Q reports?

24 A. Like I said, with the quarterlies I distinctly remember
25 that I collected data from the quarterly reports from 2001,

1 I think it was, through 2004. I would have to go back and
2 check my report to confirm whether it was '04 that I -- that
3 is my best recollection, the best I can do.

4 Q. Was the information that you saw in those public
5 filings information that you took into consideration in
6 forming your opinion that you shared with the jury
7 yesterday?

8 A. Yes.

9 Q. Now, we have talked a little bit about the work that
10 you have done in this case where the SCO Group, Inc. is
11 suing Novell, but you have also been asked by SCO's
12 attorneys to do work for them in another case for SCO,
13 right?

14 A. That is correct.

15 Q. That is the case against I.B.M., right?

16 A. That is correct.

17 Q. When were you first engaged to do work by SCO's
18 attorneys in the I.B.M. case?

19 A. That one I don't remember exactly. It was before
20 Novell. It must have been either 2006, 2005, somewhere in
21 that time frame.

22 Q. So your recollection is you began work for SCO's
23 attorneys as early as 2005, right?

24 A. Actually I think I might be able to tell you with
25 certainty on that one.

1417

1 Q. Thank you.

2 A. I should have a date. 2005.

3 Q. Have you been paid the same hourly rate by SCO's
4 attorneys in the I.B.M. case as you have been paid in the
5 Novell case?

6 A. I don't recall.

7 Q. Do you have any reason to believe you were being paid
8 more or less in the litigation against Novell than in the
9 litigation against I.B.M.?

10 A. No.

11 Q. How much have you been paid to date for your I.B.M.
12 work?

13 A. I have not been working on that case in quite awhile,
14 so I really don't recall.

15 Q. Do you have an estimation as to how much you have been
16 paid for the work that you did do?

17 A. I don't recall. I'm sorry. It has been quite awhile
18 since I had any dealings with that case.

19 Q. Now, looking at your C.V. that Mr. Hatch showed you
20 yesterday, there are a number of publications that are
21 identified in your curriculum vitae, right?

22 A. That is correct.

23 Q. None of those publications have to do with the issue of
24 a lost profits analysis, do they?

25 A. Not directly. That is not the type of thing that an

1 academic would research.

2 Q. You're telling me that an academic would not research
3 lost profits issues?

4 A. Not in an academic research context. I think often
5 there is a misunderstanding about what we do in academic
6 research.

7 Q. Are you aware of any academicians who have written on
8 the subject of lost profits damages or analyses?

9 A. From an academic perspective as opposed to a
10 practitioner perspective?

11 Q. Yes.

12 A. So running an analyses, scientific based analyses on
13 lost profits, no. I would say no, I am not aware of any.

14 Q. Have you been to the University of Utah's law library
15 to look at academic works on lost profits analyses?

16 A. Well, the law research is very different from
17 accounting research.

18 Q. You certainly have never written on that topic, have
19 you, that is lost profits analyses?

20 A. I have not.

21 Q. None of the articles that you have written address the
22 subject of the correct methodology to determine a proper
23 calculation for lost profits analyses, have they?

24 A. Well, you know, I would say that my expertise comes not
25 from the academic research that I have done, but from what

1 we discussed earlier, which is the expertise that I have in
2 financial statement analysis and financial accounting, which
3 comes more from the teaching side of my experience.

4 Q. So your answer to my question would be what?

5 A. I'm sorry. I thought I answered it.

6 Do you want to repeat the question?

7 Q. I will do my best to try.

8 Is it correct then that none of the articles that you
9 have written address the issue of the correct methodology
10 for calculating and determining lost profits?

11 A. Okay. I believe that I agreed to that statement, but
12 just wanted to make the point that that is not where I
13 purport my expertise comes from.

14 Q. Now, you do not consider yourself to be an expert in
15 computer programming, right?

16 A. No.

17 Q. You do not consider yourself to have been educated or
18 have experience in computer technology or computer operating
19 systems, right?

20 A. No.

21 Q. You don't consider yourself an expert with respect to
22 what is known as the Linux operating system, do you?

23 A. No.

24 Q. You don't consider yourself to be an expert with
25 respect to the UNIX operating system, fair?

1 A. That is all fair. I consider myself to be an
2 accounting expert.

3 Q. You're not familiar with computer operating system
4 markets, are you?

5 A. I am an accounting expert so, no.

6 Q. You don't consider yourself to be an expert with
7 respect to issues involving computer software licensing, do
8 you?

9 A. I am an accounting expert not a computer expert.

10 Q. You have never been directly involved in any issue
11 involving the licensing of computer software, have you?

12 A. Again, that was not why I was hired and that was not
13 the expertise that I was asked to have. No.

14 Q. You don't consider yourself to be an expert with
15 respect to intellectual property, correct?

16 A. Well, that depends on what aspect of intellectual
17 property you're asking me about.

18 Q. Okay. Let me --

19 A. For a damages analysis, I would disagree with that
20 statement.

21 Q. For example, you don't consider yourself to be an
22 expert with respect to patents, correct?

23 A. I am not a patent expert, no.

24 Q. You don't consider yourself to be an expert with
25 respect to copyrights, fair?

1 A. That would be fair.

2 Q. Nor do you consider yourself to be an expert with
3 respect to trademarks, correct?

4 A. Correct. There are a lot of things I'm not an expert
5 in. I am an expert in accounting and financial analysis.

6 I wish I was an expert in tons of stuff. That would be
7 great.

8 Q. Now, before you were asked to prepare the expert report
9 that you did in this case, you in your career had only
10 previously prepared one other expert report, right?

11 A. That is true. I mean, I think I made the point before
12 during my direct that I don't do a lot of expert witness
13 work. But that said, you know, I do feel that I have the
14 expertise to do it based on my education and background.

15 Q. I don't want to belabor the point, but just so we don't
16 lose the answer, I asked you whether or not it was true that
17 the only expert report that you had done previous to the one
18 in this case was one another one, right?

19 A. The only lost profits analysis or the only expert
20 report?

21 Q. The only expert report that you have done before this
22 case was one other, right?

23 A. That's not true.

24 Q. Okay. Let me just see if I understand.

25 You prepared the expert report in this case in May of

1 2007, right?

2 A. You mean -- sorry. I thought you meant to this point.

3 At the time that I prepared this expert report I had done
4 two others, I believe, but let me just check.

5 Q. Well, isn't it correct that the only other one you had
6 done was in the case of LifeWise versus eTrade?

7 A. Let me just see. There was the Freightliner versus
8 Dick Simon Trucking, which would have predated that as well,
9 the SCO Group versus I.B.M., and then LifeWise, so there
10 were three.

11 Q. Now, let me have you focus on the LifeWise case. Do
12 you recall your deposition was taken in that case?

13 A. I do.

14 Q. Do you recall in that deposition that you acknowledged
15 that you're not an expert in terms of business valuation
16 issues.

17 A. So if you could get me the actual quote, I don't
18 believe that that is what I said.

19 Q. I believe that in front of you is a copy of your
20 deposition taken in this case on February 5th of 2010.

21 In particular, if you would --

22 A. Where am I supposed to be? Is it in this pile or this
23 pile?

24 Q. Dr. Botosan, I think, if I may help, to your left are a
25 series of files, and I think you'll find the depositions

1 that you have given. I don't want to disrupt your papers
2 here.

3 A. That is okay.

4 Q. There we go.

5 A. Direct me to the specific quote that you're asking me
6 about.

7 Q. Yes, I would be pleased to.

8 What I'm going to ask you to do is look at page 26,
9 line 17, through page 27, line 9. As you do that, do you
10 recall that your deposition was taken in this case about
11 five weeks ago?

12 A. I do.

13 Q. Do you recall at that deposition stating that in
14 connection with a previous matter that you felt that you
15 were not in a position to be hired as an expert to deal with
16 business valuation issues?

17 A. What I recall from my deposition and saying after I had
18 been asked about this, and in an out of content fashion, was
19 that at the time that this particular case came about it was
20 the first one that I had ever worked on. When I said that I
21 didn't feel prepared to do a damages analysis in this
22 specific example, there were a number of reasons why that
23 was the case, not the least of which that I had been brought
24 into the case sort of last minute.

25 Q. Now, you have never taught a course regarding damages

1 issues, have you?

2 A. I have not. Well, I have taught courses that do
3 financial statement analysis, which is a big part of doing a
4 damages analysis. I have taught many courses that require
5 the skills and abilities that I bring to bear when I do this
6 sort of an analysis.

7 Q. Is it fair that you have never taught a course dealing
8 with lost profits damages?

9 A. Well, you know, I have not taught a course where I have
10 taught my students to do a damage analysis. I have taught
11 many courses where I have taught them to do the type of
12 analyses that I do in a damages analysis.

13 Q. Now, the opinion that you expressed to the jury
14 yesterday is dependent upon analyses done by Dr. Gary
15 Pisano, correct?

16 A. Could you repeat that question again?

17 Q. Yes. I would be pleased to.

18 The presentation that you made to the jury yesterday
19 and the conclusions that you communicated, those are
20 dependent upon analyses done by Dr. Gary Pisano, correct?

21 A. They incorporate some of the analyses that Dr. Pisano
22 did. They are not dependent on Dr. Pisano's analysis.

23 Q. You had a chance to sit in the courtroom yesterday and
24 listen to Dr. Pisano's testimony, correct?

25 A. I did.

1 Q. And you rely upon the opinions of Dr. Pisano, correct?

2 A. As I said, they were incorporated into my analyses.

3 Except for one piece of my analyses I do rely on his
4 opinions.

5 Q. You understood from what Dr. Pisano has said, including
6 what he said yesterday in court, that he relies upon web
7 based surveys, correct?

8 A. That was one of the pieces of information that he uses
9 in his analysis, correct.

10 Q. As you understood Dr. Pisano's opinions that you relied
11 upon, you understood that Dr. Pisano himself did not conduct
12 the surveys, right?

13 A. That is true. I understood from his testimony that
14 using his expertise and following standard procedures, he
15 did the analysis of the market based on the web based
16 surveys that were available to him.

17 Q. You have not conducted any surveys yourself, have you?

18 A. I have not.

19 Q. You did not participate in any of the surveys
20 referenced by Dr. Pisano?

21 A. I did not, no.

22 Q. You did not review the questions that were asked of the
23 participants in the surveys, have you?

24 A. I did not, no.

25 Q. You don't know what methods were used by those who did

1 conduct the surveys, do you?

2 A. I think when you went through this with Dr. Pisano --
3 not you but the other layer went through this with Dr.
4 Pisano, I think that he was making the point that none of
5 this was relevant to a scientific based approach to doing
6 the market analysis. So while the answer to all of these
7 questions will be no --

8 Q. If we could just get the answer to the question, would
9 that be agreeable to you?

10 A. It would be, but I think it is important for the jury
11 to understand --

12 THE COURT: Dr. Botosan, I explained to you at the
13 beginning that you have an obligation to answer the
14 questions posed by the attorney as directly as possible, and
15 to the extent additional information is necessary, that that
16 will be elicited by your attorney on redirect.

17 THE WITNESS: Okay. Thank you. Sorry, Your
18 Honor.

19 BY MR. BRENNAN

20 Q. Let's go back to the question I asked. You do not know
21 what methods were used by those who conducted the surveys
22 relied upon by Dr. Pisano, is that true?

23 A. True, and it is not relevant.

24 Q. Now, being web based surveys there was no way to
25 control for a number of things such as, for example, the

1 randomness of the response, correct?

2 MR. HATCH: Your Honor, objection. This is beyond
3 the scope and no foundation. She has already indicated this
4 is Dr. Pisano's analysis.

5 THE COURT: The Court will sustain the objection.
6 BY MR. BRENNAN

7 Q. Just so we are clear, your testimony, as you have told
8 us, relies upon Dr. Pisano's survey information, right?

9 A. So my testimony is that Dr. Pisano did the analysis
10 that I relied upon in my report. That is correct. I relied
11 upon his expertise.

12 Q. Have you done anything to corroborate or sustain the
13 validity of the surveys conducted by Dr. Pisano?

14 MR. HATCH: Same objection, Your Honor.

15 THE COURT: You may answer the question.

16 MR. BRENNAN: Thank you.

17 THE WITNESS: So that is kind of the point of my
18 triangulation analysis that I did, so the fact that the
19 forecast analysis that I did independently of Dr. Pisano,
20 and Dr. Pisano's analysis comes out to some numbers,
21 provides support for both of those analyses.

22 BY MR. BRENNAN

23 Q. Well, I think the question that I asked is that you did
24 not do anything to corroborate --

25 A. Well, that is the corroboration.

1 Q. -- the reliability of the methodology used by Dr.
2 Pisano in the survey; is that correct?

3 A. I did not corroborate the methodology, but I did
4 corroborate the outcome.

5 Q. You don't consider yourself an expert in the
6 formulation or implementation of surveys, correct?

7 A. That is why I rely on Dr. Pisano.

8 Q. Your answer to the question --

9 A. No.

10 Q. Now, yesterday to the jury you presented a high end
11 number and a low end number.

12 Do you remember that?

13 A. Correct.

14 Q. And the so-called high end number is dependent upon Dr.
15 Pisano's analysis, correct?

16 A. That is correct.

17 Q. So if we were to focus on the work that you did, only
18 the low end number would be the based upon your own work?

19 A. That is correct. My independent work was based on the
20 forecast analysis.

21 Q. So would you agree that if for any reason Dr. Pisano's
22 analysis is not wholly accepted, then the high end number
23 would not be reliable? Correct?

24 A. That would be correct.

25 Q. Now, when --

1 A. Actually, can I just add one thing to that, though?
2 That is that Dr. Pisano's high end number was within the
3 neighborhood -- if you remember when I went through the
4 analysis yesterday, there were three scenarios that I talked
5 about in the Deutsche Bank report, and Dr. Pisano's high end
6 number was very close not to the most optimistic outcome,
7 but to the second outcome. So there is, although I didn't
8 have that in my report, there is support in the Deutsche
9 Bank report for that number in terms of it being consistent
10 with that sort of middle scenario.

11 MR. BRENNAN: Your Honor, I move to strike, given
12 the witness's statement that it was not within her report.

13 MR. HATCH: Your Honor, it was clearly within her
14 testimony yesterday.

15 THE COURT: It was within her testimony yesterday.

16 MR. BRENNAN: Very well, Your Honor.

17 BY MR. BRENNAN

18 Q. Now, you have not spoken with any person that you
19 understood was a potential SCOSource licensee; is that
20 correct?

21 A. No, I have not.

22 Q. You didn't conduct any interviews to find out what the
23 feelings or viewpoints were of any persons who might be
24 candidates for a SCOSource license at any time, correct?

25 A. I did not, no.

1 Q. You told us that you were first contacted by SCO's
2 attorneys in about February of 2007. Do you know when this
3 lawsuit was filed by SCO against Novell?

4 A. I believe it was January of 2004.

5 Q. So you were contacted a little more three years after
6 the case was filed, correct?

7 A. Yes.

8 Q. To your observation, given the fact that it had been
9 more than three years after the lawsuit was filed, SCO's
10 attorneys didn't come to you to consult with you to get
11 information about what theories they might present in the
12 lawsuit, right?

13 A. I did not have any conversation with them prior to
14 January of '07.

15 Q. So by the time they come to you, that is SCO's
16 attorneys have come to you, you understood that this lawsuit
17 was already three years in the making, right?

18 A. Correct.

19 Q. Now, if I could direct your attention to your report,
20 and in particular I would like to direct your attention to
21 that section of the report that is entitled Exhibit 1. It
22 covers pages 23 and 24. This is a list of documents that
23 you considered in forming your conclusions when you
24 submitted your initial report in May of 2007, correct?

25 A. That is correct.

1 Q. And among the documents that you looked at was the SCO
2 Group second amended complaint filed in this case, correct?

3 A. That is correct.

4 Q. And you also look at Novell's answer to that complaint,
5 right?

6 A. Correct.

7 Q. And you also looked at a document entitled memorandum
8 in support of Novell, Inc.'s motion for partial summary
9 judgment or preliminary injunction, correct?

10 A. That is correct.

11 Q. I think you told us earlier that in addition to those
12 specific documents and pleadings filed in this case, that
13 you also had access to the other pleadings that had been
14 filed, that is the submissions by the attorneys representing
15 the parties as well as court rulings and orders, correct?

16 A. So everything that I have looked at is listed here.

17 Q. You had access to additional information, correct?

18 A. Well, I mean, I had access to it. I mean, I had access
19 to the whole database. Everything that I looked at is in
20 this list.

21 Q. What information did SCO's attorneys provide in terms
22 of documents when they first asked you to help them in this
23 case against Novell?

24 A. That was a long time ago. Just basically off the top
25 of my head, what I would expect I did see at that point was

1 the -- I don't remember the timing of some of these, and if
2 they happened after I started my report, but basically the
3 complaint that had been filed at that point in time, the
4 asset purchase agreement, the amendments, the technology
5 license agreements, so just some of the various agreements.
6 Then other documents that they had already located that I
7 would need in order to do my analysis.

8 Q. So was all of the documentary information that you
9 needed to do your work supplied to you by SCO's attorneys?

10 A. No. So they gave me kind of what they had already
11 collected and then, as I said before, I collected some data
12 on my own as well, either through accessing the database or,
13 you know, checking things out on the Internet and just
14 trying to find data myself.

15 Q. When you said that you checked things out on the
16 Internet, what sorts of things did you look for on the
17 Internet?

18 A. One of the things that I did was I did a key word
19 search looking for press releases or newspaper articles that
20 were written during this time period. I tried to find any
21 references that I could to analyst reports that had been
22 produced.

23 Q. When you're doing these Internet searches, did you use
24 a string of key words or search terms?

25 A. Generally, yeah.

1 Q. Words like Novell?

2 A. Novell would be one.

3 Q. SCO?

4 A. SCO.

5 Q. Copyrights?

6 A. In the content of Novell and SCO, yes, not just
7 copyrights.

8 Q. And as a result of doing those sorts of searches, you
9 came up with a large body of information, right?

10 A. Correct.

11 Q. Did you look at the information that you found?

12 A. I tried to, yes.

13 Q. Now, did SCO's attorneys ever instruct you not to look
14 at anything?

15 A. No. Never.

16 Q. They didn't tell you to ignore or not pay attention to
17 any of the publicly available information that you either
18 were given or that you could find through searches?

19 A. No, they did not.

20 Q. Now, you're aware that developments regarding both
21 SCO's case against I.B.M. and SCO's case against Novell had
22 been broadly reported in the press, right?

23 A. That is true.

24 Q. And you had the understanding that those who were
25 involved in the computer software market likely also had

1 been following the developments in this case, right?

2 A. I suspect that they are aware of them.

3 Q. Would you expect that those who are in the computer
4 software industry would be watching developments in this
5 case?

6 A. I would say definitely to the point that they are
7 publicly reported. To the point of sitting down and
8 actually reading legal briefs, that one I am not so sure
9 about.

10 Q. To your expectation, those individuals who are in the
11 computer software market, would include those who would be
12 users of Linux, right?

13 A. Potentially.

14 Q. And you would expect that those who use Linux would
15 likely follow developments in this case that are broadcast?

16 A. That are publicly broadcast, yes.

17 Q. Would you also expect that those in particular who may
18 have been the subject of demands by SCO, with respect to the
19 request that Linux users pay a royalty or a license fee to
20 SCO under the SCOSource license program, would follow
21 developments in this case?

22 A. I think that is fair.

23 Q. Do you believe that those who would follow developments
24 in the case would be influenced by those developments?

25 A. Well, I guess it would depend on whether the

1 development you're referring to provided new information. I
2 mean, I think that they would be aware of what was going on
3 and would take that into consideration in their decisions.

4 Q. In fact, would you expect that those who would be
5 watching developments in this case, if there was new
6 information, that that would play a role in the decision on
7 their part as to whether or not to accept SCO's demand that
8 they pay a license fee?

9 A. I think that they would take all of the information
10 into consideration when they are making that decision.

11 Q. You have mentioned analyst reports. In fact, you found
12 analyst reports on the Internet, correct?

13 A. You know, I'm trying to remember where I got them from.
14 It is kind of hard sometimes to find analyst reports on the
15 Internet because they are not always publicly available. I
16 don't recall if I found the Deutsche Bank report on the
17 Internet or if it was in the database, for example.

18 Q. Thank you for raising that. I want to focus on that
19 for a minute.

20 You have relied upon certain Deutsche Bank reports,
21 right?

22 A. That is correct.

23 Q. Were you provided those or did SCO's attorneys give
24 those to you?

25 A. As I recall, when I came to the decision as to how I

1 was going to go about trying to construct the but-for world,
2 I asked the attorneys if they knew if there were any
3 forecasts that were available. They searched the database
4 and I searched the database and found whatever we could.
5 There was some internal scope forecasts, there was an R.R.G.
6 forecast, there was Deutsche Bank forecasts.

7 Then I also did my search of the Internet but, like I
8 said, not much comes up on the Internet because generally
9 investment banks want to sell those forecasts. They are not
10 giving them away for free. They don't just post them on the
11 Internet. It depends on the investment bank.

12 Q. The Deutsche Bank reports in particular, were those
13 provided to you by SCO's attorneys or did you independently
14 find them?

15 A. I don't recall if -- they responded to my request for
16 forecast.

17 Q. You mentioned this database or data bank. What is
18 that?

19 A. It is just that there is so much material in this case,
20 that the attorneys have it all set up in a database that you
21 could key word search.

22 Q. So SCO's attorneys have set up some sort of database,
23 right?

24 A. Yes.

25 Q. They have given you access to that, correct?

1 A. I had access to it. I have not accessed it recently,
2 but --

3 Q. Was this some sort of password that you were given so
4 you could go on the Internet and get access to this database
5 of computer recorded documents?

6 A. If I recall, there was some sort of F.T.P. protocol
7 that I had to get on my computer so that I could get in and
8 get access.

9 Q. You don't remember whether the Deutsche Bank analyst
10 reports were on that database or not?

11 A. I don't recall.

12 Q. Did you contact Deutsche Bank and ask for any analyst
13 reports regarding SCO?

14 A. I did not.

15 Q. Now, you're aware that in addition to Deutsche Bank,
16 there were other analysts and stock market traders who
17 provided reports regarding SCO, right?

18 A. Yes.

19 Q. I think you mentioned R.G.?

20 A. R.R.G.

21 Q. Excuse me. R.R.G.

22 Who or what is R.R.G.?

23 A. Renaissance Research Group. It is another group of
24 analysts that provided some forecasts.

25 Q. Were there other analysts that provided forecasts?

1 A. There was also the one that Mr. Musika liked to use,
2 which is an analyst from Decatur Jones.

3 Q. When you say Mr. Musika likes to use, you understand
4 that Mr. Musika is an individual by the name of Terry
5 Musika, right?

6 A. I do.

7 Q. You understand Terry Musika to be an expert witness
8 that has been retained by Novell to challenge, as it were,
9 some of the conclusions that you have reached, right?

10 A. I do.

11 Q. And you learned about other analyst reports when Terry
12 Musika presented his opposition or rebuttal expert report,
13 correct?

14 A. The Decatur Jones report, that is true.

15 Q. Before you got Terry Musika's report in opposition or
16 rebuttal to your positions, you were not aware of these
17 Decatur Jones reports?

18 A. No, I was not.

19 Q. They were not in SCO's attorneys' database?

20 A. They were not. Decatur Jones is a very, very small
21 firm and not well known or widely publicized. That was not
22 something that came up, for example, when I did my Internet
23 search and they were not available.

24 Q. Are you familiar with an entity known as Blaylock,
25 B-l-a-y-l-o-c-k, and partners?

1 A. That name does not sound familiar.

2 Q. I take it you have never reviewed analyst reports
3 prepared by Blaylock?

4 A. I do not believe so, no.

5 Q. Are you familiar with an entity known as Kaufman
6 Brothers?

7 A. I am as of this morning.

8 Q. How so?

9 A. I saw a reference to that name, but prior to that I was
10 not.

11 Q. I take it you have never reviewed any reports by
12 Kaufman Brothers, fair?

13 A. No.

14 Q. Are there other analyst reports that you reviewed other
15 than those I have referenced this morning in connection with
16 SCO?

17 A. So I reviewed the internal forecasts, Deutsche Bank
18 forecasts, the R.R.G. forecasts, the Decatur Jones forecasts
19 after they were brought to my attention by Mr. Musika.

20 Q. Now, you would agree that one of the reasons that some
21 Linux customers chose not to enter into SCOSource licenses
22 was because of a concern that SCO could not prove that Linux
23 infringed UNIX, right?

24 A. That is true. That is incorporated into my analysis.

25 Q. Now, you talked about a but-for world, and I would like

1 to focus for a moment on a different kind of world, the real
2 world. I would like you to focus your attention on a
3 particular time period. I would like you to focus your
4 attention on the period from June 6th of 2003 until December
5 22nd of 2003.

6 Do you have that time period in mind?

7 A. Okay.

8 Q. You're familiar generally with those dates, aren't you?

9 A. I am.

10 Q. During that time period, and let's see if we can back
11 up and see what those two bookends might be. You're aware
12 through your work in the case that there is a claim by the
13 SCO Group that on June 6, 2003, that Mr. Jack Messman, then
14 the chief executive officer of Novell, issued a statement
15 suggesting that there was a question as to whether Novell
16 had in fact not transferred copyrights, correct?

17 A. That is correct.

18 Q. You're also aware that on December 22nd, 2003, a little
19 more than six months later, is a date that had some
20 significance in this case, because the suggestion has been
21 by SCO Group in this case that on December 22nd Novell made
22 public statements or the publication of information stating
23 that in fact it did own the UNIX copyrights without
24 question, correct?

25 A. Yes.

1 Q. Those are the two bookends, June 6, 2003 to December
2 22nd 2003.

3 A. Correct.

4 Q. I'm going to refer to that time period, and this is a
5 word of my choice, as the quiet period. The reason I choose
6 that term is because that was a period, at least based on
7 what we have heard in court, that there were not
8 publications made --

9 MR. HATCH: He is testifying. Is there a
10 question?

11 MR. BRENNAN: There will be. I am just trying to
12 define the terms, Your Honor.

13 THE COURT: Go ahead.

14 BY MR. BRENNAN

15 Q. Again, I was talking about why I used the term quiet
16 period to define that time period between Novell's public
17 statement on June 6th regarding copyright ownership and
18 December 22nd regarding copyright ownership.

19 A. Okay.

20 Q. Now, did you factor into your analysis, in the real
21 world, whether or not any of the individuals who might be
22 potential SCO licensees entered into SCOsource licenses with
23 SCO during that time period?

24 A. I did.

25 Q. Were there any licenses that any persons entered into

1 with SCO during that time period?

2 A. There were.

3 Q. How many?

4 A. So during that time period the only program that was up
5 and running was the vendor license program. If you recall,
6 and I think my numbers are gone now, but for 2003 there was
7 no revenue forecast for the R.T.U.s. The only revenues that
8 were forecast were for the vendor license revenues. During
9 that time period there was the Sun and the Microsoft
10 agreements.

11 Q. Let me see if we understand each other. You referenced
12 a Sun agreement, and that was entered into in February of
13 2003, right?

14 A. Correct.

15 Q. You also referenced a Microsoft agreement, right?

16 A. Correct.

17 Q. That was entered into in May of 2003, right?

18 A. Correct.

19 Q. So the time period I would like you to focus on is a
20 different time period, June 6th, 2003 through December 22nd
21 of 2003.

22 A. Okay.

23 Q. Do you have that time period in mind?

24 A. Okay.

25 Q. During that time period did SCO enter into any

1 SCOSource licenses?

2 A. I don't remember if the Computer Associates agreement
3 was during that time period, but there were no others to my
4 knowledge, any other big vendor licenses that happened
5 during that time period. The R.T.U. license program had not
6 really started at that point.

7 Q. Let me focus on what you call this R.T.U. license. I
8 think you told us yesterday that that is an acronym for
9 right to use; is that correct?

10 A. Right.

11 Q. During this June through December time period, you're
12 not aware of any right to use licenses being entered into?
13 Is that what I understood you to say?

14 A. That there were not any forecasted for that time
15 period, and that there were not any entered into because the
16 program was just getting stated.

17 Q. Now, when did SCOSource announce the right to use
18 program?

19 A. I believe that was in August.

20 Q. Your testimony is that you believe that the
21 announcement of the SCOSource right to use program was not
22 even announced until August of 2003?

23 A. The R.T.U. for the end user Linux group? It was in
24 that time frame. I don't remember exactly, but it was in
25 that time fame.

1 Q. Let's just assume that the right to use license program
2 was not announced until August of 2003. Let's then shorten
3 the time period we're looking at and focus on August of 2003
4 and until December 22nd of 2003. That is a about a four
5 plus month period, right?

6 A. Correct.

7 Q. Did SCO enter into any R.T.U. licenses during that
8 period?

9 A. Can I just check my report for one second?

10 Q. Sure. Whatever you would like to look at.

11 A. According to the numbers, the data that I have
12 collected in my report, there were no R.T.U. license
13 revenues through October of 2003, which was their 2003
14 fiscal year end.

15 There were R.T.U. license revenues recorded in the
16 first quarter, end of January of '04, which would have been
17 November, December and January. I can't say that there were
18 none in November and December, which are two of the months
19 you're asking about. I can say that there were none that
20 were recorded through October of '03.

21 Q. Since you have the materials in front of you, let's
22 focus on the first fiscal quarter of 2004, which would be
23 November 1st, 2003, through January 31st, 2004, right?

24 A. Correct.

25 Q. What was the amount of revenue indicated for SCOSource

1 licenses, R.T.U. licenses during that time frame?

2 A. During that time period, which was when they were just
3 getting going, was 20,000.

4 Q. Let me see if I understand this correctly. We have
5 looked at a time period, June 6, 2003 when Novell made a
6 public statement, that has been at least suggested in court,
7 as withdrawing its claim of ownership to the UNIX
8 copyrights. That has been the suggestion?

9 A. Correct.

10 Q. And December 22nd of 2003 when Novell publicly asserted
11 that it did in fact own the copyrights?

12 A. Correct.

13 Q. During that time period, and if we could spill over
14 another month into January of 2004, during that time period
15 when there are no public statements by Novell claiming
16 ownership to the UNIX copyrights, SCO was only able to sell
17 about \$20,000 worth of R.T.U. licenses?

18 A. Well, during that time period SCO was just getting
19 started with the program.

20 Q. Your answer to my question is what?

21 A. My answer to your question is that they were just
22 getting started with the program. They were just getting
23 ramped up, so they were in the process of starting the
24 program. There was no expectation -- I think this is
25 important to point out -- there was no expectation at that

1 point in time by either internal to SCO or external analysts
2 as of October -- when was the forecast -- October 14th was
3 the Deutsche Bank forecast -- there was no expectation by
4 anybody at that point that they were going to have R.T.U.
5 license sales, because they were just starting up the
6 program.

7 Q. Did someone from SCO tell you they had no expectation
8 that they would sell any SCOSource licenses until sometime
9 in 2004?

10 A. That is what is incorporated into the forecast. We
11 didn't discuss it in those terms, but that is what the
12 numbers convey.

13 Q. Let me ask you about your discussions that you have
14 had. Have you ever talked with Darl McBride?

15 A. I have on occasion, yes.

16 Q. Have you ever asked Mr. McBride what he expected would
17 be the revenue from the sale of SCOSource licenses from the
18 time of the announcement through the end of January of 2004?

19 A. I did ask him about the forecasts that were internal to
20 SCO.

21 Q. Did he tell you that he did not expect to sell a single
22 license from that time period?

23 A. I am not sure that it was Mr. McBride that I had this
24 conversation with, or if there was somebody else from SCO
25 that I had conversation with about the SCO forecasts, but

1 what they conveyed to me at that point in time is they were
2 only forecasting revenues for the vendor license stream.

3 Q. Let's talk about this SCOSource R.T.U. license program.

4 A. Okay.

5 Q. You understood that to be a new venture for the SCO
6 Group, right?

7 A. I understood it to be a new product line, a new product
8 they were adding to their mix.

9 Q. And you consider that to be a new business, right?

10 A. No, I don't.

11 Q. Let's back up. Had SCO ever previously offered a
12 license to Linux users that would protect them against
13 claims of infringement of the UNIX copyrights?

14 A. As I said, that was a new product that they were
15 offering.

16 Q. It had never been offered before, right?

17 A. They had offered -- they have always made their money
18 off of their intellectual property. This is another product
19 within that realm of ways of making money.

20 Q. Prior to the announcement of the vendor license
21 agreement, you're not aware of that license agreement
22 previously being offered by SCO, right?

23 A. The vendor license?

24 Q. Right.

25 A. Is that what you're asking me about?

1 That is correct. I have already testified that these
2 are new products they were offering.

3 Q. So both the vendor license program and the right to use
4 license program, you call them new products, right?

5 A. Correct.

6 Q. Was the SCOsource right to use license a product?

7 A. Yes. I consider it a product.

8 Q. Now, for example, was there something that was actually
9 physically produced?

10 A. Well, to me you don't have to physically produce
11 something to provide a product. I mean, you know, an expert
12 witness provides a product in a way when we offer our
13 expertise, but that is not necessarily something physical.

14 Q. Wasn't the right to use license program a promise by
15 SCO that it wouldn't sue people for infringement of the UNIX
16 copyrights if they paid SCO a certain amount of money?

17 A. My understanding is that those were the licenses, that
18 in return for the upfront fee the customer received the
19 right to use the infringing code that was in Linux.

20 Q. Actually, the so-called license was a promise, a
21 contractual promise by SCO that it would not sue a Linux
22 user on the basis of a claim that Linux contained UNIX,
23 right?

24 A. I think that is the value to the customer. That is
25 what they are receiving.

1 Q. That is the so-called product, right?

2 A. Yes.

3 Q. Now, would you agree that a new product, and in order
4 to make projections regarding its performance, is evaluated
5 and valued differently than a long running product?

6 A. I would say that the methods that you would use in
7 wanting to assess the market potential would be different.

8 Q. As we have talked about it, the SCOSource licensing
9 program or the vendor license aspect or the right to use
10 aspect was a new business or product, as you put it, right?

11 A. A new product, yes.

12 Q. You don't consider the SCOSource business to be a
13 start-up?

14 A. I do not.

15 Q. Do you consider it to be a long established business?

16 A. I view it as a natural extension of the business that
17 SCO had been involved in for years.

18 Q. Now, the business that SCO had been involved in for
19 years, let's talk about that. The SCO Group, Inc. had been
20 in business for how long prior to its announcement of the
21 SCOSource license program?

22 A. Well, the company had changed names over a number of
23 years, so as far as I know it went back to the 1990s, but I
24 could check and see.

25 Q. If you would. Is there something in your report that

1 will tell how long --

2 A. I think I recall --

3 Q. -- they had been in business?

4 A. Back in the discussion of the history -- let's see. In
5 September, 1995, Novell and Santa Cruz entered into the
6 asset purchase agreement and --

7 Q. Just so we can be clear on the question, how long had
8 the SCO Group, Inc., or if it previously had been named
9 something else like the Caldera Group, how long had that
10 company been in business?

11 A. It depends on sort of how far back you want to go.

12 Q. As far back as you're able.

13 A. Santa Cruz was kind of the beginning and was back in
14 1995. Then there was some changing of hands or parts of
15 that business that ultimately resulted in the SCO Group,
16 Inc.

17 Q. I apologize if I am being less than clear and I will
18 try to do better.

19 I want you to focus on the plaintiff in this case, an
20 entity known today as the SCO Group, Inc. You are familiar
21 with that entity?

22 A. Yes.

23 Q. Have you been told that before it was called the SCO
24 Group it had been known by the name of Caldera?

25 A. Correct.

1 Q. Do you know when Caldera, now known as SCO Group, first
2 stated?

3 A. I know that they purchased the software and the
4 professional services division from Santa Cruz in 2001.

5 Q. Is that when you believe Caldera started?

6 A. I don't know if Caldera had operations prior to that,
7 but I thought we were talking about the operations that
8 ultimately became the SCO Group.

9 Q. What I'm trying to find out from you is essentially
10 this: You have suggested today that the SCOSource license
11 program was not a new business but instead a new product,
12 right?

13 A. Correct.

14 Q. And you believe that the factors that one must apply to
15 value a new product must be different than that which would
16 be applied to a new business or start-up, right?

17 A. Yes. That the methods that you would use to determine
18 what you think you can sell would be different.

19 Q. So you draw a distinction between a new product and a
20 new business, right?

21 A. Well, what I'm drawing the distinction between is when
22 you have the historical data versus when you don't.

23 Q. Because if you don't have historical data you can't
24 reach the same conclusions about the future, right?

25 A. You can't use the same methods to reach your

1 conclusions about the future.

2 Q. So if you don't have historical data or performance
3 data in the past, you have to use different methods to try
4 to calculate what the future might look like, right?

5 A. Right. You would probably to a market analysis.

6 Q. For a start-up?

7 A. Yes.

8 Q. So if you were trying to evaluate a new business rather
9 than an established one, you would use a market analysis to
10 evaluate the prospects for the new business, right?

11 A. Correct, because you wouldn't have the historical data
12 to rely on.

13 Q. And using projections would not be a valid method for
14 evaluating a new business, right?

15 A. Absolutely not true.

16 Q. Absolutely not true?

17 A. Absolutely not true.

18 Q. So if you had a new business, a start-up, and it had no
19 historical record, there was no past runway to look at, what
20 methodology would you use to project the future for that
21 start-up business?

22 A. Then using sort of what firms do all the time when they
23 get involved in new product lines and need to forecast the
24 future, is they would do an analysis very similar to what
25 Dr. Pisano did. They would say how big is the market? How

1 much of that market can we capture? They would use that
2 information to generate their forecasts.

3 Q. If I understand what you're saying, for a new business
4 you would do something like Dr. Pisano did to try to project
5 the future, right?

6 A. Yes. That would be the way I would go.

7 Q. Whereas if you had a long established business that had
8 historical performance to look at, you would use a different
9 methodology to try to project the future, right?

10 A. Well, actually if I had historical data I would
11 probably do both. You know, I am a firm believer that we
12 want to use all of the data that we have available and then,
13 you know, using all of that data to see if we come out to
14 similar answers. It just provides you with much more
15 comfort.

16 Q. If you had an established business, you would want to
17 look at its past to predict the future, right?

18 A. That would be one thing that I would look at as well as
19 market analysis.

20 Q. Now, with the SCOSource license program, whether it be
21 the vendor license program or the R.T.U. license program, it
22 had no previous history to look at, right?

23 A. That is correct. So that is why you'll see that I
24 didn't attempt to do that kind of analysis.

25 Q. You would have to do what you call a market analysis

1 for that sort of business, right?

2 A. That would be the best approach, yes.

3 Q. Now, you don't think that the SCOSource program is a
4 new business, right?

5 A. It is a new product, as we talked about before, but the
6 issue is the same. You don't have historical sales data for
7 SCOSource.

8 Q. You have stated in this case in deposition that you did
9 not consider the SCOSource product to be a new business,
10 right?

11 A. That is correct.

12 Q. Now, as you sit here today in court do you believe
13 that, in fact, the SCOSource license program was a new
14 business?

15 A. No. I viewed it as a new product line within their
16 existing -- within that existing business.

17 Q. Now, let's turn to the past of Caldera or the SCO
18 Group. Did you look at any of the performance data for the
19 SCO Group previous to the announcement of the SCOSource
20 license program?

21 A. Yes, I did.

22 Q. How far back did you go?

23 A. I believe that in calculating the -- in estimating the
24 costs I went back as far as 2001. Again, I can just check
25 real quickly, if you would like me to make sure.

1 Good thing I checked. The first quarter of 2002
2 through the first quarter of 2007 was the data that I used.

3 Q. Let's look at, for example, 2002. What were SCO's
4 revenues for 2002?

5 A. I don't recall off the top of my head. If you can give
6 me their financials, I can tell you what they were.

7 Q. Did you look at the financials?

8 A. I did.

9 Q. Do you see that they had a loss?

10 A. Yes, they did.

11 Q. Did SCO also have a loss for 2001?

12 A. They did.

13 Q. What about 2000?

14 A. I believe from what I recall from reading, was that one
15 of the really positive things about the SCOSource program
16 was that it had allowed them -- I think it was referred to
17 in one of the documents -- their first profitable quarters.
18 I think that they had had a history of losses up until that
19 point in time.

20 Q. If one were to try to make projections about the future
21 regarding a business, the SCO Group, and you believe that
22 was an established business, to project the future one would
23 want to look at the past, right?

24 A. For the SCO Group, yes, but that is not the issue in
25 question here, correct.

1 Q. But the Deutsche analysis that you looked at was an
2 analysis of expected stock performance for the SCO Group,
3 right?

4 A. Well, the part of the forecast that I took and that I
5 emphasized involved SCOSource sales. That is what I was
6 looking at.

7 Q. Would you agree with me that the Deutsche analysis that
8 you looked at was in connection with the potential future
9 stock performance of the SCO Group, Inc.?

10 A. I would agree that that is what they looked at. I
11 would not agree that that is what I used from that report.

12 Q. You just went in and cherry picked something out of it?

13 A. Absolutely not.

14 Q. You looked at the entire analysis, right?

15 A. All 24 pages.

16 Q. Every bit of it?

17 A. Every bit of it.

18 Q. And you looked at all of the things that were said in
19 it, right?

20 A. I did.

21 Q. Going back to the SCO Group, Inc., if one were to look
22 at its historical performance to try to determine its
23 future, one would take into account that historical
24 performance, right?

25 A. If I wanted to try to forecast for the SCO Group, but

1 that is not what I was doing.

2 Q. You were not interested in forecasting the future for
3 the SCO Group, right?

4 A. I was interested in calculating lost profits for the
5 SCOSource program.

6 Q. Would you agree that prior to 2003 that SCO had never
7 earned a profit on its business?

8 A. As I said, the only recollection that I have directly
9 on that was that one statement which would be consistent
10 with that, yes.

11 Q. So the answer is yes?

12 A. I think so.

13 Q. Now, if we might, let's focus on a term that is called
14 risk factor.

15 Are you familiar with that term?

16 A. Yes.

17 Q. And you understand that risk factor or risk factors is
18 something that one must take into account in making a
19 determination as to what the future for a company might be,
20 correct?

21 A. I am hesitating, because the answer to my question will
22 depend on the context, so if you can give me a specific, I
23 can answer.

24 Q. Certainly. For example, in looking at the SCO Group
25 and trying to determine what the future for it might have

1 been, one would appropriately look at risk factors, right?

2 A. So if you're asking me about risk in the product market
3 that they were facing, I would agree with that statement.

4 Q. Let's focus on that. In performing your analysis and
5 in making your presentation to the jury, did you understand
6 that in trying to make a forecast about the future that is
7 premised, as I understand it from your presentation,
8 premised on forecasts on right to use license revenue and
9 vendor license revenue, one would have to take into account
10 risk factors, right?

11 A. You would need to take into consideration the market
12 conditions in determining what you thought you could sell.
13 If you want to call those market conditions risk factors,
14 then I would agree with that, but it would be related to
15 that product.

16 I guess why I'm hesitating here is because there are
17 many risk factors that a company faces that won't
18 necessarily impact the forecasts. There are risks of the
19 firm, for example, that don't have anything to do with how
20 much they can generate in revenues in a particular product
21 market. That is why I'm a little bit uncomfortable with
22 giving you a more direct answer and I apologize for that.

23 Q. Did you take into account any risk factors for the
24 potential profits for SCO Group when you made your analysis?

25 A. Yes, I did.

1 Q. Which risk factors did you take into account?

2 A. So I took into account, as did Dr. Pisano, and I think
3 he testified to this, and the same sorts of things were
4 incorporated into the forecasts, and there were -- if you
5 want to call them risks, I will call them market conditions
6 that existed at the time that infringement had not been
7 proven. There was hostility against SCO in the Linux
8 community. There was the potential for other
9 indemnification programs. All of those factors existed in
10 the marketplace and they were known to the players at the
11 time. They were incorporated into Dr. Pisano's analysis by
12 his penetration assumption.

13 If you remember, he testified that he assumed at the
14 low end that only one in five people would buy a SCOsource
15 R.T.U. license. There are lots of reasons why. With
16 respect to my forecasts, those exact same factors are
17 incorporated because they are specifically discussed by the
18 analysts, they knew what the market conditions were, and
19 they would take that into considerations in coming up with
20 their forecasts, and their forecasts are consistent with Dr.
21 Pisano's lower bound, which would suggest that they were
22 kind of roughly in the same ballpark when it came to
23 penetration rates, which is about one in five of people that
24 would purchase a R.T.U. license.

25 Q. The question that I was asking you is what risk factors

1 you took into consideration.

2 A. I think --

3 Q. You told me market conditions, correct?

4 A. I said that I would describe -- I think what you are
5 referring to as risk factors, I think of those as market
6 conditions.

7 Q. I'm trying to get a list from you, if you will, of the
8 risk factors that you took into account.

9 A. Okay.

10 Q. I think the second one you mentioned is that
11 infringement had not been proven, right?

12 A. That is correct.

13 Q. The infringement you have reference to is the
14 fundamental question as to whether or not Linux infringes
15 UNIX, right?

16 A. That is correct.

17 Q. And your understood that a risk to the SCOsource
18 licensing revenues was the unanswered question as to whether
19 in fact Linux infringes UNIX, right?

20 A. Okay. That is where I would say that there was a
21 market condition that existed, that it was not known at the
22 time that infringement had or had not occurred.

23 Q. In addition, you mentioned that there was hostility
24 against SCO, right?

25 A. Correct.

1 Q. And that hostility was manifested in a number of ways,
2 correct?

3 A. Correct.

4 Q. You became generally aware of this hostility through,
5 for example, reading the Deutsche Bank analyst report,
6 right?

7 A. They did talk about that, yes.

8 Q. Did you do any independent analysis or search to find
9 out other sources of hostility toward SCO by the consuming
10 public?

11 A. Well, as I said before, I had done a key word search of
12 newspaper articles, and it is kind of hard of search SCO
13 without getting a sense for what people's feelings are.

14 Q. You also mentioned other indemnification programs,
15 right?

16 A. Yes.

17 Q. That is the notion that there might be other computer
18 software companies, for example, Hewlett-Packard or Novell
19 or a company called Red Hat and others that would say to
20 those who acquired Linux and related products from them,
21 that if SCO sues you or comes after you and claims that your
22 use of Linux infringes UNIX, that we'll protect you, right?

23 A. My understanding is that those indemnification programs
24 existed, but I would like to make sure that we also don't
25 forget Dr. Pisano's testimony. He --

1 THE COURT: That testimony was heard yesterday,
2 Dr. Botosan.

3 Mr. Brennan, if you would look for an appropriate
4 time for a break, please.

5 MR. BRENNAN: May I have one minute?

6 THE COURT: I don't want to interfere with your
7 train of thought, but I do want you to be aware that it is
8 about that time.

9 MR. BRENNAN: I will be mindful of that.

10 BY MR. BRENNAN

11 Q. Now, were there any other risk factors that you took
12 into account other than the four that you have just
13 mentioned?

14 A. There was also some discussion in some of the analyst
15 reports about the possibility of some customers saying we
16 don't want to buy a SCOSource license, and instead we're
17 going to switch, but the analysts generally felt that that
18 was a pretty low probability. Then there was also some
19 discussion about, you know, potentially a design around, but
20 that also didn't get much traction.

21 Q. What do you mean it didn't get much traction?

22 A. I mean that the analysts didn't seem to feel like that
23 was as important a market condition as, for example, that
24 infringement was in question.

25 Q. Did you also take into account the notion that there

1 was something called the G.P.L. or the general public
2 license?

3 A. That was also discussed in the Deutsche Bank report.

4 Q. Did you take that into account in your analysis?

5 A. Well, since I used the Deutsche Bank forecasts, it is
6 incorporated, yes.

7 Q. Before we take our break, were there any other risk
8 factors that you were cognizant of or applied in your
9 analysis other than those we have briefly talked about here?

10 A. As I sit here at this particular moment I can't
11 remember any other ones. If I could go back and look at my
12 report, I know I had that discussion of these in there.
13 Right off the top of my head, I don't remember any others.

14 MR. BRENNAN: Your Honor, with your permission,
15 perhaps this is a good time to break and we will pick this
16 up after the break.

17 THE COURT: Ms. Malley.

18 THE CLERK: All rise for the jury, please.

19 (WHEREUPON, the jury leaves the proceedings.)

20 THE COURT: Dr. Botosan, can I ask you to leave
21 the courtroom just for a second?

22 THE WITNESS: Certainly.

23 THE COURT: You don't want to go out that way,
24 however.

25 Mr. Brennan, I do want to add some clarification

1 to my ruling allowing you to question this witness about the
2 prior court decisions of Judge Kimball. I want to make it
3 clear to you that it is based upon your representation to
4 the Court that you can prove its relevance through Dr.
5 Botosan's analysis. If the Court deems that you simply have
6 raised the existence of those prior court decisions in an
7 effort to bring it to the jury's attention without it being
8 relevant at all, in other words, if you ask her about them
9 and she convincingly explains why it is totally irrelevant
10 to her analysis, then the Court will deem that to be an
11 unwise decision on your part.

12 I am assuming, based upon your representation to
13 the Court, both in the written memorandum and also what you
14 said her today, that you fully expect that it is something
15 that she should have considered and that she should have
16 been aware of and is relevant to her analysis. Again, if it
17 proves otherwise, I think that is a risk and the Court is
18 going to have to entertain some type of motion from SCO in
19 regard to that. Okay.

20 MR. BRENNAN: Thank you, Your Honor.

21 Just so we are clear, I don't know what her answer
22 will be in advance for my questions.

23 THE COURT: And I don't want her being advised of
24 this discussion, and that is why I asked her to leave the
25 courtroom. I don't want her back there being primed to

1 respond in a certain way. I just need you to understand,
2 all of you, that I do deem the raising of the issue with the
3 jury, the prior court decisions, to be something that is
4 really unnecessary as a general rule. Not just unnecessary,
5 but highly prejudicial. I am willing to grant you that you
6 believe that you can establish that her analysis is
7 defective and significantly because she did not consider
8 these decisions. I want to give you that opportunity.

9 MR. BRENNAN: Thank you, Your Honor.

10 THE COURT: I do want to state also to all of you,
11 that because the door has been opened with this witness,
12 that that does not mean that it ought to be raised again
13 with any other witnesses, unless this Court gives you
14 permission to do so.

15 I want to add also that in instructing the jury,
16 what I intend to say is SCO appealed the District Court
17 rulings that we have heard about. The Court of Appeals
18 reversed those decisions, meaning that they found them to be
19 without merit, and determined that a jury should decide the
20 issues in this case. I believe that using the phrase
21 reversed will not be meaningful to the jury unless I add
22 that.

23 All right, counsel.

24 I also have to add, Mr. Brennan, that the jury was
25 really struggling there towards the end. You perhaps are

1 not watching that, but I thought you ought to be aware of
2 the Court's observance.

3 MR. BRENNAN: Thank you.

4 MR. HATCH: Consistent with what you have been
5 saying, I noticed that Mr. Brennan, and I was trying to
6 watch it very closely, he is bringing up some things that
7 Dr. Botosan looked at in her report, but the report covered
8 two areas, one of which is not at issue in this trial. I
9 want the Court to be very cognisant of any kind of
10 bootstrapping of any kind of opinions that were not offered
11 in this trial as a way to get the prior opinion in.

12 MR. BRENNAN: Your Honor, just to comment on that,
13 first of all, as I understand what transpired here --

14 THE COURT: Ladies and gentlemen, you may sit
15 down. You don't have to be standing.

16 MR. BRENNAN: Dr. Botosan was proffered prior to
17 her testimony for two purposes. One was a causation
18 analysis and an event study, and the second one was the lost
19 profits damages analysis. It is when we I think did the
20 courtesy to SCO Group, and mindful of the Court's desire not
21 to be surprised, that we said if you pursue the event study
22 we think that is one of two pathways by which you have
23 opened the door. The SCO Group strategically decided to
24 withdraw the proffering of that testimony. I did not
25 understand that was by court order. They made a strategic

1 decision simply not to put a witness up to testify on a
2 certain subject.

3 THE COURT: That is my understanding as well.

4 MR. BRENNAN: That in mind, given the fact that
5 she is an expert and she testified to it, but I did not
6 understand, nor would I have understood, that that meant
7 that I couldn't ask any questions about it.

8 THE COURT: About that testimony that they
9 withdrew?

10 MR. BRENNAN: Simply because they chose not to ask
11 the witness about it. It is in her report.

12 During the course of the proceedings this morning
13 I asked the question, did you reach conclusions in your
14 report that your attorneys asked you not to present? I do
15 not believe that the subject matter was privileged and it
16 was not subject to an evidentiary ruling.

17 THE COURT: Do you intend to pursue that further?

18 MR. BRENNAN: I don't. The objection was
19 sustained. The reason I raise this is if there is some
20 suggestion that we engaged in some impropriety in asking a
21 witness about testimony that her attorneys chose not to
22 examine her about, I would not have believed or understood
23 that to have been off bounds simply for me to ask her about
24 that.

25 THE COURT: You don't intend to pursue that

1 further?

2 MR. BRENNAN: I don't.

3 THE COURT: I don't think there was anything
4 untoward about your question, but I was afraid that you were
5 going to go perhaps down that path, and had it gone any
6 further I think I would have to have sustained an objection
7 to that.

8 MR. BRENNAN: Yes. In fact, you did sustain the
9 objection to that question.

10 I suppose the other point I just want to alert the
11 Court to is this, that during the examination we have had of
12 Dr. Botosan so far, without at this juncture asking her
13 specifically about the rulings, and I did ask her whether or
14 not rulings and decisions in this case were broadly
15 disseminated, which she said she would except so, and I
16 asked whether or not they would have an impact on potential
17 licensees of the SCOSource program. She said yes to that.

18 THE COURT: In the real world.

19 MR. BRENNAN: In the real world.

20 THE COURT: This is my dilemma. You have to,
21 somehow or other, have to draw her away from her but-for
22 world, that she testified on, to the real world. That is
23 what I'm trying to warn you about. There has to be that
24 connection in order for her testimony on the court decisions
25 to be relevant. You just can't say I want you to throw out

1 everything that you did in your but-for world, and now
2 answer all my questions about the real world, unless you're
3 able somehow to draw the connection between the two. That
4 is what Mr. Singer was arguing about earlier this morning.
5 I am basing my ruling on the presumption that somehow or
6 other that is a relevant line of questioning.

7 MR. BRENNAN: And my suggestion, because I don't
8 want there to be an unnecessary problem with Novell and the
9 Court on this, is because an expert witness comes in and
10 says I have created a construct, a but-for world, that that
11 insulates them from examination regarding the real world.
12 The mere fact that they have chosen a device, the so-called
13 but-for world, because I think Your Honor what she may say,
14 and I don't know this, but anything that you ask me about
15 the real world is different than the but-for world and
16 thereby it is somehow irrelevant.

17 I think the unfairness of that is it impedes our
18 ability to conduct an appropriate cross-examination, to
19 impeach the witness, and to draw conclusions that might be
20 different were the jury to focus on the real world. The
21 reason I raise that is I don't want to be crosswise with the
22 Court on this.

23 THE COURT: No.

24 Again, I want to give you leeway because I realize
25 the importance of this testimony, but the dilemma I would

1 have, if you continue to question her about the real world,
2 and she simply responds over and over again that I did not
3 consider that, it is not relevant to my analysis, so that
4 you end up with a bunch of questions to which there is no
5 response, and I would think that would be highly
6 prejudicial. I don't quite know how to suggest to you that
7 you approach this, but that to me, as I say, would be -- if
8 she is in effect going to say I have not considered that,
9 because I worked within my little world of but-for, the
10 construct that I was given, and the rest of this stuff I
11 have never even thought about, what will be the value of
12 that?

13 MR. BRENNAN: Well, two responses.

14 First of all, Your Honor, I also was very careful
15 to ask her so far, and I apologize if it wasn't
16 scintillating testimony, what did you look at? I read to
17 her specifically from her report where she said I reviewed
18 the motion for summary judgment filed by Novell.

19 THE COURT: The question may be, yes, she may have
20 reviewed it, but did she consider it in her but-for world?
21 That would be the relevant question.

22 MR. BRENNAN: Let me assume for purposes of
23 discussion, because I don't know what her answer will be,
24 that she were to say no, and I believe that it would be of
25 value to the jury to actually draw a contrast between real

1 world developments involving real world licensees and her
2 but-for world. That is the fundamental purpose of the
3 cross-examination.

4 THE COURT: I think that is a legitimate point
5 that you can make.

6 MR. BRENNAN: That is the point that I do intend
7 to make, Your Honor.

8 Just so we are clear, I don't know what she will
9 say. My expectation, frankly, is that she will answer the
10 questions as the Court may suspect. Whenever I ask about a
11 whole host of these matters she will say but I was in a
12 but-for world, and I'll want to draw the comparison between
13 the but-for world and the real world. We got a taste of
14 that, for example, Your Honor, and I was just about to show
15 her that the Deutsche Bank report is a real world study,
16 where it specifically states that if SCO does not succeed in
17 its litigation against I.B.M., it will have to close its
18 doors. It will fail.

19 So what I want to among other things show the
20 jury, is that the very report that she is relying upon, and
21 I asked her about did you cherry pick matters out, and that
22 the analysis is a litigation analysis. It is a study of
23 whether or not an investor should engage in what they refer
24 to as a binary decision, that either this company will fail
25 or succeed based on the outcome of the litigation. They say

1 in the report this is kind of a wild shot. If you want to
2 take a risky investment and ride it up and you do well, but
3 if they don't succeed, it fails. That is the context by
4 which she has drawn her analysis.

5 If what she is going to do is say, well, yeah,
6 that is what the Deutsche Bank report says, and it is called
7 on its surface, on its face a call to arms, and Deutsche
8 Bank calls this a litigation strategy. Is she going to say,
9 well, no, I want to parse that. I want to divorce myself
10 from those considerations. Then she is stepping away from
11 the very analysis. That is the first point.

12 The second point, and I apologize for going on,
13 but I just want the record to be clear, is that I want to be
14 able to do the very thing I have suggested to the Court, and
15 that is draw a very clear line of demarcation between her
16 very narrow construction by which she is suggesting the jury
17 should award \$250 million in damages, and a very real world
18 where people are making much different decisions real time
19 before she even submitted her report.

20 THE COURT: Thank you.

21 MR. BRENNAN: Thank you, Your Honor.

22 MR. HATCH: The problem with what Mr. Brennan is
23 saying is, one, he is ignoring the 403 issues here. He is
24 bootstrapping because he even talks about the Deutsche Bank
25 report. That report was before the slander suit. He is

1 bringing in issues and trying to bring in court decisions in
2 this case that didn't exist when those reports were being
3 done. As Mr. Singer said today, the but-for world here is
4 that SCO owned the copyrights and Novell had never asserted
5 that they thought they did and then go out and slander our
6 client. That is the world. He wants to confuse the two.
7 That is highly prejudicial, Your Honor.

8 THE COURT: Counsel, the Court believes that to
9 the extent that Mr. Brennan wants to undermine the but-for
10 world with the real world, the Court has to allow him to do
11 so.

12 MR. HATCH: Should that be done with a proffer
13 outside of the presence of the jury, before he connects it
14 up and --

15 THE COURT: I will just rely on you to make
16 objections to the questions asked. All right.

17 MR. BRENNAN: Thank you, Your Honor.

18 THE COURT: We'll take another ten minutes.

19 (Recess)

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