

1 THE COURT: Are we ready?

2 MR. JACOBS: We are, Your Honor.

3 THE COURT: Okay. Ms. Malley.

4 We went a little bit longer because the jury  
5 did not receive its allotment of rations until later on.

6 MR. JACOBS: I'll go along with Mr. Brennan. A  
7 hungry jury is not a happy jury.

8 THE COURT: That's a good point.

9 Is Mr. Braham in the courtroom?

10 MR. JACOBS: Yes.

11 THE COURT: Okay.

12 (Jury brought into the courtroom.)

13 Mr. Jacobs.

14 MR. JACOBS: Your Honor, Novell calls Mr. Tor  
15 Braham.

16 THE COURT: Mr. Braham, if you will please come  
17 forward.

18 TOR BRAHAM,

19 the witness hereinbefore named, being first duly  
20 cautioned and sworn or affirmed to tell the truth, the  
21 whole truth, and nothing but the truth, was examined and  
22 testified as follows:

23 THE CLERK: Please be seated. And if you would  
24 please state and spell your name for the Court.

25 A. Tor Braham. T-o-r. B-r-a-h-a-m.

1 DIRECT EXAMINATION

2 BY MR. JACOBS:

3 Q. Good afternoon Mr. Braham.

4 A. Good afternoon.

5 Q. What was your role in the 1995 Asset Purchase  
6 Agreement between Novell and Santa Cruz?

7 A. I was one of the lead negotiators and the head  
8 of the outside legal group that managed the transaction  
9 on behalf of Novell as a partner at Wilson, Sonsini,  
10 Goodrich and Rosati.

11 Q. How did you happen to become a partner at  
12 Wilson, Sonsini? What was -- where did you start in  
13 terms of school?

14 A. I went to college at Colombia University in New  
15 York and then went to law school at New York University  
16 in New York. I came out to California, really, to work  
17 with technology companies. I started at a law firm in  
18 Southern California called Manaf, Phelps, Rothenberg &  
19 Tunis. And, after about a year and a half --

20 THE COURT: Mr. Braham, may I remind you that  
21 the Court reporter has got to get everything you say, and  
22 when you start using terms such as the names of law firms  
23 and so on, slow down a little bit so everything can be  
24 heard?

25 THE WITNESS: Okay. Sure.

1 THE COURT: Thank you.

2 A. I joined Wilson, Sonsini Goodrich & Rosati in,  
3 I think, 1984 as an associate and worked there, until I  
4 left the firm in 1997, doing exclusively mergers and  
5 acquisitions, initial public offerings, and intellectual  
6 property work and related corporate work for technology  
7 companies located in Silicon Valley and around the United  
8 States.

9 Q. So give the jury a sense of your practice as of  
10 the mid-'90's. What kind of transactions were you doing,  
11 and what was your role?

12 A. So, by the mid-'90's, I had transitioned into  
13 being primarily a lawyer working and advising on mergers  
14 and acquisitions. I still did some work on initial  
15 public offerings or registration statements with the SEC  
16 for companies when they do financing, but I also  
17 continued to do a fair amount of intellectual property  
18 licensing for my clients.

19 So, I would have a range of clients, and I  
20 would generally -- all corporations that were technology  
21 companies, and I would represent them in everything, sort  
22 of soup to nuts, but, by the mid-'90's, I had  
23 transitioned into a particular focus on mergers and  
24 acquisitions for the tech companies.

25 Q. And describe your relationship with Novell as

1 of 1995.

2       A.    So, Novell was one of my biggest clients, and  
3 the firm's biggest clients, and particularly around  
4 mergers and acquisitions or M&A. We had done work from  
5 them, worked with them for a long time. And my mentor  
6 and the top partner at Wilson, Sonsini is a guy named  
7 Larry Sonsini. And he was on the board of Novell and was  
8 one of the lead directors there who created, in addition  
9 to my work with the company, a close relationship.

10           And so I knew the company well, and I had, by  
11 the mid-'90's, worked on eight or nine different  
12 acquisition transactions representing them, and they were  
13 one of my biggest clients and one that I was -- you know,  
14 a substantial portion of my time was working with them,  
15 as they did all kinds of deals and built the company.

16       Q.    So, again, just to give the jury a sense of  
17 this, as an outside counsel, what kind of understanding  
18 do you gain of a company like Novell's business in the  
19 course of representing them?

20       A.    Well, you get to know, you know, all the  
21 different moving parts, and you get to know all the  
22 people as well. You -- frequently, when you work with  
23 them on an acquisition, you get to know the business,  
24 intimately, of what was acquired, and then sometimes,  
25 when those businesses are separated or you do a different

1 transaction, then you kind of bring your institutional  
2 history to bear on remembering what you learned when you  
3 worked on a different deal.

4           You also -- one of the reasons why corporate  
5 law firm relationships are long-term relationships is  
6 that you learn how decisions are made within a company  
7 and how to interact with the company to help them come to  
8 decisions and come to terms on a transaction, and which  
9 is frequently difficult to do when it's a new client, but  
10 when you have a long history, you get a familiarity with  
11 all the people and what their strategies are and  
12 objectives are for the company, as well as how to -- how  
13 to navigate through all the different voices that compose  
14 a corporation.

15       Q.   So, as of 1995, your relationship with Novell,  
16 who were you interacting with? Who were you taking  
17 direction from?

18       A.   At that time, David Bradford was my primary  
19 interaction. He was the general counsel of Novell. But,  
20 more importantly, he was, for me, the lead voice on --  
21 about what kinds of business decisions Novell was making,  
22 and he would give me direction on how to represent Novell  
23 in various different transactions, but also Jim Tolonen,  
24 who was the CFO. Jim actually resided out in the West  
25 Coast. Novell was headquartered in Provo, Utah, but it

1 had a very significant business fingerprint in Silicon  
2 Valley, and Jim Tolonen, the CFO, lived out on the West  
3 Coast, and that had me meeting him a little bit more than  
4 the Utah -- all of the other Utah Novell people.

5           Mary Burnside, who was the chief operating  
6 officer, who was -- kind of ran the nuts and bolts,  
7 day-to-day of the company, less involved in deals, but I  
8 would interact with her.

9           Q.   So, as of 1995, to sum up, you have done,  
10 eight, nine transactions. You've worked with David  
11 Bradford on those transactions?

12          A.   I worked extensively with David Bradford, but I  
13 also worked with my partner Larry Sonsini, who would give  
14 me direction from time to time, and I probably worked on  
15 another, I mean, maybe that many transactions that didn't  
16 happen, and I also worked on deals that were contemplated  
17 or ideas that never crystalized into actual  
18 transactions.

19          Q.   And, in all those transactions, how would you  
20 describe your role -- the role of David Bradford in  
21 giving you direction, in a nutshell?

22          A.   He would be the person I would get the most  
23 ultimate instruction from as to how to -- how to advance  
24 Novell's interest and where the various different  
25 tradeoffs that occur in a deal should be balanced. And

1 we had done enough deals together where we kind of had a  
2 very efficient methodology of -- with him as sort of the  
3 business negotiator and guider of me, and me being the  
4 implementer along with him. And we understood each other  
5 well.

6 Q. Mr. Braham, I'd like to show you a document,  
7 Exhibit H-2, and ask if you can identify that for us,  
8 please.

9 A. This is the agreement and plan of merger or  
10 acquisition agreement under which Novell acquired the  
11 UNIX business from AT&T, through acquisition of the UNIX  
12 System Laboratories, Inc. company, which was a  
13 corporation owned by AT&T -- owned primarily by AT&T. It  
14 actually had some small minority investors as well.

15 Q. Did you represent Novell in that transaction?

16 A. I did.

17 MR. JACOBS: Your Honor, we would move H-2 into  
18 evidence.

19 MR. SINGER: No objection.

20 THE COURT: It will be admitted.

21 (Novell Exhibit H-2 received in evidence.)

22 Q. BY MR. JACOBS: To step back a little bit in  
23 time Mr. Braham, did you become familiar with the UNIX  
24 Operating System in the course of your work with Wilson,  
25 Sonsini?

1 A. Yes.

2 Q. And how did that happen?

3 A. Well, over the years, even before this  
4 transaction, UNIX was a pretty high-profile collection of  
5 technologies. I had worked a lot with companies in  
6 Silicon Valley who used UNIX or touched UNIX in various  
7 different parts of their business. SUN Microsystems, for  
8 example, was a client of Wilson, Sonsini, and UNIX was  
9 the other operating system or collection of operating  
10 systems out there, in contrast to Microsoft and Microsoft  
11 Windows, Microsoft Windows NT operating system. And a  
12 lot was covered in the press and certainly in the  
13 industry around UNIX and the importance of UNIX as an  
14 alternative to Microsoft, particularly as Microsoft  
15 became more and more powerful and the perception that  
16 Microsoft was becoming a monopoly emerged.

17 So I learned about UNIX through our clients,  
18 but also through the financial and technology press, but  
19 never worked directly with the UNIX technologies until  
20 this deal.

21 Q. So, let's describe this -- this transaction  
22 in a nutshell. It's called an Agreement and Plan of  
23 Reorganization and Merger. Can you describe for the jury  
24 in sort of a lay-person's terms, what the form of the  
25 Novell/USL/AT&T transaction was?

1           A.    So, I mean, in simplest terms, it was an  
2 acquisition of the corporation, UNIX Systems Labs. It's  
3 called an agreement and plan of reorganization and merger  
4 because it was done as a stock-for-stock transaction.  
5 Novell issued stock, which went to AT&T, and acquired  
6 this business, and for tax reasons and for historical  
7 corporate reasons, these things are done in what's called  
8 a reverse triangular merger, which is a little  
9 complicated.

10                 But, basically, you have the subsidiary of AT&T  
11 merge with a newly-formed subsidiary of Novell end up as  
12 a subsidiary of Novell. And there's a variety of reasons  
13 why it's done that way rather than simply  
14 I-buy-your-stock kind of deal, but largely driven by tax  
15 and some corporate history.

16           Q.    And describe the -- as compared with other  
17 kinds of M&A deals, is it simpler or more complicated if  
18 you buy an entity like, say, USL, as compared with buying  
19 specific assets, for example?

20           A.    You know, generally speaking, it's simpler to  
21 buy the whole company and just to buy a business because  
22 then you're not going to have to go through and parse  
23 what assets am I getting? What assets am I leaving  
24 behind? Asset deals are very time intensive and very  
25 complex.

1           You know, I think, intuitively, sometimes you  
2 think, well, if I don't buy the whole business, maybe it  
3 will be simpler. But the reality is, it's simpler to  
4 say, I'm going to buy the whole corporation. And you  
5 just inherit whatever is there; whereas, when you do an  
6 asset deal and buy a business out of another entity but  
7 by doing it by assets, you now have to go essentially  
8 asset by asset and define what's coming, what's staying  
9 behind.

10           And very often there are shared assets or there  
11 are assets that bear not only on the business you are  
12 acquiring but on the business that's being left behind  
13 and so you have to parse out, how do we share? And this  
14 is not just intellectual property. How do we share a  
15 building that has employees who might work for both  
16 businesses? How do we share customers who may be  
17 continuing.

18           And so the process of doing an asset deal  
19 is -- you know, you can start with, we are going to buy  
20 this business, but then you have to actually go and, in  
21 some cases, down to the desk top, what am I transferring  
22 and what am I keeping? And it's a lot of work.

23           So, as a general rule, you know, you kind of  
24 want to buy the whole corporation if you can so you don't  
25 have to have the arm wrestling asset by asset, just

1 because it's a lot of work. And it's also possible, you  
2 know, to have confusion in that. But, you know, people  
3 do asset -- when you have a business within a larger  
4 entity, you frequently are stuck with doing an asset  
5 deal, and when you have a business where you're  
6 continuing relationships on both sides, you frequently do  
7 an asset deal.

8 Q. So, this was the simpler kind of acquisition,  
9 an acquisition of an entity?

10 A. Yes. It was simpler. It was not simple, but  
11 it was simpler.

12 Q. Okay. And this being the USL transaction. Do  
13 you recall the value of the stock that Novell issued in  
14 exchange for the UNIX Systems Laboratory, Inc., business?

15 A. Yes. It was approximately 300 million.

16 Q. So, this transaction is dated as of February  
17 12, 1993. And, about two and a half years later, the  
18 Asset Purchase Agreement between Novell and Santa Cruz is  
19 going to get negotiated. What's your understanding of  
20 what changed as you were brought into the APA? What  
21 changed such that Novell was now divesting assets that it  
22 had just acquired?

23 A. So, Novell's interest in UNIX was -- it had a  
24 variety of different purposes, in acquiring UNIX, in  
25 owning it, and in ultimately selling it, selling a piece

1 of the business. There was the financial side. This was  
2 an important technology that there was royalties that  
3 were -- that USL was collecting and Novell was partnered  
4 with the company that partly built itself through  
5 acquisition, but there was also a strategic side which  
6 was that Novell, in the industry, had a very important  
7 role in providing software and infrastructure for  
8 networking, and it was important for its business that  
9 Microsoft not have too much strength and too much power  
10 over the entire world of software.

11           Netware, which was its core product, and then  
12 ultimately Netware directory services and other related  
13 products, would flourish more if Microsoft was not in a  
14 position of going to corporations and saying: You'll  
15 take my operating system. You'll take my networking  
16 architecture. You'll take my applications. I'll provide  
17 it all to you.

18           Netware was a set of infrastructure software  
19 that would work to connect different computers, and  
20 particularly disparate kinds of computers, and if  
21 Microsoft had too much dominance, the importance of  
22 Netware and the value of Netware and the money that could  
23 be made by selling Netware would be diminished.

24           So, it was originally acquired, UNIX Systems  
25 Labs, partly for financial reasons, but partly for Novell

1 to become a good shepherd of the UNIX Operating System  
2 and collection of operating systems, which is really what  
3 it was, so that the other players in the industry, major  
4 players in the industry, would have -- could sell  
5 computers that ran on operating systems that were not  
6 solely Microsoft; so AT&T, SUN, HP, Sequent, Digital  
7 Equipment Corporation, on down, would have -- not have to  
8 only seem Microsoft software.

9           And there was a feeling, at AT&T, that they  
10 were not in a great position. AT&T, of course, is a  
11 phone company and the backbone of the internet from a  
12 physical standpoint, but that they weren't in the best  
13 position to license software around the country, to  
14 develop it and to be responsive to all of the  
15 corporations who wanted to use UNIX, and there was a  
16 feeling that Novell was a good home for it.

17           And Novell felt that way, and AT&T felt that  
18 way, and so they bought it.

19       Q.   So that explains the 1993 transaction. That  
20 explains the inbound transaction, right?

21       A.   Yes.

22       Q.   Okay. Then what happens?

23       A.   Once they bought it, they found that they were  
24 not in the strongest position to support and proliferate  
25 UNIX. They had their own battles to fight around other

1 technologies, Netware, GroupWise, others. And they began  
2 to feel that they couldn't invest all the resources that  
3 would be desirable to make it as successful as possible,  
4 and they were developing a set of technologies, a  
5 particular flavor or brand of UNIX called UnixWare, and  
6 they had worked on that, and there was a feeling that  
7 they were not in the best position to continue to develop  
8 it and to market that particular flavor to exploit.

9           Now, UnixWare was addressed to the Intel -- the  
10 Intel microprocessor hardware, and there was a feeling  
11 that -- which is where Microsoft had the greatest  
12 dominance. And there was a feeling at Novell that  
13 emerged that we want this to be successful, but we can't  
14 put all the wood behind this arrow ourselves, and, if we  
15 can find another home for UnixWare, that would be  
16 desirable if it could be somebody who would really go  
17 after that business more aggressively and with more focus  
18 than we can.

19       Q.    So you gained this understanding as you were  
20 brought in to represent Novell in the Asset Purchase  
21 Agreement; is that correct?

22       A.    Yes. I may have got some of that understanding  
23 simply working with Novell over the two years in the  
24 interim, but got more of it as we got into discussion of  
25 the potential sale to SCO.

1 Q. In a general case, leaving aside the specifics  
2 of the Asset Purchase Agreement for a minute, at what  
3 point does an outside counsel like yourself get involved  
4 in an M&A transaction like this?

5 A. Well, you're talking about any outside counsel?  
6 I mean, it might be any point --

7 Q. Well, let's take your experience with Novell.  
8 Typically how would you get get involved, and at what  
9 point would you be brought in?

10 A. In the case of Novell, I would probably get  
11 involved maybe a month, six weeks before a transaction,  
12 when people were still crystallizing ideas about the  
13 deal. In other situations, outside counsel isn't brought  
14 in until the end. And, in fact, in many companies -- not  
15 Novell -- companies might do transactions by themselves  
16 without outside counsel at all. They might do them all  
17 internally.

18 But, with Novell, I would hear about them  
19 relatively early, either through David Bradford or Jim  
20 Tolonen or others at Novell or through my partner Larry  
21 Sonsini who, of course, sat on the board, and I would  
22 hear about things in the germination stage more often.

23 Q. Now, at some point, you get involved in the  
24 Asset Purchase Agreement?

25 A. Yes.

1 Q. What is your recollection when your period of  
2 intense involvement actually got underway?

3 A. The most intense involvement I remember over  
4 the last week or so before the announcement of the  
5 transaction. And it's hard for me to remember exactly.  
6 It was 15 years ago. But I remember what people  
7 sometimes refer to as a forced march, where people show  
8 up at a law firm, day after day after day, negotiating  
9 drafts and turning a deal. And you have representatives  
10 of both sides there. And I remember that forced march  
11 very clearly at the offices of Brobeck, Phleger,  
12 primarily in -- I don't remember exactly the time  
13 frame.

14 Q. It sounds like you have a picture in your mind  
15 of this place?

16 A. I have a picture in my mind of the place and  
17 the conference room and where I was sitting and where  
18 other people from the law firm on the other side, Brobeck  
19 Phleger, as well as some SCO people were in the room.  
20 And I have a picture in my mind of an exhausting series  
21 of days, including one weekend, all weekend long.  
22 Placing that in an exact time frame is just very hard  
23 after 15 years.

24 Q. Now, Mr. Braham, who was on the Wilson, Sonsini  
25 team representing Novell in that forced march to

1 concluding the agreement?

2       A.    So, primarily it was myself, and then a younger  
3 lawyer named Allen -- Aaron Alter, who is a partner there  
4 now.  I'm not sure whether he was a partner or a senior  
5 associate.  At the time, I think he was a young partner.  
6 And then a very smart associate named Shannon Whisenant,  
7 who worked at Wilson -- actually she's from this area --  
8 but she was a younger associate.

9           And then, behind that, there was a tax lawyer  
10 named Don Bradley.  He didn't appear at the negotiations,  
11 but he was -- gave me counsel behind the scenes.  And  
12 then Larry Sonsini, although he wasn't day-to-day on the  
13 transaction, was back in his office and a resource for me  
14 to consult with.

15       Q.    And who were your counterparts representing  
16 Santa Cruz in the negotiations?

17       A.    So, there was -- the most senior person who did  
18 appear at the negotiations was a partner there named Ed  
19 Leonard, who was one of the top business lawyers at  
20 Brobeck, Phleger.  There was a younger partner named  
21 Scott Lester and, then, most immediately, day-to-day, was  
22 a smart associate there named Jeff Higgins.

23       Q.    Now, in an M&A deal, as opposed to maybe some  
24 other kinds of transactions, talk about the differing  
25 roles and agendas that people in a transaction like that

1 might have and what the role of outside counsel is in  
2 putting all that together?

3 A. So, the different agendas among --

4 Q. Among the company representatives, the people  
5 who might be funneling to you or funneling through the  
6 general counsel.

7 A. On the Novell side?

8 Q. Yes.

9 A. So, there's David Bradford, who was the primary  
10 communicator to me and the lead negotiator as to what  
11 positions to take and what was most important, both  
12 objectives and weighing of tradeoffs that occur in the  
13 negotiation, and he would be right up there. And he had  
14 been involved in all of the transactions for Novell, and  
15 you know, I viewed as a very credible, authorized and  
16 dispassionate voice as to how to think about Novell's  
17 interests.

18 Then there were a whole range of people who  
19 were involved in the USL UNIX business within Novell, and  
20 some of those people -- in fact, most of them had come  
21 over from USL when we acquired USL. When Novell acquired  
22 USL from AT&T. And those people were good people and  
23 were very important to the UNIX business, but they --  
24 they were more interested in that business and, as I  
25 remember, I knew many of them, and I don't know if it's

1 even clear which we were going to move over and be part  
2 of the acquired business.

3           One of the things that happens in a  
4 disposition, when a company is being -- selling off a  
5 business, is you have people who still are technically or  
6 still working for the seller but who are going to be  
7 moving over and working for and going to be compensated  
8 and fed by and looking for protection from the buyer.  
9 And this results in an inherent conflict of interest.  
10 It's nothing that's wrong about it.

11           It's just that you have people whose roles are  
12 moving, and their interests frequently are different than  
13 the interests of the seller. And, frankly, they are also  
14 different, sometimes, from the interests of the buyer.  
15 They have interests that coincide with each side and some  
16 that are different from each side. So there was that  
17 universe of people, and I think, you know, they were --  
18 they have to be involved because they are the most  
19 knowledgeable about the business, but you also have to be  
20 sensitive to -- that not everything that they want is  
21 what's necessarily in the best interests of your client,  
22 the seller.

23       Q.   Okay. And when you are referring, now, to your  
24 client, who, ultimately, are you accountable to?

25       A.   So, it would be the -- David Bradford is the

1 spokesman for the client, and he was accountable to the  
2 board of directors of the company and to -- and with  
3 direction from the CEO, but not exclusively the CEO of  
4 the company.

5 Q. Specifically, with respect to the Asset  
6 Purchase Agreement, then, what was your day-to-day  
7 responsibility in that intense period of negotiation?

8 A. To represent Novell, to determine what Novell  
9 wanted to accomplish with the transaction at a strategic  
10 level as well as an execution level, to be their primary  
11 mouthpiece in the negotiations, funneling through all the  
12 different inputs that I would get from Novell, to  
13 negotiate for them the best I could, to protect their  
14 interests, to draft the contract along those lines, to  
15 supervise people who worked for me to draft other pieces  
16 of the contract along those lines, to report back to  
17 David Bradford and others at Novell faithfully what the  
18 art of the possible is in the negotiation and to  
19 implement the best deal I could get Novell consistent  
20 with the direction I had been given as to how to protect  
21 them.

22 Q. As you got into the period of intensity for  
23 your involvement, what did you understand some of the  
24 specific issues to be on account of the fact that Santa  
25 Cruz was the acquiror here?

1           A.    So, fairly along the way, we discovered that  
2 Santa Cruz, as we spent more time with it, really did not  
3 have the financial resources to buy all of the UNIX  
4 business that was owned by Novell, and it was a small  
5 company. It was struggling. It was a publicly-held  
6 corporation, but it had struggled for a number of years.  
7 Its stock price had come under pressure. I think there  
8 was a perception that its business, which was developing  
9 and licensing a flavor of the UNIX business for the Intel  
10 386 microprocessors, that that business was under  
11 pressure and potentially not viable at all, long-term.

12                So its stock priced suffered, and they didn't  
13 have sufficient -- they didn't have significant cash.  
14 They didn't have any excess cash. What cash they had,  
15 they needed for their operations, and they had a limited  
16 market cap or a limited market value of their company and  
17 thus were limited in their ability to pay for a  
18 collection of technologies that Novell had purchased for  
19 300 million and were worth a tremendous amount of money.

20           Q.    So, how was the deal structured in order to  
21 address that concern?

22           A.    So, a number of -- a number of moving parts to  
23 go in to get into a collection of economics that could  
24 make the deal work with Novell. So, first of all, they  
25 got what turned out to be a little over 16 percent of

1 Santa Cruz Operation's stock.

2 Q. Meaning Novell, here?

3 A. Novell did. And that particular piece was  
4 constrained by a NASDAQ, which is a Federal Rule that  
5 says that a public company can't issue more than that  
6 amount of its shares in an acquisition without getting  
7 stockholder approval of its own shareholders.

8 So if you were going to issue, for example, 50  
9 percent of your company to somebody to acquire a  
10 business, you need stockholder approval. To get -- you  
11 need to go to your own stockholders for approval. To do  
12 that, you need to file a proxy statement with the  
13 Securities and Exchange Commission, and that proxy  
14 statement needs to include a tremendous amount of  
15 information, including audited financial statements of  
16 the business that you're acquiring.

17 In this case, there weren't separate audited  
18 financial statements for the UNIX business or the  
19 UnixWare business or any piece of it at Novell. And so  
20 financial statements couldn't be obtained that would have  
21 enabled SCO to go to its shareholders, and it would have  
22 taken a year. I have been through this a number of  
23 times. It could have taken at least a year for them to  
24 be in a position to make that filing.

25 So nobody wanted to wait a year, so that was a

1 constraint. We had to keep the number of shares below  
2 that threshold so that we wouldn't have to go through  
3 that process. Time was passing, and it's not desirable  
4 for either side to go through that. So we're limited in  
5 terms of the value of stock, and that was about 50  
6 million.

7           So, beyond that, there was a royalty  
8 arrangement that said that, if SCO developed -- was  
9 required to actually develop and complete a new version  
10 of UnixWare called the merged product and go out and  
11 license that, and there would be royalties that would  
12 come, if they hit their business plan, to Novell, to pay  
13 a portion -- to pay additional cash flows to Novell  
14 for -- that would come back to Novell. And that was  
15 viewed as a potential contingent element of the purchase  
16 price.

17           And then, perhaps most importantly, Novell  
18 retained all the economics and relationships arising out  
19 of the UNIX business. This is not the UnixWare flavor,  
20 but the basic UNIX business under which Novell, USL and  
21 then Novell, had licensed to IBM and SUN and HP and  
22 Sequent and all these other companies, their own version  
23 of UNIX. Those -- that business or the economics of that  
24 business is retained for Novell, so that we weren't  
25 selling all that we bought from AT&T. Novell wasn't

1 selling all that we bought from AT&T.

2           We basically carved down to what SCO could  
3 afford to pay for, which was the UnixWare business, or  
4 the right to exploit and develop that particular flavor,  
5 which was the objective of the deal to begin with.

6       Q.    So, let's talk for a bit about the retained  
7 portion of the business, the UNIX part of the business  
8 that dated back to the AT&T days, as opposed to the  
9 UnixWare business. Let me -- as the deal was presented  
10 to you for implementation, did you understand that SCO  
11 would have some role, vis-a-vis the old UNIX business, or  
12 SCO would have some role, vis-a-vis the old UNIX  
13 business?

14       A.    Yes.

15       Q.    And what was that role?

16       A.    They were going to be the agent to manage the  
17 collection of monies, of royalties on behalf of Novell,  
18 of those older base UNIX businesses, those other  
19 relationships. And the reason for that is we were  
20 transferring all the physical manifestations of the  
21 contracts and the people to SCO, and it made sense for  
22 there just to be one administrator, so they acted as an  
23 agent.

24           They were intended to act as an agent to manage  
25 that business on our behalf, on Novell's behalf, so that

1 you wouldn't have a licensing group at Novell and a  
2 licensing group at SCO doing -- you know, tripping over  
3 each other. They were basically put in as an agent.

4 Q. I'm showing you U-3, Mr. Braham. Is U-3 a  
5 draft of the Asset Purchase Agreement with your  
6 handwriting on it?

7 A. It is.

8 MR. JACOBS: Offer U-3 into evidence, Your  
9 Honor.

10 MR. SINGER: No objection.

11 THE COURT: U-3 will be admitted.

12 (Novell Exhibit U-3 received in evidence.)

13 Q. BY MR. JACOBS: So, Mr. Braham, this is a draft  
14 of the Asset Purchase Agreement. It has a typed-on-it  
15 date, in the lower left-hand corner, of September 16,  
16 1995. Do you see that?

17 A. I do.

18 Q. And it has a lot of your handwriting on it,  
19 right?

20 A. It does. That's my handwriting.

21 Q. This is only three days from the closing,  
22 right -- not the closing but the execution of the Asset  
23 Purchase Agreement?

24 A. I believe that's correct, yes.

25 Q. So does this refresh your recollection a little

1 bit about what you were referring to as to the forced  
2 march and as to when that was likely taking place?

3 A. Yeah. I believe that the forced march of the  
4 day-after-day meetings, that this was in the middle of  
5 that.

6 Q. Now, if you turn to, in the draft, page 26,  
7 Bates Novell 42712.

8 A. Yes.

9 Q. I'm sorry. Twenty-seven Can you see a section  
10 there marked 4.16?

11 A. Yes.

12 Q. Now, what's going on in this section and what  
13 can you tell, from some of the handwriting that you've  
14 applied to this draft?

15 MR. SINGER: Excuse me, Mr. Jacobs, the copy of  
16 this exhibit you have provided me doesn't have page 27.

17 MR. JACOBS: It's out of order.

18 THE COURT: Nor does mine. Where will I find  
19 it?

20 MR. JACOBS: It's out of order, Your Honor.  
21 It's before 26.

22 THE COURT: What's the Bates number?

23 MR. JACOBS: 42711.

24 THE COURT: 427.

25 MR. JACOBS: 11.

1 THE COURT: 11?

2 THE WITNESS: So this is -- 4.16 is the key  
3 provision that embodied the deal that the UNIX business,  
4 as compared to the UnixWare business, that the old UNIX  
5 business, the base ownership of UNIX and the relationship  
6 of all the other hardware companies, IBM, SUN, HP,  
7 Sequent, etc., that those licenses and those  
8 relationships would be -- would remain with Novell, but  
9 be administered by SCO.

10 And I'm putting in language here -- this is my  
11 handwriting -- to make very clear that SCO did not have  
12 the right to modify or change or waive those licenses  
13 without our written consent and that they were acting --  
14 they were to act only as our agent, and, if they did not,  
15 we could step in and do it ourselves. So this was an  
16 enforcement mechanism that established that SCO would act  
17 as Novell's agent to exploit these SVRX licenses, which  
18 is really -- think of it as the UNIX relationship with  
19 the other big companies.

20 And it was important that we establish that  
21 this is Novell's business, essentially, and their  
22 involvement in it is to be our agent, and if they didn't  
23 do what they were supposed to do, we could step in and do  
24 it on our own.

25 Q. The concept of an agent, that's something that

1 lawyers become familiar with in law school, correct?

2 A. Yes.

3 Q. And what's the basic idea of an agent and what  
4 their duties are?

5 A. So, if you are -- if you own an asset or a  
6 business or have the economic rights to something, you  
7 can appoint somebody to act on your behalf so that you  
8 don't need to be there every minute and sign every  
9 document or to exploit -- it empowers somebody to work  
10 for you and to represent you.

11 And we all have real estate agents when we sell  
12 our home, and they might go into negotiations on our  
13 behalf when we are selling a home or when we are buying a  
14 home. Sometimes the agents don't have any power on their  
15 own. Sometimes they are given limited powers, but within  
16 the scope of the agency, to act on our behalf.

17 You see it in real state. You see it in all  
18 kinds of businesses, where businesses identify somebody  
19 who has a limited power to do the work on behalf of  
20 somebody else, and they frequently get -- in our real  
21 estate deals, we get commissions. In this case, they got  
22 a 5 percent share of the royalties.

23 But the idea is, is that it's our money, our  
24 business, and you work for me except for your slice of  
25 the economics. And that's what we were trying to get at

1 here.

2 Q. And if the person who has retained the agent is  
3 dissatisfied with the agent's performance, what can  
4 typically happen?

5 A. Well, then you can terminate the agent at-will.  
6 Now, there's frequently negotiations over -- in a real  
7 estate deal, you can terminate your agent, but if he's  
8 brought you a buyer, you can't terminate him and cut him  
9 out of that fee. You have what people call a tail that  
10 deals with a transitional relationship between  
11 termination of an agent and going to maybe -- and  
12 starting with a new agent. But the agent works for and  
13 at the pleasure of the principal and has frequently  
14 fiduciary duties to the principal, meaning very high  
15 duties to work for you, not for himself.

16 Q. And what were you trying to configure here,  
17 vis-a-vis the agency relationship that you testified  
18 to?

19 A. I was trying to configure here -- or not really  
20 me. Novell was trying to configure here, with me as its  
21 negotiator and implementer, a relationship where SCO  
22 would work on Novell's behalf around this set of  
23 technologies to maximize and assist Novell in maintaining  
24 the viability of this business because this was a  
25 critical part of the purchase price that made it possible

1 for them to buy the UnixWare and take over the UnixWare  
2 assets that it got.

3 Q. And did Novell, in the drafting that you did of  
4 section 4.16, limit its authority to direct SCO as to  
5 what it could do vis-a-vie the UNIX licenses?

6 A. It did.

7 Q. Sorry?

8 A. It did restrict SCO. The language that I  
9 recognize here says: Shall not have the right to enter  
10 into future licenses and amendments of the SVRX licenses,  
11 it says, except as may be incidental to the UnixWare  
12 business that they were acquiring.

13 And it -- they couldn't do SVRX licenses  
14 without our consent.

15 Q. And if you go to the bracketed sentence: In  
16 addition, at seller's sole discretion and at seller's  
17 direction, buyer shall amend, modify or waive.

18 Do you see that? It's highlighted on your  
19 screen, Mr. Braham.

20 A. Yes. Yes.

21 Q. Did Novell, seller, limit itself in any way as  
22 to the direction it could give to Santa Cruz, the buyer?

23 A. It did not. That sole discretion is put in  
24 there to try to make completely clear that Novell is in  
25 control here, and Novell has the right to tell SCO what

1 it can do and can't do and to avoid -- people talk about  
2 for the avoidance of doubt. That's something people talk  
3 about in legal contracts. That's in there for the  
4 avoidance of doubt.

5 Q. The avoidance of doubt of what, sir?

6 A. As to whether Novell had complete rights to  
7 control what happened with the UNIX business, the SVRX  
8 historical UNIX assets and technologies.

9 Q. Showing you V-3, is that your handwriting on  
10 V-3, sir?

11 A. It is.

12 MR. JACOBS: I move V-3 into evidence, Your  
13 Honor.

14 MR. SINGER: No objection.

15 THE COURT: It will be admitted.

16 (Novell Exhibit V-3 received in evidence.)

17 Q. BY MR. JACOBS: Now, if you turn -- so V-3 is  
18 another draft of the Asset Purchase Agreement with your  
19 handwriting on it; is that right, Mr. Braham?

20 A. It is.

21 Q. And now if we turn to section 4.16 in this  
22 draft, which is at 42765, could you read aloud,  
23 Mr. Braham, the handwritten box at the bottom of that  
24 page?

25 A. "In the event that buyer shall fail to take any

1 such action concerning the SVRX licenses as required  
2 herein, seller shall be and hereby is granted the rights  
3 to take any such action on its own behalf."

4 Q. So, the intent of that language, Mr. Braham,  
5 was what?

6 A. If SCO didn't do what it was supposed to do as  
7 our agent, we could step in, on our own, on our own  
8 initiative, at our choice, and do it ourselves. And so  
9 it's intending to give us the right to do that, as well  
10 as granting us any rights we need in order to be able to  
11 have the power to do that. So, it is intended to be a  
12 crystal clear communication that Novell can step in and  
13 protect itself if SCO goes off the reservation.

14 Q. Now, were there a couple of particular concerns  
15 that Novell had about being able to direct Santa Cruz  
16 back in September of 1995? Were there some agenda items  
17 that related to this provision in the company's agenda?

18 A. I'm not sure I understand what you mean by  
19 that.

20 Q. Were you aware that Novell had entered into  
21 buyouts of SVRX royalties going into these negotiations?

22 A. Yes. They had done -- I believe that they  
23 had -- I'm not sure what they had done before, but there  
24 was always the possibility of doing complete buyout  
25 transactions with the end user -- not really the end

1 user, the OEM customer of UNIX, such as an IBM, Sequent,  
2 HP, other big companies that might be running royalties  
3 in the UNIX relationships.

4           In other words, those companies pay a per-copy  
5 fee or pay for source code access, and they might do a  
6 deal with Novell, where we just pay a lump sum, and now  
7 we have a royalty-free, unfettered right in the future.  
8 And the ability to do those buyouts was something that we  
9 were very interested in preserving.

10       Q.   And then was there a project related to Hewlett  
11 Packard that was on the company's agenda at that time?

12       A.   There was.  So -- it was believed -- I  
13 believed.  People at Novell communicated to me that they  
14 believed that the best party to advance UNIX, for the  
15 Intel 64 bit architecture.  So, at this time, Intel's  
16 microprocessors were 32 bit microprocessors.

17           And think have of it as they are like a  
18 6-cylinder car but not a 12-cylinder car.  And so you had  
19 software in UNIX for the 6-cylinder car, but HP was  
20 working on its 64 bit architecture, and it was believed  
21 that they would be the best party to develop the software  
22 for the 64 bit architecture, so the 12-cylinder car.

23           And Novell -- it was very important to Novell  
24 to retain the rights to enable HP to develop that flavor  
25 of UNIX.  And another purpose of the retention in rights

1 is so that Novell had the ability to enable HP to go off  
2 and do this.

3           So, the licenses to UNIX with these other big  
4 companies, it wasn't as simple as we're granting you  
5 technology and you can put it with your computers and  
6 ship it. Within each of those relationships, there was  
7 source code, which enabled those companies to go off and  
8 develop their own flavors of UNIX and to use in their own  
9 computer systems. And, in this case, HP, there was one  
10 coming up with HP, where they were going to develop a  
11 flavor for the 64 bit microprocessor, and we wanted the  
12 flexibility -- insisted upon, and I don't even think it  
13 was controversial -- the flexibility to grant those  
14 rights to HP to allow them to do that for the benefit,  
15 ultimately, of UNIX in the marketplace.

16       Q. Now let's create a picture here of what's going  
17 on. You're drafting away. You're in this conference  
18 room. How are the negotiations actually taking place  
19 between the Santa Cruz representatives and the Novell  
20 representatives over issues like this particular  
21 language?

22       A. So, from time to time, Santa Cruz executives  
23 might appear for a very short period of time in the  
24 negotiating room, but they were not the voice. They  
25 weren't negotiating anything. The negotiations were

1 happening between me and my team and Brobeck and its  
2 team.

3           So the way it works, which is very common in  
4 the way complex deals are done is, each side funnels in  
5 its viewpoints, its hopes and aspirations and fears into  
6 their negotiating people, and then that -- those  
7 negotiating people articulate a position to the other  
8 side, which then is communicated to the lawyers on the  
9 other side, and then the lawyers funnel that back to  
10 their people. And so you kind of a funnel of all these  
11 different inputs which then get put out to the lead  
12 negotiator.

13           And it's helpful, to avoid chaos in deals, that  
14 that there actually be a single voice representing an  
15 entire constituency on each side. It isn't always the  
16 case that it works that way, but in this situation it  
17 did. They had Brobeck, Phleger as their voice. We were  
18 live, in person; me in the conference room, in their  
19 offices, as well as Aaron Alter with me most of the time,  
20 and the lawyers on their side. And so that was -- that  
21 was the war room, where the deal was negotiated.

22       Q.   And would the people on your team, acting at  
23 your direction, would they exchange drafts with the  
24 Brobeck representatives?

25       A.   We would. There was -- we would send over, by

1 e-mail or fax, drafts. This was a time where e-mail was  
2 happening, but we all forget that there was a time before  
3 e-mail, but we would have e-mail at this point as well as  
4 faxes.

5 Q. The good old days?

6 A. Yeah.

7 Q. Let me show you D-4, please. What is D-4,  
8 Mr. Braham?

9 A. I'm trying to look at this and see whether --  
10 it looks like it's a fax. I'm not sure whether this was  
11 a fax or an e-mail. But it's an enclosure, sending some  
12 language to Jeff Higgins, who was the associate on the  
13 deal for Brobeck, from Aaron Alter.

14 Q. And Aaron Alter was your subordinate on the  
15 team, correct?

16 A. Yes. So this is a fax, so we're still in the  
17 time of the faxing.

18 At this point, people, when they had  
19 handwritten stuff on documents, they would fax rather  
20 than e-mail because -- right now you can e-mail, and you  
21 can put it in a PDF and then you can e-mail it. Back  
22 then, PDF's were not -- it may have been possible, but  
23 when people had a mark up of something, they would fax  
24 those pages rather than e-mail.

25 THE COURT: Mr. Braham, I've got to ask you.

1 You've got a lot of information, but only some of it is  
2 relevant to the case, and I want you to please answer the  
3 questions posed to you by Mr. Jacobs as directly as you  
4 can, please.

5 THE WITNESS: Okay.

6 MR. JACOBS: I offer D-4 into evidence, Your  
7 Honor.

8 THE COURT: Any objection.

9 MR. SINGER: No objection.

10 THE COURT: D-4 will be admitted.

11 (Novell Exhibit D-4 received in evidence.)

12 Q. BY MR. JACOBS: So, as you said, Mr. Braham,  
13 this is a fax cover sheet from Aaron Alter to Jeff  
14 Higgins, you see it's on Wilson, Sonsini letterhead, and  
15 it's going over to Brobeck, and it's dated September 18,  
16 1995. Do you see that?

17 A. Yes.

18 Q. And if you look on the third page, you'll see  
19 some of what's called a rider, with some language in it  
20 about -- about bankruptcy in the middle. Do you see  
21 that?

22 A. Yes.

23 Q. What was the concern that drove the proposed  
24 inclusion of that language?

25 A. So, there was a question on the Novell team as

1 to whether SCO was -- potentially at risk for going  
2 under, going bankrupt or becoming insolvent. And there  
3 is concern, in intellectual property situations, that, in  
4 bankruptcy, contracts can be modified or you really don't  
5 know how they are going to be handled in bankruptcy.

6           And so, we were concerned that we wanted to  
7 make sure that Novell had the equitable interest in the  
8 SVRX agreements and royalties because under -- my  
9 understanding is that under the Bankruptcy Code, that  
10 would enable us not to be -- enable Novell not to be  
11 adversely affected if SCO did go into bankruptcy and so  
12 that we wouldn't have the unpredictability that can occur  
13 as intellectual property or contracts or agreements find  
14 their way into a company that's in bankruptcy.

15       Q.    So, September 18, 1995. The Asset Purchase  
16 Agreement will be executed on September 19, 1995?

17       A.    Yes.

18       Q.    And the language is going back and forth  
19 between the negotiating teams?

20       A.    Yes.

21       Q.    Y-3. If you look at especially the third page  
22 in on Y-3, Mr. Braham, can you identify what we've got  
23 here? Do you see Shannon Whisenant's name there, on 407?

24       A.    Yes.

25       Q.    And you see that she's faxing to Jeff Higgins?

1 A. Yes.

2 Q. And Shannon was on your team and working at  
3 your direction, correct?

4 A. Yes.

5 MR. JACOBS: Offer Y-3 into evidence.

6 MR. SINGER: No objection.

7 THE COURT: It will be admitted.

8 (Novell Exhibit Y-3 received in evidence.)

9 Q. So, actually, let's start on the front page.  
10 And this is a fax from Shannon Whisenant to Burt Levine.  
11 Do you see that?

12 A. Yes.

13 Q. Did you know who Burt Levine was?

14 A. I believe he was a lawyer who worked in the  
15 UNIX business at Novell at this point.

16 Q. And if you see the city, state, it says Floren  
17 Park, New Jersey?

18 A. Yes.

19 Q. Is that consistent with your recollection that  
20 he worked in the UNIX business unit?

21 A. Yes. That's where the UNIX business was and  
22 remained at Novell.

23 Q. And then the cover sheet that I was showing you  
24 at 40407, that's from Shannon Whisenant -- I'm not saying  
25 her name right, am I?

1 A. Whisenant.

2 Q. Whisenant at Wilson, Sonsini, again, to Jeff  
3 Higgins at Brobeck. Do you see that?

4 A. Yes.

5 Q. And then, if you look at the schedules, you'll  
6 see there is a draft dated 9/18/95 of Schedule 1.1(a) and  
7 Schedule 1.1(b).

8 A. Yes.

9 Q. Do you see that? And if you look at schedule  
10 1.1(a), and you look at the intellectual property  
11 section, you see intellectual property listed on 1.1(a).  
12 Do you see that? That's 1.1(a) is the included asset  
13 schedule?

14 A. Yes.

15 Q. And then if you turn the page over to 1.1(b)  
16 and look at Roman V, you'll see that in intellectual  
17 property, all copyrights are excluded. Do you see that?

18 A. Yes, I do.

19 Q. How did it come to be that copyrights were  
20 listed as an excluded asset in the drafts of schedules to  
21 the Asset Purchase Agreement?

22 A. We proposed it, negotiated for it. It was  
23 agreed upon, and that's how the agreement was executed.

24 Q. And at whose direction did you implement the  
25 exclusion, on the excluded assets schedule of all

1 copyrights?

2 A. At Novell's, but through David Bradford.

3 Q. And what was the rationale that you understood  
4 for excluding the copyrights?

5 A. We were protecting Novell's interests. We were  
6 concerned about the copyrights moving over from a  
7 bankruptcy standpoint. We were concerned about the  
8 copyrights moving over because we had a very important  
9 interest in retaining the UNIX business, which is part of  
10 the core economics of the deal. And this was the deal we  
11 negotiated for.

12 It's not -- when you go through an asset deal,  
13 you negotiate asset-by-asset, and we were unwilling to  
14 transfer the copyrights, and they were willing to acquire  
15 the business without them.

16 Q. Do you recall any push back from Santa Cruz  
17 during negotiations on this question?

18 A. I recall some discussion, but I don't -- I  
19 don't actually recall strong push back.

20 Q. And did you have an understanding of how the  
21 structure of the Asset Purchase Agreement would work if  
22 copyrights were excluded, ownership of copyrights were  
23 excluded as an asset being transferred to Santa Cruz?  
24 How would the deal work? How would -- for example, how  
25 did you understand Santa Cruz would go forth and prosper

1 in the UnixWare business without copyrights?

2       A.    It had access -- it had physical ownership, in  
3 terms of the actual physical embodiment, of the disketts,  
4 the manuals, the people who understood it, the computers  
5 that had the UnixWare business, the software on it.  And,  
6 essentially, it had a license to use that to then build a  
7 new version of UnixWare, and it would own the copyrights  
8 in what it built on top of the base UNIX and UnixWare  
9 software that it had a copy of.

10           And it would go forth and license that to third  
11 parties, sell it.  And because its embodiment, its  
12 improvements on that were its copyrights, they had  
13 complete ability to exploit the business.

14       Q.    And how did that compare with your  
15 understanding of the basic structure of the relationship  
16 with other vendors of UNIX flavors?

17       A.    Well, those other vendors had licenses to UNIX  
18 from -- to their version of UNIX and would build their  
19 own improvements on their versions of UNIX to which they  
20 also had their own copyrights and ownership.  Everybody  
21 is -- everybody starts out with a foundation and then  
22 they build their own house on top of it, and they have  
23 the ability, then, to sell that house or exploit that  
24 house as they wish, but -- so, everybody sort of starts  
25 with a basis that they get a license to, and then they go

1 off and build what is actually theirs on top of it.

2 Q. I'd like to show you, sir, SCO Exhibit 1.

3 Actually, at this time, I think I won't. Just to tell  
4 the jury where we're going on this, you weren't involved  
5 in Amendment Number 2, were you, sir?

6 A. I was not.

7 Q. So, let's look at A-1, which is the Asset  
8 Purchase Agreement as executed on September 19, 1995.  
9 Would you please look at Section 1.1(a), Purchase And  
10 Sale Of Assets. And do you see there's an explanation  
11 there of what is going to go to seller and what is not --  
12 what is going to go from seller to buyer and what is not?  
13 Do you see that?

14 A. Yes.

15 Q. I would like to ask you particularly about the  
16 phrase "notwithstanding the foregoing."

17 A. So, 1.1(a) lays out a list of assets or  
18 actually refers to the attachment as a list of assets  
19 that are going to be transferred to SCO. 1.1(b) is a  
20 definition of assets that are excluded. Sometimes, in  
21 drafting an agreement, you have provisions which can be  
22 read as inconsistent, or you can have a schedule that  
23 looks like it overlaps with another schedule.

24 And what you do in drafting, hopefully, is to  
25 clarify that one trumps the other; that, in the event

1 there is a conflict, one wins, so that people can say,  
2 well, I know -- maybe I'm confused as to what's on  
3 Schedule A, but Schedule B is very clear, and now I need  
4 to know who wins in the event that you have a potential  
5 overlap.

6           And, "notwithstanding the foregoing," is magic  
7 language, in my view and my understanding, that makes it  
8 clear that 1.1(b) wins over 1.1(a).

9           I was focused on this language when we were  
10 drafting because I was watching with a keen eye to  
11 protect Novell's interests, and it's very difficult, in  
12 working on a hundred-page agreement, to be absolutely  
13 confident as to how every clause is going to be viewed.  
14 So you set up some rules to order them. And that  
15 "notwithstanding the foregoing" is actually one of the  
16 things that I remember very clearly, 15 years later.

17       Q.   If you turn, then, to Schedule 1.1(b) and you  
18 look at the reference there to intellectual property and  
19 the excluded assets, all copyrights and trademarks, do  
20 you see that? You can follow on the screen. I think it  
21 may be easier.

22       A.   Yes.

23       Q.   Did the Santa Cruz representatives have an  
24 opportunity to review this language before the Asset  
25 Purchase Agreement was signed?

1 A. Yes, they did.

2 Q. Was Santa Cruz represented by skilled counsel  
3 in the transaction?

4 A. They certainly were.

5 Q. Is there any doubt in your mind that the Santa  
6 Cruz representatives, in looking at this schedule, were  
7 capable of understanding your intent to exclude the UNIX  
8 and UnixWare copyrights existing as of the date of the  
9 Asset Purchase Agreement?

10 A. No doubt, whatsoever.

11 MR. JACOBS: Thank you, Mr. Braham.

12 THE COURT: Mr. Singer.

13 MR. SINGER: Your Honor, with the Court's  
14 permission, I'll look for an appropriate breaking point  
15 in about ten minutes or so.

16 THE COURT: Thank you, Mr. Singer.

17 CROSS EXAMINATION

18 BY MR. SINGER:

19 Q. Good afternoon, Mr. Braham. My name is Stuart  
20 Singer. I'm one of the attorneys for the SCO Group.

21 A. Good afternoon.

22 Q. Now, have you heard of Amendment Number 2?

23 A. I have.

24 Q. You understand that Amendment Number 2 changed  
25 the language in the Schedule of Excluded Assets that you

1 were discussing with Mr. Jacobs, right?

2 THE COURT: One second, please.

3 MR. JACOBS: Your Honor, this is beyond the  
4 scope. I specifically excluded him from any -- he  
5 specifically excluded himself from any involvement of  
6 Amendment Number 2, and now Mr. Singer is just going to  
7 engage in a lawyers' debate about the meaning of  
8 Amendment Number 2.

9 THE COURT: Well, you asked him about his  
10 involvement with Amendment Number 2, so Mr. Singer must  
11 be permitted to ask some questions about it as well.

12 MR. JACOBS: If it's about his involvement,  
13 fine. If it's about asking this lawyer to be a legal  
14 interpreter, I think we're beyond the scope of the direct  
15 and wasting time.

16 THE COURT: Do you intend to ask this lawyer  
17 about his lawyerly opinion on Amendment Number 2?

18 MR. SINGER: Well, I don't know where this is  
19 going with him, but I intend to elicit the existence of  
20 Amendment Number 2, the role Amendment Number 2 has  
21 versus the others.

22 THE COURT: Why don't you go ahead, and  
23 Mr. Jacobs can object to specific questions.

24 Mr. Braham, I'm sure you understand that if  
25 Mr. Jacobs stands up before you have answered the

1 question, please pause so that I can hear the objection.

2 THE WITNESS: Okay.

3 Q. BY MR. SINGER: Mr. Braham, just so we're clear  
4 on what we're talking about, let's put Amendment Number 2  
5 before you, which is part of SCO Exhibit 1. Which is the  
6 last part of that exhibit. You have seen this before,  
7 haven't you?

8 A. I have.

9 Q. And you understand that the way an amendment  
10 works -- you were talking a few minutes ago about  
11 something having priority over something else. An  
12 amendment like this has priority over the language which  
13 is replaced, correct?

14 A. It should be read together, but I'm not sure I  
15 understand priority.

16 Q. Well, let me be more specific. You understand  
17 that when it says, as it does here in paragraph A, "With  
18 respect to Schedule 1.1(b) of the agreement titled  
19 Excluded Assets, Section 5, Subsection A shall be revised  
20 to read."

21 When you have a later amendment like that, you  
22 understand that the old language that you were testifying  
23 to on the Excluded Assets Schedule no longer exists, and  
24 this is the new language that that has replaced it,  
25 correct?

1 A. Yes.

2 Q. This is now the operative language, from  
3 October, 1996, forward, that has been put into the  
4 agreement, correct?

5 A. Yes.

6 Q. And so, what you were talking about with this  
7 asset schedule that was carefully negotiated, that  
8 excluded copyrights from the deal; one year later, that  
9 exclusion was taken out and replaced with this language?

10 A. I don't believe that it had the effect of --

11 Q. I'm not asking you that. I'm asking you: That  
12 language was taken out?

13 A. The language was taken out and replaced by  
14 this. I assumed that it was properly executed. I  
15 don't -- I didn't -- wasn't participating in it, so I  
16 assume it was properly executed.

17 Q. I assure you, Mr. Braham, if this wasn't  
18 carefully and properly executed, we would be hearing all  
19 about it from Novell.

20 A. Okay.

21 Q. So, assuming that this was properly executed,  
22 you understand that the language that you have been  
23 testifying about earlier, on copyrights being excluded,  
24 was replaced by the language which now appears in  
25 Amendment Number 2?

1 A. Yes.

2 Q. Now, you weren't involved in the drafting of  
3 Amendment Number 2, correct?

4 A. No.

5 Q. And you weren't involved in the negotiation of  
6 Amendment Number 2, correct?

7 A. Correct.

8 Q. Okay. Now let's turn back to what you were  
9 involved in, which were the issues on the Included Asset  
10 Schedule. Is copyright, sir, a way of indicating  
11 ownership of source code?

12 A. It's a way of -- it is a -- one of the  
13 intellectual property interests involved in ownership.  
14 It is not the only form of intellectual property interest  
15 in ownership of software or in source code, but it is a  
16 particular -- it is a particular slice of intellectual  
17 property interests that relate to a software or source  
18 code.

19 Q. So there may be other forms of ownership, like  
20 owning the tangible media. That's one form of ownership,  
21 correct?

22 A. Yes. That's ownership of the tangible media,  
23 correct.

24 Q. And another type of ownership is the ownership  
25 of the copyright in that source code?

1 A. Correct.

2 Q. Correct? Okay. Now let's look at what was the  
3 Included Asset Schedule in the agreement you negotiated,  
4 Schedule 1.1(a). And let's take a look at it together.  
5 And if Mr. Calvin highlights that first paragraph, I  
6 think you will be able to read even more clearly.

7 You understood that, in the agreement you  
8 negotiated, these were the assets being sold to Santa  
9 Cruz, correct?

10 A. Yes.

11 Q. And that says: "All rights in ownership of  
12 UNIX and UnixWare, including but not limited to all  
13 versions of UNIX and UnixWare."

14 And let's pause there. This included all  
15 versions of both UNIX and UnixWare, correct?

16 A. Yes, but the --

17 Q. Well.

18 A. Yes, but you have to read this in connection  
19 with the specific paragraph on intellectual property.  
20 So --

21 Q. We're going to get to that. You have -- each  
22 of these paragraphs, sir, is cumulative. In other words,  
23 if you sell Santa Cruz an asset in paragraph 1 of the  
24 list of included assets, you don't have to repeat that  
25 in, say, paragraph 5, right?

1           A.    Sometimes you have more specific clauses that  
2 could be a subset of a more general clause, and the  
3 specific clause is what lawyers typically look to, to  
4 deal with those specific items so --

5           Q.    Well, my question --

6           A.    -- you said you don't have to, but it is the  
7 practice, in drafting contracts, to sometimes have  
8 broader sets and narrower sets, and sometimes they  
9 overlap.

10          Q.    If something is transferred on a list of assets  
11 that I'm buying on one paragraph, and we're still on  
12 another paragraph of the list of assets I'm buying, if  
13 something isn't listed in that paragraph, are you saying  
14 that somehow it means that it wasn't included in the  
15 first paragraph?

16          A.    I'm confused.

17          Q.    Okay. That wasn't a very good question. So  
18 let's look at what this actually says: "All rights in  
19 ownership of UNIX and UnixWare, including but not limited  
20 to all versions of UNIX and UnixWare."

21                   And if you go down -- and I'm going to skip  
22 over some of this that the jury has seen before, and it  
23 says: "Including source code."

24                   Do you see that? Correct?

25          A.    Yes.

1 Q. So one of the included assets, when you just  
2 look at the schedule of assets being sold, are all rights  
3 of UNIX and UnixWare, including, but not limited to, all  
4 versions UnixWare, including source code.

5 Do you see that?

6 A. Yes.

7 Q. And then, Mr. Braham, if we go down to the list  
8 of products right before that.

9 Mr. Calvin, if you could blowup the last part  
10 of paragraph 1.

11 At the end there it says: "Such assets to  
12 include, without limitation."

13 Now, "without limitation" is also a term of art  
14 in your field, right?

15 A. Yes.

16 Q. Can you tell the jury what it means?

17 A. If you are making a list of something under a  
18 general statement, then the list doesn't -- if there's  
19 something that's not on the list, it doesn't necessarily  
20 mean that it's not included. So, it enables you to talk  
21 about something and give examples but not necessarily  
22 give every single example, so your list is representative  
23 but not necessarily complete. It may be complete. It  
24 may not be. But the -- what you're saying is that, by  
25 virtue of making the list, you're not necessarily making

1 it complete.

2 Q. Right. It includes the assets, without  
3 limitation, meaning at least the following, but there may  
4 be more. Correct?

5 A. Yes.

6 Q. Now, if we look at what is then following that  
7 paragraph, you have a list of UNIX source code products,  
8 correct?

9 A. Yes.

10 Q. And those are both UnixWare 2.0 and products  
11 listed as prior products on such schedule. Do you see  
12 that?

13 A. Yes.

14 Q. And you have the UNIX products, which are  
15 listed then below that, which are products that are  
16 called UNIX System V Release 4, 1/ES, and prior products  
17 to that, UNIX SVR 4, 4.0 MP, and prior products to that,  
18 correct?

19 A. Yes.

20 Q. So all rights total -- so all rights in  
21 interest, all rights in ownership, to use your language,  
22 of UNIX and UnixWare, in these products, and/or prior  
23 products, were being transmitted in the Schedule of  
24 Included Assets, right?

25 A. I believe the intellectual property clause has

1 to be read with this. So, you're saying all rights in  
2 ownership. Copyrights are part of rights in ownership,  
3 but copyrights and IP is dealt with specifically under  
4 the IP section. So, in the absence of that section being  
5 there, I would agree with you, but, because that section  
6 is there, that specifically deals with the issue of  
7 intellectual property, I believe this relates to the  
8 physical manifestations of the source code. It's not --  
9 it's not as comprehensive as you say.

10 Q. So you're saying, when you said all rights in  
11 ownership of UNIX and UnixWare, that doesn't include the  
12 rights you get by copyright. That is what you're saying?

13 A. Because of how we drafted the intellectual  
14 property section, that's correct.

15 MR. SINGER: I think we'll pick up with this  
16 tomorrow if it's all right with the Court, Your Honor.

17 THE COURT: All right. Ladies and gentlemen,  
18 we will recess for the afternoon, and we will continue  
19 tomorrow at 8:30.

20 (Jury leaves the courtroom.)

21 Mr. Braham, do you pronounce your last name  
22 Braham or Brahham?

23 THE WITNESS: Braham like "graham" only with a  
24 B.

25 THE COURT: All right. Thank you. I think we

1 all ought to be somewhat consistent with the names.

2 Is there anything, counsel, before we recess?

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

4 MR. BRENNAN: Your Honor, we just have a brief  
5 matter.

6 THE COURT: Go ahead.

7 MR. JACOBS: Maybe we could let Mr. Braham step  
8 out.

9 THE COURT: Mr. Braham, if you would just  
10 please excuse yourself to the hallway.

11 MR. BRENNAN: Your Honor, this is a matter that  
12 we would solicit your assistance in. The practice and  
13 understanding, I think express agreement between counsel  
14 for the respective parties has been to notify one another  
15 the day prior as to who the expected witnesses would be.  
16 We received a request from SCO's counsel as to who we  
17 would call tomorrow, the last day of evidence, and we  
18 informed SCO's counsel that we expected, if Mr. Braham  
19 didn't finish, we would conclude with him, and we  
20 expected to call Terry Musika, who is the expert witness  
21 and, with time, David Bradford.

22 We, in turn, since tomorrow is the last day,  
23 asked for SCO's counsel to identify to us who they  
24 expected to call, recognizing there's not a lot of time  
25 and that we were keeping track, and the response was to

1 give us a list of seven different individuals. And, Your  
2 Honor that really just isn't very helpful. I don't think  
3 it's consonant with the spirit of what we were going to  
4 do.

5 I hate to end trial with this sort of  
6 disagreement. We've been very clear about who we were  
7 going to be presenting, and, just in short, Dr. Musika or  
8 Mr. Musika has been deposed. They know what his opinions  
9 are. There is no surprise there. They certainly know  
10 who David Bradford is. The question, Your Honor, is if  
11 we could get, frankly, a more specific indication, if  
12 there is any time, and I'm not confident there will be,  
13 but who, in fact, they would expect to call. And we  
14 would be able to prepare.

15 THE COURT: Mr. Singer?

16 MR. SINGER: Yes, Your Honor. They have a  
17 number of witnesses who haven't yet testified, and I will  
18 mention the list and why we are where we are with it. We  
19 intend to call rebuttal witnesses to be extremely  
20 focused, as we think the purpose of rebuttal testimony  
21 is.

22 THE COURT: I'm sure that's true. 1:30 is the  
23 witching hour, you understand, Mr. Singer?

24 MR. SINGER: We understand that. We are going  
25 to have to be very careful how we allocate that time.

1 There have been witnesses who have testified, where we  
2 would intend to call Mr. Frankenberg and Mr. Thompson.  
3 If Mr. Bradford testifies, and it still sounds equivocal,  
4 Mr. Johnson, Lee Johnson, would be a likely rebuttal  
5 witness to it. We don't know for sure whether  
6 Mr. Bradford is going to testify, and Mr. Mattingly falls  
7 in that same category. We listed Ms. Botosan as a  
8 potential rebuttal witness because we haven't gotten,  
9 yet, to the direct testimony of Mr. Musika.

10 THE COURT: You do know what his report says.

11 MR. SINGER: If his report comes in as  
12 anticipated, we believe Ms. Botosan would have a short  
13 rebuttal testimony. The other two witnesses listed, in  
14 an abundance of caution, Ryan Tibbitts and Chris Sontag,  
15 I think those are less likely to be needed, and it would  
16 only have to be if something unanticipated happened, and  
17 these witnesses will remain to be called.

18 THE COURT: It doesn't help a lot,  
19 Mr. Brennan.

20 MR. BRENNAN: It, frankly, doesn't. I think,  
21 as a practical matter, given the course of where we're  
22 headed, there will be very limited time, and to, again,  
23 be given a list of seven people, I don't think is --

24 THE COURT: I do understand what you're saying,  
25 but I don't know what more I can force out of him.

1           MR. BRENNAN: I'm not asking you to force. I'm  
2 just asking you to encourage cooperation.

3           MR. SINGER: I can help a little bit. Unless  
4 there is something really unforeseen tomorrow -- and if  
5 it happened, we would raise it as briefly as possible --  
6 we don't anticipate calling Mr. Sontag and Mr. Tibbitts.  
7 I thought those were more safety valves if something came  
8 up we weren't expecting.

9           THE COURT: To that end, then, in order to  
10 reinforce this a bit more, the Court would not allow you  
11 to recall them unless you could make a very convincing  
12 argument they are necessary. Do you understand?

13          MR. SINGER: I understand, Your Honor.

14          THE COURT: Clear and convincing argument.

15          MR. SINGER: Excuse me, Your Honor?

16          THE COURT: Clear and convincing argument.

17          MR. SINGER: Clear and convincing argument. We  
18 will be especially careful before going there. On the  
19 other hand, the other witnesses, I think, are ones which  
20 should be anticipated, at least depending on our time.  
21 And it would be very focused testimony. Obviously  
22 Ms. Botosan would be in relationship to what Mr. Musika  
23 says, and the others depend a great deal on what  
24 Mr. Bradford says on the stand and relate also to what  
25 Mr. Tolonen said.

1 THE COURT: In the spirit of cooperation, if,  
2 by chance, you decide not to call Mr. Bradford, I think  
3 it would be helpful if you communicate that so that  
4 witnesses will not be kept on call that will not be  
5 called.

6 MR. BRENNAN: We certainly will do that. And I  
7 can at least make this -- I will do exactly as the Court  
8 has instructed.

9 THE COURT: And you, too, Mr. Singer. If you  
10 decide there are any witnesses of those remaining five  
11 you clearly will not call, I think you should communicate  
12 that immediately to Mr. Brennan.

13 MR. SINGER: We will do so. Will we know, say,  
14 before the end of the day today about Mr. Bradford?

15 MR. BRENNAN: Your Honor, so we are precise, I  
16 think this is going to be a function solely of the clock.  
17 That's going to be the determining factor, how much time  
18 is still consumed on our behalf with Mr. Braham, how much  
19 is spent with Mr. Musika, and then that will be the  
20 driving factor.

21 THE COURT: Okay. I think we all understand  
22 each other. All right then

23 MR. BRENNAN: Thank you, Your Honor.

24 MR. SINGER: Yes.

25 THE COURT: Is there anything else?

1 MR. BRENNAN: No, that's fine, Your Honor.

2 THE COURT: All right. We'll be in recess.

3 Counsel, there are no hearings, if that makes any

4 difference.

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25 (Whereupon the proceedings were concluded for the day.)