EXHIBIT 13

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

--oOo--

THE SCO GROUP, INC.,

     Plaintiff/Counterclaim Defendant,

vs.   No. 2:04CV00139

NOVELL, INC.,

     Defendant/Counterclaim Plaintiff

_____/

Videotaped Deposition of

STEVEN M. SABBATH

_____

Monday, February 12, 2007

Reported by:
Leslie Rockwood

CSR No. 3462

Job No. 191637

09:55:10 1   A. Well, their chief negotiator, their
09:55:15 2 counterpart to our Geoff and Jim, was a fellow named Ed
09:55:21 3 Chatlos, who was stationed in New Jersey, worked for
09:55:26 4 Novell out of New Jersey. He was their project manager.
09:55:31 5 There were a few others from Utah that I met from time to
09:55:35 6 time. I can't recall their names or their titles. To
09:55:40 7 some extent, David Bradford, their general counsel, was
09:55:44 8 involved. He did appear in California at least once,
09:55:49 9 that I can recall and worked on the deal with us. And
09:55:52 10 then, of course, there were their Wilson Sonsini outside
09:55:59 11 counsel.
09:55:59 12   Q. Can you recall any of the attorneys from
09:56:00 13 Wilson that you dealt with?
09:56:02 14   A. Well, Tor Braham was their lead. He was Ed
09:56:07 15 Leonard's counterpart. Tor Braham, and I think his
09:56:13 16 number 2 would have Aaron Alter, who would have been
09:56:16 17 Scott Lester's counterpart on the Wilson side.
09:56:21 18   Q. Did you have occasion during the negotiations
09:56:23 19 of this potential transaction to review any draft
09:56:27 20 agreements embodying the transaction?
09:56:29 21   A. Well, the asset purchase agreement,
09:56:32 22 certainly. There were a lot of agreements and exhibits
09:56:35 23 and schedules, and I can't tell you I reviewed every
09:56:39 24 single one. That may not have been possible for anybody
09:56:41 25 to do. But the asset purchase agreement, certainly.

09:57:16 1   Q. I'm handing you, Mr. Sabbath, what's
09:57:18 2 previously been marked as Exhibit 1 titled "Asset
09:57:22 3 Purchase Agreement By and Between The Santa Cruz
09:57:26 4 Operation, Inc., and Novell, Inc.," dated as of
09:57:28 5 September 19th, 1995.
09:57:30 6   Do you recognize the document?
09:57:31 7   A. I do, yes.
09:57:33 8   Q. I wanted to ask you about some language in
09:57:58 9 this agreement, Mr. Sabbath. I'm looking at the page
09:58:00 10 ending with the Bates Number 900 on the bottom right.
09:58:10 11   A. Okay.
09:58:12 12   Q. If you look at paragraph A, in the recitals?
09:58:18 13   A. Uh-huh.
09:58:19 14   Q. It says, "Sellers engage in the business of
09:58:22 15 developing a line of software products currently known as
09:58:26 16 UNIX and UnixWare, the sale of binary and source code
09:58:30 17 licenses to various versions of UNIX and UnixWare, the
09:58:35 18 support of such products and the sale of other products
09:58:37 19 which are directly related to UNIX and UnixWare,
09:58:40 20 collectively, the business."
09:58:41 21   Do you see that language?
09:58:42 22   A. I do.
09:58:43 23   Q. And then if you look down on that same page
09:58:46 24 at Section 1.1(a)?
09:58:48 25   A. Uh-huh.

09:58:49 1   Q. The agreement says, "On the terms and subject
09:58:51 2 to the conditions set forth in this agreement, seller
09:58:55 3 will sell, convey, transfer, assign and deliver to buyer,
09:58:59 4 and buyer will purchase and acquire from seller on the
09:59:03 5 closing date as defined in Section 1.7 all of sellers
09:59:08 6 right, title, and interest in and to the assets and
09:59:11 7 properties of seller relating to the business,
09:59:14 8 collectively the assets, identified on Schedule 1.1(a)
09:59:18 9 hereto. Notwithstanding the foregoing, the assets to be
09:59:22 10 so purchased shall not include those assets, the excluded
09:59:26 11 assets set forth on Schedule 1.1(b)."
09:59:29 12   Do you see that language?
09:59:30 13   A. I do, yes.
09:59:31 14   Q. Does this language refresh your recollection
09:59:34 15 at all as to the nature of the business that was being
09:59:37 16 sold under the APA?
09:59:41 17   A. Well, I mean, as I said before, it was the
09:59:44 18 entire UNIX business that Novell had was going to Santa
09:59:50 19 Cruz Operation.
09:59:52 20   Q. Was it ever your understanding during the
09:59:54 21 negotiations leading up to the APA or thereafter that
10:00:01 22 copyrights in the UNIX business were being excluded from
10:00:04 23 the assets transfer?
10:00:05 24   A. No, copyrights were going with the assets.
10:00:25 25   Q. I'm turning, Mr. Sabbath, to the schedule

10:00:29 1 referred to in that Section 1.1(a), and that begins on
10:00:34 2 page Bates Number ending 950.
10:00:42 3   A. 950. Okay.
10:00:53 4   Q. Bates Number ending 950 is titled "Schedule
10:00:57 5 1.1(a), Assets."
10:00:59 6   A. Uh-huh.
10:01:00 7   Q. And Roman Numeral I -- let me just read it
10:01:03 8 for the record: "All rights and ownership of UNIX and
10:01:05 9 UnixWare, including but not limited to all versions of
10:01:08 10 UNIX and UnixWare and all copies of UNIX and UnixWare
10:01:13 11 including revisions and updates and process" --
10:01:15 12   A. Uh-huh.
10:01:15 13   Q. -- "and all technical design, development,
10:01:18 14 installation, operation and maintenance information
10:01:22 15 concerning UNIX and UnixWare, including source code,
10:01:28 16 source documentation, source listings and annotations,
10:01:34 17 appropriate engineering notebooks, test data and test
10:01:39 18 results, as well as all reference manuals and support
10:01:42 19 materials normally distributed by seller to end-users and
10:01:46 20 potential end-users in connection with the distribution
10:01:50 21 of UNIX and UnixWare, such assets to include without
10:01:53 22 limitation the following."
10:01:55 23   Do you see that language?
10:01:55 24   A. I do.
10:01:56 25   Q. Do you recall reviewing that language at the

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10:14:09 1 copyrights, et cetera, went from Novell to Santa Cruz
10:14:15 2 Operation when Novell sold the UNIX business to Santa
10:14:19 3 Cruz Operation.
10:14:19 4 Q. Paragraph A says: "With respect to Schedule
10:14:23 5 1.1(b) of the agreement entitled 'Excluded Assets,'
10:14:27 6 Section V, subsection A shall be revised to read: 'All
10:14:32 7 copyrights and trademarks except for the copyrights and
10:14:35 8 trademarks owned by Novell as of the date of the
10:14:38 9 agreement required for SCO to exercise its rights with
10:14:45 10 respect to the acquisition of UNIX and UnixWare
10:14:47 11 technologies."
10:14:48 12 A. Uh-huh.
10:14:48 13 Q. "However, in no event shall Novell be liable
10:14:53 14 to SCO for any claim brought by any third party
10:14:55 15 pertaining to said copyrights and trademarks."
10:14:57 16 Do you see that language?
10:14:58 17 A. I do, yes.
10:14:59 18 Q. In your view, as of the execution of the APA,
10:15:02 19 what copyrights were required for SCO to exercise its
10:15:06 20 rights with respect to the acquisition of UNIX and
10:15:08 21 UnixWare technologies?
10:15:10 22 MR. JACOBS: Objection. Vague and ambiguous
10:15:11 23 calls for speculation, lacks foundation, ambiguous as to
10:15:15 24 time.
10:15:15 25 THE WITNESS: Well, you would need all of the

10:15:19 1 copyrights.
10:15:20 2 Q. BY MR. NORMAND: And why do you say that?
10:15:21 3 A. To do the future development, you would need
10:15:26 4 the copyrights, to license the technology the way you saw
10:15:33 5 fit, you would need the copyrights. My gosh, if you
10:15:35 6 didn't own the copyrights, how could you even go after
10:15:38 7 somebody that's pirating your software? How could you
10:15:42 8 enforce your rights in the technology? So you would need
10:15:45 9 all of the copyrights and binaries and source code.
10:15:49 10 Q. At any time after the execution of Amendment
10:15:51 11 Number 2, did Santa Cruz ever have occasion to ask Novell
10:15:55 12 to transfer any UNIX or UnixWare copyrights to Santa
10:16:00 13 Cruz?
10:16:00 14 A. Not that I recall.
10:16:01 15 Q. Did you ever have an understanding during
10:16:10 16 your tenure at Santa Cruz that Santa Cruz was obligated
10:16:13 17 to ask Novell to transfer particular UNIX and UnixWare
10:16:16 18 copyrights?
10:16:17 19 A. No, no.
10:16:25 20 Q. No one from Santa Cruz ever told you that
10:16:28 21 that was the process in place that needed to be pursued
10:16:32 22 with Novell?
10:16:32 23 MR. JACOBS: Objection. Leading.
10:16:33 24 THE WITNESS: I don't recall that.
10:16:58 25 Q. BY MR. NORMAND: Do you know whether after

10:16:59 1 the execution of the APA, Santa Cruz had occasion to
10:17:02 2 enter into source code licenses with any third parties in
10:17:06 3 which Santa Cruz licensed UNIX or UnixWare source code to
10:17:09 4 those third parties?
10:17:09 5 A. Well, I mean, we routinely licensed source
10:17:15 6 code to customers who needed it for development purposes,
10:17:18 7 for supporting their own customer base, what have you.
10:17:39 8 Q. And at the time, did you have a view as to
10:17:42 9 what gave Santa Cruz the right to enter into such
10:17:46 10 licenses?
10:17:47 11 A. We owned the technology, you know, lock,
10:17:49 12 stock, and barrel.
10:17:52 13 Q. Do you know whether at any time after the
10:18:05 14 execution of the APA, Novell entered into any UNIX or
10:18:09 15 UnixWare licenses with any third parties in which Novell
10:18:12 16 licensed UNIX or UnixWare source code to that third
10:18:16 17 party?
10:18:16 18 A. Well, are you referring to the IBM issue?
10:18:18 19 Q. No.
10:18:19 20 A. "No"? Other than that, I don't recall any
10:18:23 21 such case.
10:18:25 22 Q. And I understood your question to mean to
10:18:29 23 refer to the IBM issue that resulted in the paragraph B,
10:18:32 24 C, and D of Amendment Number 2?
10:18:35 25 A. That's correct.

10:18:50 1 Q. Did Santa Cruz have occasion to enter into
10:18:53 2 what's been described as Project Monterey with IBM at
10:18:56 3 some point in the late 1990s?
10:18:58 4 A. Yes, that's right.
10:18:59 5 Q. And I guess at a high level, what was your
10:19:03 6 understanding of Project Monterey?
10:19:06 7 MR. JACOBS: Objection. Can we go off the
10:19:08 8 record for a second because I think you and I can do
10:19:11 9 something more efficiently.
10:19:14 10 THE VIDEOGRAPHER: We are now going off the
10:19:16 11 record. The time is 10:20 a.m.
10:19:19 12 (Recess.)
10:35:45 13 THE VIDEOGRAPHER: We are now back on the
10:36:00 14 video record. The time is 10:37 a.m.
10:36:04 15 Q. BY MR. NORMAND: Before the break,
10:36:05 16 Mr. Sabbath, I had asked you what your understanding was
10:36:09 17 at a high level of what Project Monterey is.
10:36:14 18 A. Yeah, I can't recall the timing, but Project
10:36:19 19 Monterey was a -- was to be a joint venture between Santa
10:36:28 20 Cruz Operation and IBM to jointly develop future UNIX
10:36:32 21 products and to jointly market them globally. Santa Cruz
10:36:38 22 Operation, primarily through the distribution channels,
10:36:41 23 to small and medium business, and IBM primarily to big
10:36:45 24 companies.
10:36:46 25 I guess Santa Cruz Operation also to other

10 (Pages 34 to 37)

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13:45:13 1   Q. How does that language comport with your
13:45:15 2 understanding today regarding the meaning and the
13:45:17 3 parties' intent under Amendment Number 2?
13:45:20 4   A. Well, the last sentence here, I don't know
13:45:25 5 whether they ever executed an instrument, I don't -- I
13:45:29 6 have no idea. I don't know why such an instrument would
13:45:32 7 have been required. The APA states that it transfers.
13:45:38 8 Going back up into this paragraph 26, actually, they may
13:45:45 9 have identified the copyrights and trademarks. I'm not
13:45:50 10 100 percent sure. But there may have been some exhibit
13:45:53 11 in the APA where they actually listed the copyrights and
13:45:57 12 trademarks.
13:45:57 13   But I mean, you know, keep in mind, the
13:46:01 14 trademark UNIX was actually -- had been sold by Novell to
13:46:04 15 X Open. So that trademark, the language here is a little
13:46:10 16 confusing and certainly isn't 100 percent accurate.
13:46:13 17   Q. When you say the language here, do you mean
13:46:15 18 the language --
13:46:16 19   A. In this paragraph 26, I'm sorry.
13:46:18 20   Q. -- of your declaration?
13:46:30 21   Is it your view that Amendment Number 2
13:46:32 22 created a process by which Santa Cruz would go to Novell
13:46:35 23 and specify the copyrights that Santa Cruz believed was
13:46:38 24 required to exercise its rights with respect to UNIX and
13:46:41 25 UnixWare technologies?

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13:46:42 1   A. No, no.
13:46:43 2   Q. If you look at paragraph 29 of your
13:47:07 3 declaration, you say: "It is my understanding based upon
13:47:12 4 my review of plaintiff's Amended Complaint that plaintiff
13:47:15 5 claims to have acquired all right, title, and interest in
13:47:18 6 and to UNIX System V operating system source code,
13:47:23 7 software and sublicensing agreements, together with
13:47:26 8 copyrights, additional licensing rights in and to UNIX
13:47:30 9 System V and claims against all parties breaching such
13:47:34 10 agreements. I understand that plaintiff also claims to
13:47:36 11 control the right of all UNIX vendors to use and
13:47:40 12 distribute UNIX System V. I believe that these claims
13:47:42 13 are incorrect. As described above in relation to the
13:47:45 14 related agreements and Amendment Number 2, Novell
13:47:49 15 retained certain rights under the UNIX System V licensing
13:47:53 16 agreements as well as certain UNIX System V intellectual
13:47:56 17 property as described above."
13:47:58 18   Do you see that language?
13:47:58 19   A. I do.
13:47:59 20   Q. How does that language comport with your view
13:48:03 21 today as to what, if any, UNIX System V intellectual
13:48:06 22 property rights Novell retained under the APA?
13:48:10 23   A. Well, the only thing I can think of is that
13:48:13 24 UNIX trademark, that bizarre transaction where it went to
13:48:17 25 X Open, and at the time we did the asset purchase

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13:48:21 1 agreement, it was -- I'm not sure exactly what that
13:48:24 2 transaction between Novell and X Open was all about, but
13:48:28 3 we were kind of midstream in some transition period of
13:48:31 4 that mark moving over to X Open. That's the only IP I
13:48:37 5 can think of that was in kind of limbo.
13:48:48 6   Q. To the extent this declaration could be read
13:48:58 7 to suggest your view that Novell had retained the UNIX
13:49:02 8 and UnixWare copyrights, is that an accurate reflection
13:49:09 9 of your understanding of that issue?
13:49:10 10   MR. JACOBS: Object to the form of the
13:49:13 11 question.
13:49:13 12   THE WITNESS: My understanding is that they
13:49:15 13 did not retain any copyrights pertaining to the UNIX
13:49:18 14 technology.
13:49:31 15   Q. BY MR. NORMAND: As you sit here today, are
13:49:33 16 you satisfied that this declaration accurately reflects
13:49:37 17 your views regarding the issues we've discussed?
13:49:40 18   A. Well, I mean, this declaration was a quick
13:49:43 19 and dirty, you know, done before the holidays over the
13:49:47 20 phone with an associate in -- somewhere in the East Coast
13:49:50 21 and me. And, I mean, it's, you know, close enough for
13:49:54 22 government work, if you want to use that phrase, but it's
13:49:57 23 a hundred percent accurate, no, not at all.
13:49:59 24   Q. Do you think the views that you've
13:50:01 25 communicated on these issues today are a reflection of

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13:50:04 1 your having spent more time thinking about the issues
13:50:07 2 addressed in this declaration?
13:50:08 3   A. Well, not only thinking about the issues, but
13:50:10 4 actually reading the documents.
13:50:21 5   MR. NORMAND: Michael, I'm going to take a
13:50:24 6 break now, and it may be that I'm done, but if not, I'll
13:50:27 7 have maybe five or ten minutes.
13:50:29 8   MR. JACOBS: Okay.
13:50:30 9   THE VIDEOGRAPHER: We are now going off the
13:50:32 10 video record. The time is 1:51 p.m.
13:50:35 11   (Recess.)
14:08:15 12   THE VIDEOGRAPHER: We are now back on the
14:08:25 13 video record. The time is 2:09 p.m.
14:08:28 14   Q. BY MR. NORMAND: Good afternoon, Mr. Sabbath
14:08:30 15 Do you recall from your participation in the negotiation
14:08:33 16 of the APA whether the issue of patents arose?
14:08:36 17   A. It did, yes.
14:08:38 18   Q. And in what way did it arise?
14:08:41 19   A. Somewhere in the negotiation, I'm pretty sure
14:08:46 20 it was Tor Braham, the Wilson Sonsini outside counsel,
14:08:51 21 told us that there were no patents that we were to
14:08:55 22 receive as part of the assets.
14:09:01 23   Q. And did you understand why Novell was making
14:09:03 24 that representation?
14:09:04 25   A. Well, we then tried to find out, you know,

26 (Pages 98 to 101)

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16:40:49 1 A. That's correct.
16:40:49 2 Q. It's not hard to say "all" or "the" to convey
16:40:52 3 that intent; right?
16:40:52 4 MR. NORMAND: Objection to form.
16:40:54 5 Q. BY MR. JACOBS: Right?
16:40:54 6 A. I suppose so.
16:40:55 7 Q. And if you look at Amendment Number 2, it
16:40:59 8 doesn't say that, does it?
16:41:02 9 MR. NORMAND: Objection to form.
16:41:04 10 THE WITNESS: If you're saying the word "all"
16:41:05 11 isn't there, you're absolutely right.
16:41:07 12 Q. BY MR. JACOBS: And a simple expression like
16:41:07 13 "the UNIX copyrights" isn't there, either?
14 MR. NORMAND: Objection to form.
16:41:11 15 THE WITNESS: The UNIX copyrights.
16:41:12 16 Q. BY MR. JACOBS: I'm sorry, looking at Exhibit
16:41:15 17 Number 2, sir.
16:41:16 18 A. Oh, with respect -- well, it says "all
16:41:20 19 copyrights and trademarks."
16:41:22 20 Q. That's the exclusionary part.
16:41:24 21 A. Oh, let me read it. Oh, except for the
16:41:32 22 copyrights and trademarks covered by Novell -- yeah, it
16:41:36 23 doesn't say "except for all the copyrights and
16:41:40 24 trademarks." True.
16:41:43 25 Q. And when it says the copyrights necessary to

16:41:48 1 carry on the business -- do you want to read that
16:41:50 2 expression again?
16:41:52 3 A. Okay. "Except for the copyrights and
16:41:56 4 trademarks owned by Novell as of the date of the
16:41:58 5 agreement, required for SCO to exercise its rights with
16:42:03 6 respect to the acquisition of UNIX and UnixWare
16:42:07 7 technologies."
16:42:09 8 Q. So it's -- refers to the exercise of rights;
16:42:13 9 correct?
16:42:13 10 MR. NORMAND: Objection. Form.
16:42:14 11 THE WITNESS: Yes.
16:42:16 12 Q. BY MR. JACOBS: And up until the time that
16:42:20 13 you left Santa Cruz/Tarantella, what copyright rights in
16:42:28 14 UNIX did Santa Cruz need in order to carry on the
16:42:33 15 business contemplated by the Asset Purchase Agreement?
16:42:36 16 MR. NORMAND: Objection. Asked and answered.
16:42:37 17 THE WITNESS: Well, once we sold the business
16:42:39 18 to Caldera, now The SCO Group, and became Tarantella, we
16:42:46 19 didn't need those rights. Up until then, you would need
16:42:50 20 all rights to run your business. You don't know what
16:42:53 21 you're going to be doing day-to-day, what kinds of
16:42:56 22 situations you'll find yourself in with potential
16:42:59 23 partners, with potential customers. So you want all
16:43:03 24 rights to do anything that you deem fit with the
16:43:06 25 technology.

16:43:07 1 Q. BY MR. JACOBS: SCO wasn't going to enter
16:43:10 2 into new SVRX licenses; correct?
16:43:12 3 A. Right. We didn't want to do that, anyway.
16:43:14 4 Q. So you didn't need the copyright necessary to
16:43:16 5 enter into new SVRX licenses?
16:43:18 6 MR. NORMAND: Objection to form.
16:43:19 7 THE WITNESS: But we did need to protect the
16:43:23 8 technology. We didn't want somebody to be able to go off
16:43:27 9 and pirate it, for example, so we needed the copyright in
16:43:31 10 order to defend the property.
16:43:32 11 Q. BY MR. JACOBS: Did you ever take such a step
16:43:35 12 while you were at Santa Cruz?
16:43:36 13 A. Well, with respect to SVRX?
16:43:39 14 Q. Correct.
16:43:39 15 A. I don't recall that.
16:43:40 16 Q. And with respect to the code that you
16:43:42 17 developed at UnixWare, we established -- the UnixWare
16:43:45 18 code that Santa Cruz developed, we established earlier
16:43:48 19 that you would own that by virtue of the operation of
16:43:52 20 copyright law; correct?
16:43:53 21 MR. NORMAND: Objection to form.
16:43:54 22 THE WITNESS: Yeah, it may not be that
16:43:57 23 simple, but if what you're getting at is anything we
16:44:00 24 developed, we would hold a copyright in, true, but there
16:44:04 25 might be some other older UNIX code in it, okay? Which

16:44:08 1 could be a problem if you don't own the copyright to it.
16:44:10 2 Q. BY MR. JACOBS: Well, the specific right you
16:44:12 3 need in order to effectuate that, based on your knowledge
16:44:15 4 and experience in the software industry, is the right to
16:44:18 5 create a derivative work; correct?
16:44:20 6 MR. NORMAND: Object to form.
16:44:21 7 THE WITNESS: Well, you definitely need that,
16:44:23 8 but you can do that as a licensee.
16:44:25 9 Q. BY MR. JACOBS: In fact, what you really need
16:44:26 10 from Novell is an explicit or implied license in order to
16:44:28 11 evolve the UnixWare product as contemplated by the Asset
16:44:30 12 Purchase Agreement; correct?
16:44:31 13 MR. NORMAND: Objection to the form.
16:44:32 14 THE WITNESS: That would have been a
16:44:34 15 different form of transaction. It's not -- you know, we
16:44:38 16 were already a licensee. It's not what we wanted to do.
16:44:42 17 We wanted to own the technology.
16:44:45 18 Q. BY MR. JACOBS: But in order to carry out the
16:44:47 19 business contemplated by the Asset Purchase Agreement,
16:44:50 20 we've established that that business did not include new
16:44:53 21 SVRX licenses; correct?
16:44:55 22 MR. NORMAND: Objection to form.
16:44:56 23 THE WITNESS: That's right.
16:44:58 24 Q. BY MR. JACOBS: It did include creating this
16:45:00 25 unified UNIX, and more particularly, the Eiger and UNIX

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16:52:44 1 leave the deposition open.
16:52:45 2 From our standpoint, until that's resolved.
16:52:49 3 I hope we won't need to get further in touch with you.
16:52:52 4 THE WITNESS: Okay. I have no idea what
16:52:53 5 you're talking about, and that's probably a good thing.
16:52:56 6 MR. NORMAND: I have a few questions.
7 FURTHER EXAMINATION BY MR. NORMAND
16:52:59 8 Q. With respect to Exhibit 49, Mr. Sabbath?
16:53:03 9 A. Uh-huh.
16:53:07 10 Q. I take it that in contacting Mr. Swartz,
16:53:12 11 you're working on the assumption that you had the right
16:53:14 12 to enforce UNIX copyrights. Is that a fair statement?
16:53:17 13 MR. JACOBS: Objection. Leading.
16:53:19 14 THE WITNESS: Oh, certainly.
16:53:20 15 Q. BY MR. NORMAND: Was there ever a time at
16:53:30 16 your tenure at Santa Cruz when you believe you did not,
16:53:33 17 meaning Santa Cruz, own the UNIX or UnixWare copyrights?
16:53:36 18 A. I don't recall such a time.
16:53:38 19 Q. Do you recall anyone at Santa Cruz suggesting
16:53:40 20 to you that Santa Cruz did not own the UNIX or UnixWare
16:53:44 21 copyrights during your tenure there?
16:53:46 22 A. I don't recall that.
16:53:47 23 Q. Can you recall anyone from Novell suggesting
16:53:49 24 to you that Santa Cruz didn't own the UNIX or UnixWare
16:53:53 25 copyrights during your tenure at Santa Cruz?

16:53:56 1 A. I don't recall that.
16:54:07 2 Q. If you look at Amendment Number 2, the
16:54:10 3 language in paragraph A, you've spoken now with both me
16:54:16 4 and Mr. Jacobs regarding this language copyrighted is a
16:54:22 5 trademark owned by Novell at the date of the agreement
16:54:24 6 required from SCO to exercise its rights with respect to
16:54:27 7 the acquisition of UNIX and UnixWare technologies.
16:54:30 8 Now, did you have any understanding at the
16:54:31 9 time as to whether SVRX source code was part of UNIX and
16:54:37 10 UnixWare?
16:54:38 11 A. There was an assumption that SVRX was part of
16:54:41 12 UNIX, sure. UNIX would have been, you know, all
16:54:46 13 releases, all forms of the UNIX operating system.
16:54:49 14 Q. Was it your understanding under the APA that
16:54:52 15 Santa Cruz had the right to develop the UnixWare
16:54:54 16 business?
16:54:54 17 A. Well, certainly that was the primary intent.
16:54:59 18 Q. Was it your understanding at the time of the
16:55:02 19 execution of the APA that in order to develop the
16:55:05 20 UnixWare business, Santa Cruz would have to copy and
16:55:08 21 reproduce UnixWare source code?
16:55:10 22 A. Sure. And modify it, certainly.
16:55:12 23 Q. Does it follow that in order to develop the
16:55:16 24 UnixWare business, it was your understanding that Santa
16:55:19 25 Cruz would need to copy and reproduce the SVRX source

16:55:24 1 code?
16:55:24 2 MR. JACOBS: Objection. Leading.
16:55:26 3 THE WITNESS: You know, I'm not technical
16:55:28 4 enough to know if that's the case. I think, but I don't
16:55:31 5 know.
16:55:31 6 Q. BY MR. NORMAND: Would that statement be true
16:55:34 7 if SVRX source code was part of UNIX and UnixWare source
16:55:37 8 code?
16:55:37 9 A. If that were the case, then it's probably so
16:55:40 10 that we would have to modify, reproduce, so forth, the
16:55:45 11 SVRX code as well.
16:55:45 12 Q. Is it your view that under the Asset Purchase
16:55:50 13 Agreement, Santa Cruz licensed from Novell the UNIX and
16:55:52 14 UnixWare source code?
16:55:54 15 A. No. I mean, the purpose of the Asset
16:55:58 16 Purchase Agreement was that we would acquire, we would
16:56:01 17 buy and own all of the UNIX business, all of the UNIX
16:56:05 18 technology. We were already a licensee.
16:56:09 19 MR. JACOBS: Objection. Move to strike.
16:56:11 20 Q. BY MR. NORMAND: Mr. Jacobs asked you earlier
16:56:13 21 about paragraph A of Amendment Number 2, and he used the
16:56:16 22 phrase "nunc pro tunc."
16:56:18 23 Do you remember that?
16:56:19 24 A. Vaguely.
16:56:20 25 Q. "Nunc pro tunc" is Latin for "now for then"?

16:56:25 1 A. Uh-huh.
16:56:25 2 Q. Did you understand paragraph A of the
16:56:28 3 Amendment 2 to amend the excluded asset schedule of the
16:56:32 4 APA?
16:56:33 5 A. No, I took this as a clarification, not
16:56:36 6 actually an amendment. And whether it was effective way
16:56:42 7 back when, or 16 October, '96, to be honest with you, I
16:56:46 8 failed to see any significance. But maybe I'm missing
16:56:50 9 some fine point that is a contention between you two.
16:56:56 10 Q. Well, to the extent paragraph A clarifies a
16:57:00 11 schedule to the APA --
16:57:02 12 A. Uh-huh.
16:57:02 13 Q. -- is it fair to say that Amendment Number 2,
16:57:05 14 paragraph A, was effective as of the execution of the
16:57:08 15 APA?
16:57:08 16 MR. JACOBS: Objection. Leading.
16:57:10 17 THE WITNESS: And I can only say I suppose
16:57:15 18 so.
16:57:15 19 Q. BY MR. NORMAND: And why is that?
16:57:17 20 A. Because I don't really speak very good Latin.
16:57:27 21 No, what I meant is I don't understand the
16:57:29 22 rules pertaining to that legal principle.
16:57:32 23 Q. There is language in paragraph A of Amendment
16:57:35 24 Number 2 that says "With respect to Schedule 1.1(d) of
16:57:39 25 the agreement, titled 'Excluded Assets,' Section 5,

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16:57:42 1 subsection A shall be revised to read."
16:57:45 2   Do you see that language?
16:57:46 3   A. Yes, I do.
16:57:48 4   Q. To the extent that the excluded asset
16:57:51 5 schedule of Amendment A was revised, does that affect
16:57:54 6 your view one way or the other as to whether copyrights
16:57:57 7 were deemed transferred under this Amendment Number 2 as
16:58:03 8 of the time of the APA?
16:58:04 9   A. No. I mean, you know, again, I was told --
16:58:07 10 we understood this to be a clarification, not a revision.
16:58:25 11   Q. Mr. Jacobs asked you about Scott Lester's
16:58:28 12 involvement in certain negotiations --
16:58:30 13   A. Yeah.
16:58:30 14   Q. -- under the APA. Do you recall that
16:58:32 15 question?
16:58:32 16   A. Yes.
16:58:33 17   Q. Was Mr. Lester part of any negotiations in
16:58:38 18 which outside counsel for the other side was not
16:58:42 19 involved?
16:58:44 20   A. I suspect not. Nor do I think Ed Leonard was
16:58:50 21 probably meeting with the other side without their
16:58:53 22 outside counsel.
16:59:37 23   Q. I wanted to direct your attention to
16:59:39 24 Exhibit 46, which was one of the email chains.
16:59:43 25   A. Okay. Got it.

17:00:15 1   Q. Do you see on the first page of the document
17:00:20 2 in the email to John Maciaszek from Scott McGregor
17:00:29 3 beginning, "John, Alok and I spoke about this, and here's
17:00:34 4 the status"? First page of the document?
17:00:40 5   A. Oh. Okay. Yeah.
17:00:42 6   Q. And the language says: Alok spoke with
17:00:45 7 Frankenberg last Friday, and Novell thinks they have the
17:00:49 8 right to do this. On the other hand, Geoff Seabrook, who
17:00:53 9 negotiated the deal from our end, is adamant that they
17:00:57 10 don't or at least the intent is that they don't."
17:00:57 11   Do you see that language?
17:00:59 12   A. I do.
17:01:00 13   Q. Do you know whether Mr. Seabrook was relying
17:01:03 14 on Section 4.16(c) in reaching the conclusion that's
17:01:06 15 attributed to him here?
17:01:08 16   A. I have no idea. You know, when I saw this
17:01:11 17 email thread today, I had no recollection whatsoever of
17:01:18 18 it.
17:02:03 19   Q. I'm handing you, Mr. Sabbath, what's been
17:02:06 20 marked as Exhibit 1050, a letter dated May 1st, 1996
17:02:14 21 under Brobeck, Phleger & Harrison letterhead to Novell,
17:02:19 22 attention David Bradford, signed by Scott Lester?
17:02:23 23   A. Yes.
17:02:25 24   Q. In which Mr. Lester states in the first page,
17:02:30 25 paragraph 3: "This letter constitutes notice on behalf

17:02:34 1 of SCO that the execution of the amendment by Novell
17:02:38 2 constitutes a breach of the Asset Purchase Agreement and
17:02:40 3 represents an invalid exercise of Novell's authority.
17:02:44 4 The amendment purports to grant certain rights to IBM and
17:02:48 5 to modify preexisting license agreements in a manner that
17:02:53 6 contravenes the provisions of the asset purchase
17:02:54 7 agreement and potentially causes substantial harm and
17:02:57 8 damages to SCO."
17:02:58 9   Do you see that language?
17:02:59 10   A. Yes, I do.
17:03:00 11   Q. Is it your view that in writing this letter,
17:03:03 12 Mr. Lester meant to refer only to Section 4.16(c) of the
17:03:08 13 APA?
17:03:08 14   MR. JACOBS: Objection. Calls for
17:03:10 15 speculation, lacks foundation.
17:03:13 16   THE WITNESS: And I have no idea.
17:03:22 17   Q. BY MR. NORMAND: Do you recall you had a
17:03:23 18 series of questions and answers with Mr. Jacobs regarding
17:03:29 19 Novell's rights to enter into buyouts on behalf of Santa
17:03:32 20 Cruz in 1996? Do you recall those questions and answers?
17:03:35 21   A. Vaguely.
17:03:36 22   Q. And do you recall my asking you this morning
17:03:41 23 about Amendment Number X?
17:03:43 24   A. What about Amendment Number X?
17:03:47 25   Q. Do you recall me asking you questions about

17:03:51 1 it?
17:03:51 2   A. Oh, sure. Sure.
17:03:52 3   Q. Is it your view that following the execution
17:03:56 4 of Amendment Number X, Novell was entitled to enter into
17:04:00 5 buyouts unilaterally on behalf of Santa Cruz?
17:04:02 6   MR. JACOBS: Object to the form of the
17:04:04 7 question.
17:04:04 8   THE WITNESS: Well, Amendment Number X was
17:04:07 9 the three-way between IBM, Novell, and SCO. There was
17:04:12 10 another amendment -- well, Amendment Number 2,
17:04:16 11 actually --
17:04:17 12   Q. BY MR. NORMAND: It's really more a question
17:04:19 13 to time. Amendment Number 2 and Amendment Number X,
17:04:24 14 following the execution of those documents, do you have a
17:04:27 15 view as to whether Novell was entitled to enter into
17:04:30 16 buyouts unilaterally for Santa Cruz?
17:04:32 17   A. I do have a view. I think that really nailed
17:04:35 18 down the clarification that Novell would not have the
17:04:38 19 ability to do a buyout on our behalf or on anybody's
17:04:41 20 behalf.
17:05:34 21   Q. Do you have any understanding, Mr. Sabbath,
17:05:36 22 as to whether following the execution of the APA, Santa
17:05:41 23 Cruz had occasion to enter into UnixWare licenses in
17:05:45 24 which it licensed SVRX source code to a third party?
17:05:49 25   MR. JACOBS: Objection. Asked and answered.

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17:05:50 1   THE WITNESS: I don't know.
17:06:04 2   Q. BY MR. NORMAND: Mr. Jacobs directed you to
17:06:05 3   Section 2.10 of the Asset Purchase Agreement.
17:06:13 4   A. 2.10 of technology?
17:06:18 5   Q. Correct. And that's the section in which
17:06:22 6   Novell as the seller makes certain representations
17:06:26 7   regarding a list of seller intellectual property rights?
17:06:30 8   A. Yes.
17:06:31 9   Q. Now, do you have any explanation as to why
17:06:36 10   copyrights would have been included in those seller
17:06:39 11   intellectual property rights, and representations would
17:06:41 12   have been made about such copyrights in Section 2.10 if
17:06:46 13   Novell were not transferring those copyrights?
17:06:49 14   A. No, I don't know why it would be there if
17:06:53 15   that were not the case.
17:07:02 16   Q. Do you have any reason to believe that you
17:07:05 17   ever told Allison Lisbonne or Allison Amadia that UNIX or
17:07:09 18   UnixWare copyrights had not been transferred under the
17:07:13 19   APA?
17:07:13 20   A. I sure don't recall that.
17:07:15 21   Q. Do you have any reason to believe you would
17:07:17 22   have made such a statement?
17:07:17 23   A. Well, I mean, it could be that she brought it
17:07:20 24   up or -- I mean, not me, but her. I don't recall that.
17:07:25 25   It could be somebody brought up the fact that maybe there

17:07:28 1   needed to be a clarification on the language in the APA.
17:07:32 2   I don't recall that.
17:07:38 3   Q. Was it ever your understanding after the
17:07:40 4   execution of the APA that Novell had retained UNIX or
17:07:43 5   UnixWare copyrights?
17:07:44 6   A. No.
17:07:57 7   Q. Mr. Jacobs pointed you in the technology
17:08:00 8   license agreement to the top of page 2 --
17:08:04 9   A. Top of page 2.
17:08:09 10   Q. -- which certain definitions in the APA are
17:08:12 11   incorporated.
17:08:13 12   A. Yes.
17:08:13 13   Q. And including the word "assets"?
17:08:17 14   A. Okay. I see assets.
17:08:21 15   Q. I take it from our discussion this morning
17:08:40 16   that it was your understanding that the UNIX and UnixWare
17:08:48 17   licenses were among the assets transferred, is that fair
17:08:52 18   to say, under the APA?
17:08:53 19   A. The licenses, what licenses specifically?
17:08:57 20   Q. That UNIX and UnixWare licenses were among
17:09:01 21   the assets transferred under the APA?
17:09:03 22   A. You mean the licenses that Novell had entered
17:09:06 23   into with its customers?
17:09:08 24   Q. Correct.
17:09:08 25   A. Yes, of course.

17:09:12 1   Q. If you look at Schedule 1.1(a) of the APA.
17:09:17 2   That's the Bates number ending 950?
17:09:19 3   A. Okay.
17:09:29 4   Q. Paragraph 1, among the assets transferred was
17:09:32 5   the UNIX and UnixWare source code; correct?
17:09:35 6   A. Right. Right.
17:09:48 7   Q. And if you see at the top of the Amendment
17:09:50 8   Number 2, the phrase "licensed technology"?
17:09:54 9   A. I'm sorry, where is that?
17:09:55 10   Q. At the top of page 2 of Amendment Number 2?
17:09:58 11   A. Other technology? Yes.
17:10:01 12   Q. I'm sorry, licensed technology.
17:10:04 13   A. Like what page of the footer on the bottom
17:10:09 14   right?
17:10:09 15   Q. The top of page 2 of the Technology License
17:10:12 16   Agreement?
17:10:12 17   A. Oh, I'm looking at the wrong agreement.
17:10:23 18   License technology, right.
17:10:26 19   Q. And if you look in paragraph Roman Numeral II
17:10:30 20   A 2 of the Technology License Agreement?
17:10:35 21   A. Subject to paragraphs B and C of this
17:10:39 22   Section 2?
17:10:40 23   Q. Novell was given with the consent of SCO a
17:10:42 24   non-exclusive, non-terminable, worldwide fee-free license
17:10:46 25   to use, reproduce, and modify and authorize its customers

17:10:52 1   to use, reproduce, and modify licensed technology."
17:10:56 2   Do you see that?
17:10:56 3   A. I do.
17:10:57 4   Q. Did you understand such licensed technology
17:11:00 5   to include the UNIX and UnixWare source code?
17:11:05 6   A. No.
17:11:12 7   Q. Well, let's look at the definition of
17:11:14 8   licensed technology in the APA.
17:11:17 9   MR. JACOBS: 1.6.
17:11:22 10   MR. NORMAND: I'm sorry?
17:11:23 11   MR. JACOBS: 1.6.
17:11:36 12   Q. BY MR. NORMAND: If you look at Section 1.6
17:11:39 13   of the APA, Mr. Sabbath.
17:11:40 14   A. I'm sorry, Section 1.6? License back of
17:11:52 15   assets, okay.
17:11:53 16   Q. It says: "Concurrent with the closing, buyer
17:11:56 17   shall execute a license agreement under which it shall
17:11:58 18   grant the seller a royalty-free perpetual worldwide
17:12:02 19   license to all of the technology included in the assets."
17:12:05 20   A. Uh-huh.
17:12:06 21   Q. Do you remember we looked at the definition
17:12:08 22   of "assets"?
17:12:09 23   A. Uh-huh.
17:12:09 24   Q. It is your understanding that UNIX and
17:12:11 25   UnixWare source code were among the assets?

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