

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NETBULA, LLC, a Delaware
limited liability company,

Plaintiff,

vs.

No. C-06-07391-MJJ

STORAGE TECHNOLOGY CORPORATION, A DELAWARE
CORPORATION; SUN MICROSYSTEMS, INC., A
DELAWARE CORPORATION; INTERNATIONAL BUSINESS
MACHINES CORPORATION, A NEW YORK CORPORATION;
EMC CORPORATION, A MASSACHUSETTS CORPORATION,
VERITAS SOFTWARE CORPORATION, A DELAWARE
CORPORATION; DARDEN RESTAURANTS, INC., A
FLORIDA CORPORATION; AND DOES 1-100,
inclusive,

Defendants.

CERTIFIED
COPY

AND RELATED COUNTER-CLAIMS.

30 (b) (6) DEPOSITION OF MICHAEL MELNICK
San Francisco, California
Wednesday, September 19, 2007

REPORTED BY:
KELLI COMBS
CSR No. 7705
Job No. 3-73276

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AND RELATED COUNTER-CLAIMS.

30(B) (6) Deposition of MICHAEL MELNICK, taken on
behalf of Plaintiff, at Sarnoff Court Reporters, 450
Sansome Street, Suite 1550, San Francisco, California,
beginning at 8:37 a.m. and ending at 1:18 p.m. on
Wednesday, September 19, 2007, before Kelli Combs, CSR
7705.

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Also Present: Don Yue

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1 San Francisco, California, Wednesday, September 12, 2007

2 8:37 a.m. - 1:18 p.m.

3 MICHAEL MELNICK,

4 after having been duly sworn, testified as follows:

5

6

7

EXAMINATION

8 BY MS. BRILLET:

9 Q Good morning, Mr. Melnick.

10 A Good morning.

11 Q Mr. Melnick, have you ever had your deposition
12 taken before?

13 A Yes.

14 Q Okay.

15 So you understand the oath that you just took?

16 A Yes. Not in person, no, but I have the
17 deposition that we did, so...

18 Q Do you understand that the oath that you have
19 just taken is the same oath you would be taking in the
20 court of law?

21 A Yes.

22 Q Please make sure that you enunciate all of
23 your answers. Make sure you answer with "yes" or "no"
24 and no nods of the head so the court reporter will be
25 able to record every answer that you give.

1 A I will.

2 Q Please wait until I ask the question before
3 you begin to answer.

4 A I will.

5 Q At some point, you will be presented with an
6 opportunity to review the transcript from today's
7 deposition. You can make any corrections or
8 clarifications.

9 However, if you do that, we'll have an
10 opportunity to comment on those clarifications in these
11 proceedings --

12 A Okay.

13 Q -- okay?

14 Are you under the influence of any medication
15 or aware of any reason why you would not be able to give
16 truthful testimony today?

17 A No.

18 MS. BRILLET: Start with Exhibit 1.

19 (Plaintiff's Exhibit No. 1
20 marked for identification.)

21 MS. BRILLET: I did not bring an additional
22 copy, I'm sorry. I did not know you were going to be
23 here today.

24 MR. EISEMAN: You can assume that I will be at
25 depositions or someone from my office will be at

1 deposition.

2 MS. BRILLET: Okay.

3 BY MS. BRILLET:

4 Q Mr. Melnick, do you have Exhibit 1?

5 A I do.

6 Q Do you recognize this exhibit?

7 A I do.

8 Q Have you had an opportunity before today to
9 review that document?

10 A I have.

11 Q What did you do to prepare for today's
12 deposition?

13 A I looked at documents, communications, license
14 agreements, those types of things.

15 Q Okay.

16 And are you appearing as a designated 30(b)(6)
17 witness to testify for Sun and StorageTek?

18 A I am.

19 Q What is your current position at Sun?

20 A At Sun? Right now, I'm -- my title, I'm
21 global sourcing manager.

22 Q When did you join Sun?

23 A Officially, it was -- I believe it was
24 November of 2005. The actual acquisition was completed
25 January 1st of 2006.

1 Q What titles or positions have you held since
2 the time you joined Sun or StorageTek?

3 MR. PULGRAM: Compound.

4 BY MS. BRILLET:

5 Q Since you joined Sun.

6 A I have just been a global sourcing manager.

7 That was the title I was given.

8 Q Were you an employee of StorageTek?

9 A I was.

10 Q And what was your position there?

11 A The title then was -- what was it? Senior
12 subcontract administrator, senior consultant.

13 THE WITNESS: Want me to say that again just
14 in case?

15 BY MS. BRILLET:

16 Q Would you please describe your job functions
17 since you joined Sun.

18 A My responsibilities now are to source hardware
19 and security services globally on behalf of Sun.

20 Q Have you reviewed the list of deposition
21 topics for today?

22 A I have.

23 Q Are you able to testify on the listed topics?

24 MR. PULGRAM: Objection. We've submitted
25 objections to the deposition, which I believe you

1 received, and those identify the subjects as to which
2 Sun and StorageTek are offering a 30(b)(6) witness.
3 Mr. Melnick is here to testify about those subjects.

4 BY MS. BRILLET:

5 Q And for those particular subjects, you are
6 prepared to testify on those today?

7 A I am.

8 Q Okay.

9 Do you have personal knowledge of all the
10 deposition topics?

11 MR. PULGRAM: Objection; calls for -- well,
12 it's compound.

13 BY MS. BRILLET:

14 Q I'm just asking if you have knowledge of the
15 topics?

16 MR. PULGRAM: Also vague.

17 BY MS. BRILLET:

18 Q Are you familiar with the topics of today's
19 deposition?

20 MR. PULGRAM: Also vague.

21 BY MS. BRILLET:

22 Q Have you seen the questions of today's
23 deposition? Have you seen the topic list for today's
24 deposition?

25 A I have looked at the list.

1 Q Thank you.

2 And would you be able to look at the list and
3 tell me which topics you are prepared to testify on
4 today?

5 A Yes.

6 Q Would you please do that?

7 A Oh, is this the one?

8 MR. PULGRAM: I'm going to instruct the
9 witness that he needs to look at the objections that
10 were filed, because that is the subjects as to which we
11 have put him up as a deponent.

12 Would you like a copy of those objections?

13 MS. BRILLET: Please. Your witness has not
14 seen those objections yet?

15 MR. PULGRAM: I believe he has, but you can
16 ask him.

17 Frankly, I'm not sure I have a clean copy.

18 BY MS. BRILLET:

19 Q Mr. Melnick, have you seen the Defendants'
20 objections to the deposition topics?

21 A I have. Do I know them by heart? No as far
22 as which ones they are.

23 Q Okay.

24 Mr. Melnick, have you brought any documents
25 for today's deposition?

1 A I have not.

2 MS. BRILLET: Do you have a clean copy of
3 those?

4 MR. PULGRAM: I don't.

5 THE WITNESS: Actually, I may have. Do you
6 want me to look? It's up to you. You decide.

7 BY MS. BRILLET:

8 Q In the meantime, we'll move on.

9 Sun Microsystems and Storage Technology
10 produced some documents responsive to Plaintiff's
11 Request for Production of Documents.

12 Did you participate in the production of any
13 of those documents?

14 A Can you be a little more specific about
15 documents?

16 Q Well, did you see the request for documents
17 that Plaintiff sent to Defendants?

18 A I don't recall, honestly, because I'm not sure
19 what you're talking about. Any documents?

20 Q Yes.

21 A I have seen some documents, participated in
22 the preparation of some documents.

23 Q Did you participate in preparing any documents
24 or giving documents for the Request for Production that
25 Plaintiff requested?

1 A No.

2 Q Sun produced some E-mails.

3 Did you participate in the production of any
4 E-mails --

5 A Yes.

6 Q -- for this --

7 So those are documents.

8 A Okay. That's why I was looking for specifics.
9 I'm sorry.

10 Q How are the E-mails produced?

11 MR. PULGRAM: Vague.

12 BY MS. BRILLET:

13 Q Were the E-mails simply called up on the
14 Internet and print -- and printed directly from the
15 E-mail address?

16 A No. Actually, what I did is I had provided a
17 copy on a DVD and burned them to a DVD of all the
18 E-mails that I had.

19 Q The E-mails that you produced, were they
20 authentic E-mails? Were there any changes made to any
21 of them before you burned them onto the CD and produced
22 them?

23 A No, they were original. There were no
24 changes.

25 Q Okay.

1 Sun also produced some spreadsheets in the
2 production of documents.

3 Did you participate in preparing those
4 spreadsheets?

5 A Not preparing them, no. What I did with them
6 is forwarded them to Don.

7 Q Okay.

8 Were those sent in electronic version or on
9 disk?

10 A They were sent electronically via E-mail.

11 Q Via E-mail? Okay.

12 Is Sun or StorageTek -- I'm sorry.

13 Is Sun paying a cost to convert any electronic
14 documents into nonsearchable TIF images, to your
15 knowledge?

16 MR. PULGRAM: Objection. To the extent he
17 could have any knowledge about that, it would be
18 attorney/client privilege. Instruct the witness not to
19 answer.

20 MS. BRILLET: Attorney/client privilege as to
21 whether or not you are aware that there is a cost for
22 converting the images?

23 MR. PULGRAM: Any information the witness
24 could possibly have about what his counsel did with
25 respect to this, which is what you're inquiring about,

1 would be attorney/client privilege, and I instruct the
2 witness not to answer.

3 MS. BRILLET: Okay.

4 BY MS. BRILLET:

5 Q Did anyone other than your attorneys convert
6 any documents to a TIF image, just to your knowledge?

7 A Not that I'm aware of.

8 Q Plaintiff requested Sun to produce installable
9 copies of software that used the Netbula RPC software.
10 Can Sun produce that software?

11 MR. PULGRAM: Objection.

12 Counsel, we have objected to production of
13 documents on the basis of relevancy to the subject
14 matter of this particular phase of the proceeding.

15 Asking the witness -- this witness hasn't been
16 designated to testify about what documents could or
17 couldn't be produced, nor as to what is relevant.

18 I have allowed you to inquire as to what his
19 participation was in the collection of production of
20 documents and you have done so. This witness is not
21 here to testify about whether or not Sun could make
22 certain other copies of materials that we have objected
23 to as being irrelevant.

24 MS. BRILLET: This question goes to part of --
25 the questioning here is supposed to be regarding the

1 licensing and contracting, and if he can't answer a
2 question regarding what's going on with the licensing
3 and contracting, then he is not a 30(b)(6) witness for
4 this purpose.

5 MR. PULGRAM: But the question that you asked
6 wasn't about the license and contract, it was about the
7 installable code.

8 MS. BRILLET: It's about installable copies,
9 copies of the software that use the Netbula RPC.

10 There is a question about the licensing of the
11 contract and the terms. This will go to the terms of
12 the contract and as far as whether or not those terms
13 were exceeded.

14 MR. PULGRAM: If you are asking to get a copy
15 of a particular disk because it might have a license in
16 it, you can ask that question to me and I'll respond to
17 it. Your request for additional documents should be
18 directed to me.

19 MS. BRILLET: I did not ask him for the
20 documents; I asked if Sun could produce those documents,
21 if they are able to produce those documents.

22 But I'll move on.

23 BY MS. BRILLET:

24 Q Have you spoken with any other Sun employees
25 about today's deposition?

1 A No.

2 Q Have you spoken with any StorageTek employees
3 about today's deposition?

4 A Well, can I go back on that first one --

5 Q Yes.

6 A -- and answer that?

7 I have, in the fact that I have had to contact
8 my manager to let him know that I was coming out here
9 for a deposition.

10 Q Who is your manager?

11 A Carl Avola. And that's strictly to get travel
12 approval.

13 Q Have you spoken with any Sun developers who
14 use the Netbula RPC about today's deposition?

15 A Yes.

16 Q And who?

17 A Just a second. I'll think of it.

18 I'm drawing a blank on his name.

19 Q Okay. We'll come back to that.

20 Did you talk to any Sun sales or accounting
21 people about today's deposition?

22 A No.

23 Q Okay.

24 Who else did you speak with outside of counsel
25 about today's deposition?

1 A Other than my manager?

2 Q Yes.

3 A One other person within our group that needed
4 to cover for me when I was gone.

5 Q What is that person's name?

6 A Robert Marranzino.

7 Q Would you spell the last name, please?

8 A M-A-R-R-A-N-Z-I-N-O.

9 And it was the same type of thing about, "I'm
10 going because I have to go do this" and to help cover,
11 and mostly talking to him about covering because he was
12 going to check on my wife for me.

13 MS. BRILLET: Okay. Exhibit 2, please.

14 (Plaintiff's Exhibit No. 2
15 marked for identification.)

16 BY MS. BRILLET:

17 Q You have now been handed Exhibit 2.

18 Do you recognize this document?

19 A No, I do not.

20 Q Would you take a moment to look it over?

21 A I certainly will.

22 I've read what I could, but I don't know what
23 this is over here. I'm saying this particular piece on
24 the right-hand side where it says "Nigel Dessau," but I
25 can't read what that says.

1 Q Okay.

2 A So --

3 Q I won't ask you anything about that particular
4 portion.

5 MR. PULGRAM: The witness is noting that a
6 piece of the document appears to be cut off.

7 BY MS. BRILLET:

8 Q Okay.

9 Is StorageTek now a division of Sun
10 Microsystems?

11 A Yes.

12 MR. PULGRAM: Foundation.

13 BY MS. BRILLET:

14 Q When did StorageTek become a division of Sun?

15 A It was January 1st of 2006.

16 Q Is Sun Microsystems responsible for all legal
17 claims brought against StorageTek in this lawsuit?

18 MR. PULGRAM: Objection; calls for a legal
19 conclusion, no foundation, calls for lay opinion.

20 You can answer if you know the answer to that.

21 THE WITNESS: Can you repeat the question,
22 please?

23 BY MS. BRILLET:

24 Q Is Sun Microsystems responsible for all legal
25 claims brought against StorageTek in this lawsuit?

1 MR. PULGRAM: My objection is on the record.

2 THE WITNESS: And my understanding is yes.

3 MS. BRILLET: This is Exhibit 3.

4 (Plaintiff's Exhibit No. 3
5 marked for identification.)

6 BY MS. BRILLET:

7 Q You have been handed Exhibit 3.

8 Do you recognize this document?

9 A I do.

10 Q Okay.

11 And this is an E-mail from Don Carroll to
12 Sales@Netbula.com dated January 18th, 2000?

13 A It appears that way, yes.

14 Q Would you please read the two paragraphs of
15 the E-mail.

16 A I will.

17 Q Out loud, please.

18 A Oh, yes. I'm sorry.

19 "Is there any way we can get
20 the full version of ONC RPC for
21 testing and evaluation? We have an
22 existing product that we're trying
23 to replace MKS NutCracker RPC with
24 your product. Our product has far
25 more than six RPC functions. We

1 are unable to properly evaluate
2 your product with these
3 limitations.

4 "The product we are working on
5 is for resale and not internal use.
6 We are a large company and it would
7 not be wise for us to distribute
8 the software unlicensed. We are
9 willing to sign agreements to this
10 effect."

11 Q The E-mail signature says: "Don B. Carroll,
12 Project Manager."

13 A It does.

14 Q Is there more than one project manager?

15 A There are many. There are many project
16 managers.

17 Q Which project is Don Carroll -- or at this
18 time was Don Carroll the project manager for?

19 A I do not know.

20 Q Okay.

21 How many software engineers worked under Don
22 Carroll in his division?

23 A I do not know specifically.

24 Q Okay.

25 Do you know who Don Carroll is?

1 A I have never met the man, no.

2 Q Have you ever spoken with Don Carroll?

3 A I have never spoken with Don. I know of the
4 name.

5 Q Okay.

6 To your knowledge, is Don Carroll still
7 employed by Sun?

8 A I do not know if he is or not.

9 Q What does a backup and recovery engineer do?

10 A It's a long title for an engineering manager
11 for a particular group of engineers, backup and
12 recovery. I don't know specifically. I could only
13 speculate.

14 Q Okay.

15 What kinds of products or solutions does the
16 backup and recovery engineering department work on?

17 A I don't know specifically.

18 Q Okay.

19 Do you know if the people in the backup and
20 recovery engineering group are located in one office
21 location?

22 A I would say that the majority of them were in
23 one location, but I couldn't say that all of them are.

24 Q Okay.

25 Who is Vaughn Howard?

1 A I believe Vaughn Howard is an engineer.

2 Q Do you know what his job function is?

3 A According to this, because this says, "For
4 Vaughn Howard, backup and recovery engineering manager,"
5 so I'm assuming he's backup and recovery engineering
6 manager.

7 Q Do you know who Keith Oliver is?

8 A I know the name. I do not know the person.

9 Q Okay.

10 Do you know if Vaughn Howard is still an
11 employee of Sun?

12 A I do not.

13 Q Do you know if Keith Oliver is still an
14 employee of Sun?

15 A I do not.

16 Q The E-mail refers to an existing product.
17 What is that existing product?

18 A It says right here that it's MKS NutCracker
19 RPC.

20 Q No, actually, it says:

21 "We have an existing product
22 that we are trying to replace MKS
23 NutCracker RPC with your product."

24 A No, I think you're misreading that.

25 Q "Typing"?

1 A No, that's not what I meant. No, I'm sure
2 they mean "trying."

3 I think what it's saying is we have an
4 existing product that we're trying to replace the MKS
5 NutCracker RPC product with. They are trying to replace
6 that particular product.

7 Q So you believe that "your product" should not
8 be in that -- end of that sentence?

9 A Once again, I believe that what they are
10 trying to say is that the MKS NutCracker RPC product is
11 what they are trying to replace.

12 And because this is to Sales@Netbula.com, it
13 would be with their product, because it is addressed to
14 Netbula.

15 Q Okay.

16 What's the functionality of the MKS NutCracker
17 RPC?

18 A I don't know specifically technically what
19 that does.

20 Q Do you know anything about the MKS NutCracker
21 RPC?

22 A No. You mean as far as functionality, things
23 like that?

24 Q Yes.

25 A No, I do not.

1 Q Have you heard anything about that product?

2 A I have.

3 Q To your knowledge, what is it?

4 A Like I say, I have heard of it. I'm not sure
5 what it is or what it does.

6 Q Okay.

7 To your knowledge, did StorageTek license MKS
8 NutCracker RPC?

9 A Yes.

10 Q And do you know what the license fee was for
11 that MKS NutCracker --

12 A I do not.

13 Q Okay.

14 The E-mail asks for a full version of the ONC
15 RPC for testing and evaluation; is that correct?

16 A Are you asking me if that's what it says?

17 Q Yes.

18 A That's what it looks like it says to me, yes.
19 That's what they are asking for.

20 Q Okay.

21 And asks about a limitation of six RPC
22 functions in the Netbula RPC?

23 A No, I don't believe that's what it says.

24 Q Could you read that sentence?

25 A Says: "Our product has far more than six RPC

1 functions." I don't think it mentions Netbula's at all.

2 Q Okay.

3 Well, in the prior sentence it asks about
4 "your product."

5 A It does, yes.

6 Q Okay.

7 What's the next sentence, the last sentence in
8 that paragraph:

9 "We are unable to properly
10 evaluate your product with these
11 limitations"?

12 A That is what that says, yes.

13 Q Okay.

14 Did StorageTek test a trial version of the
15 Netbula RPC before sending this E-mail?

16 A I do not know.

17 Q Who would have been in charge of that? Who
18 would know the answer to that question?

19 A Probably the engineering folks.

20 Q Would that be the backup and recovery
21 engineering area or the project manager, Don Carroll?

22 MR. PULGRAM: Calls for speculation.

23 BY MS. BRILLET:

24 Q To your knowledge.

25 You answered the engineering folks. I'm just

1 wondering who you meant when you said "engineering
2 folks."

3 A What I meant by that was someone within the
4 engineering organization. Specifically who, I don't
5 know.

6 Q But to your knowledge, would it be the backup
7 and recovery engineering section or another engineering
8 section?

9 MR. PULGRAM: Asked and answered, calls for
10 speculation.

11 MS. BRILLET: Are you instructing him not to
12 answer?

13 MR. PULGRAM: No.

14 MS. BRILLET: Okay.

15 THE WITNESS: I'm sorry, can you ask that one
16 more time?

17 BY MS. BRILLET:

18 Q When you said the "engineering folks," did you
19 mean the backup and recovery engineering division or did
20 you mean a different engineering division?

21 A Honestly, I don't know, because engineering
22 was engineering to me. When I dealt with engineering,
23 it was the engineering group.

24 Q Okay.

25 How did StorageTek obtain a trial version of

1 the Netbula RPC?

2 A I do not know.

3 Q Okay.

4 To your knowledge, were there any internal
5 communications, such as E-mails, about Netbula RPC
6 before this E-mail was sent?

7 A There was.

8 Q And who was involved in those communications?

9 A I'd have to look at the record to see who that
10 was.

11 Q Okay.

12 A I believe they are within the E-mails that you
13 have got.

14 Q Okay.

15 I see in the E-mail, it says:

16 "It would not be wise for
17 StorageTek to distribute this
18 software unlicensed."

19 A It does say that.

20 Q And this says: "We are a large company" -- we
21 were a large company.

22 Is the size of StorageTek a factor in
23 determining whether it was wise to distribute the
24 software unlicensed?

25 A No, ma'am.

1 Q Okay.

2 Mr. Melnick, you may have answered this
3 question already.

4 Have you ever seen this E-mail before?

5 A This one?

6 Q Yes.

7 A I did answer that already. Yes, I have.

8 Q Okay.

9 Have you seen any responses to this E-mail?

10 A Not that I recall --

11 (Plaintiff's Exhibit No. 4
12 marked for identification.)

13 BY MS. BRILLET:

14 Q You have been handed Exhibit 4.

15 A Yes, I have.

16 Q Please review it.

17 Do you recognize this E-mail?

18 A I do.

19 Q Would you please read the E-mail?

20 A I certainly will.

21 "I am looking to speak with
22 someone on the purchase of eight
23 developer licenses for PowerRPC,
24 ONC RPC SDK for win32, and limited
25 application distribution agreement.

1 I would also like to see your
2 license and distribution agreement
3 and need to know who I can
4 negotiate the agreement with."
5 And then I signed it, et cetera.

6 Q Okay.

7 At the time that this E-mail was sent, was
8 your position at StorageTek subcontract administrator?

9 A It was.

10 Q Okay.

11 In this E-mail, you refer to a "limited
12 application distribution agreement."

13 What is that?

14 A In this particular case, what I did was took
15 the information straight from a purchase requisition
16 that was given to me by engineering that had that exact
17 wording in it.

18 So in order to make sure that I didn't
19 misinterpret anything back to Netbula, I used the exact
20 same wording. So that's why it reads like that.

21 Q Okay.

22 Do you know the price for the different packs
23 for the Netbula?

24 MR. PULGRAM: Vague.

25

1 BY MS. BRILLET:

2 Q For the Netbula RPC software?

3 MR. PULGRAM: Still vague as to time and as
4 to -- generally.

5 MS. BRILLET: I'll rephrase it.

6 BY MS. BRILLET:

7 Q At the time that you sent this E-mail, did you
8 know the pricing for your request?

9 A I had not received a quote yet.

10 Q Okay.

11 Did StorageTek --

12 To your knowledge, did StorageTek read
13 Netbula's sales web page and find the limited
14 application distribution agreement? Again, referring to
15 this E-mail.

16 A Okay. Can you repeat that again, please?

17 Q Sure.

18 To your knowledge, did StorageTek read
19 Netbula's sales web page and find the limited
20 application distribution agreement?

21 A I can't speak for all of StorageTek. I can
22 say that I did not look at it.

23 Q The question was to your knowledge.

24 A Okay.

25 Q Would you be able to tell me the process of

1 acquiring third-party software licenses at StorageTek --

2 A Certainly.

3 Q -- at this time?

4 A Any kind of third-party software licenses?

5 Q Yes.

6 A Basically, what happens is there is a process
7 in which the end user, whether it be an engineering
8 group or someone within IT that just wants to use
9 software for internal use, puts together their
10 information as far as what they want, will -- would go
11 out and get a quote, and then they bring -- they go get
12 their approvals through -- their financial approvals,
13 their management approvals, et cetera.

14 They bring a requisition in to procurement to
15 whoever is responsible for that particular category or
16 commodity.

17 Once that occurs, then that frees the
18 purchasing person up to go in and whether it's negotiate
19 agreement or place an order against any existing
20 agreement.

21 Q Okay.

22 Did Mr. Carroll communicate with you directly
23 on the RPC licenses?

24 A Not that I recall. I don't believe it was
25 him.

1 Q Who communicated with you on the RPC licenses?

2 A I'd have to look at the requisition. I'm
3 trying to think of the person's name that I dealt with
4 originally.

5 It was -- can we come back to that one? I'll
6 think of his name.

7 Q Okay.

8 A Oh, I'm sorry. It was Tracy Gagnon,
9 G-A-G-N-O-N.

10 Q What is her title?

11 A She was an engineering manager.

12 Q Is she still an employee?

13 A No, she is not.

14 Q Have you seen any documents as far as the
15 responses to this E-mail?

16 A Yes. I would have all of those in my inbox.

17 Q Okay.

18 And do you recall what was the response?

19 A I'd have to look at the string to know
20 specifically what the response was. I know that I did
21 get a quote finally.

22 Q Okay.

23 And the documents that you reviewed for
24 today's deposition, this was not part of that set of
25 documents?

1 A It may have been.

2 Q Okay.

3 My concern is with you being a 30(b)(6)
4 witness and you're not able to answer certain questions.

5 MR. PULGRAM: Well, you asked for the
6 documents. Even 30(b)(6) witnesses can't memorize the
7 documents.

8 MS. BRILLET: I understand and I heard his
9 question.

10 BY MS. BRILLET:

11 Q Okay.

12 The E-mail refers to eight developer licenses?

13 A Yes, it does.

14 Q Were all eight developers in Mr. Howard's
15 group?

16 A It wasn't limited to Mr. Howard's group; it
17 was for eight users.

18 MS. BRILLET: Exhibit 5.

19 (Plaintiff's Exhibit No. 5
20 marked for identification.)

21 BY MS. BRILLET:

22 Q You have been handed Exhibit Number 5.

23 A Yes, she did.

24 Q Okay.

25 And that is to Michael Melnick and it's from

1 Netbula sales?

2 A That is correct.

3 Q February 7th, 2000?

4 A That is also correct.

5 Q Okay.

6 If you look at the page, it was a message
7 originally sent by you, looks like?

8 A This one? Yes.

9 Q Uh-huh, at the bottom of the page.

10 And this is Netbula's reply?

11 A Yes --

12 Q Okay.

13 A -- it is.

14 Q Would you please read the two sentences
15 starting from, "Dear Mike"?

16 A Sure.

17 "Dear Mike, please read the
18 attached license agreement
19 template, limited distribution
20 licenses for distributing the DLLs
21 and support quote programs for --
22 I'm sorry -- to 1,000 machines."

23 MS. BRILLET: Exhibit 6.

24 (Plaintiff's Exhibit No. 6
25 marked for identification.)

1 BY MS. BRILLET:

2 Q I'll give you a moment to review that document
3 and tell me if you recognize it.

4 Do you recognize this document?

5 A Yes, I do.

6 Q Would you please read the first paragraph on
7 the first page.

8 A Can I read the rest of it first?

9 Q Pardon?

10 A May I read the rest of it first?

11 Q Sure.

12 A Thank you.

13 So you want me to read the first paragraph
14 starting with, "Mina"?

15 Q Yes, please.

16 A (Reading)

17 "Mina, normally, I would agree
18 with you, especially considering
19 that Don Carroll has experience
20 with the product and has personally
21 never used call-in support.

22 However, since this is a new
23 package to our organization, since
24 we are changing massive amounts of
25 code, which potentially may take

1 some pinpointing, a" -- should be a
2 "bit tough," but "a bug tough," it
3 says, "and since our support
4 organization will eventually have
5 to have knowledge of Netbula also,
6 I think we should initially cover
7 ourselves with the ten-call
8 package."

9 Q Thank you.

10 A I'm good at reading.

11 Q Pardon?

12 A I'm good at reading.

13 Q You are very good at it.

14 MS. BRILLET: This is Exhibit 7.

15 (Plaintiff's Exhibit No. 7
16 marked for identification.)

17 BY MS. BRILLET:

18 Q You have been handed Exhibit 7.

19 A Yes, I have.

20 Q It's a string of E-mails --

21 A Yes, it is.

22 Q -- between you and Netbula.

23 A Uh-huh.

24 Q Okay.

25 Would you look at --

1 On the heading, it has "Christine Tocalino"?

2 A Where are you looking?

3 Q Hold on one second.

4 A Says what?

5 Q Pardon?

6 A It says what?

7 Q The heading.

8 A Okay.

9 Q The very top of the page.

10 A Christine Tocalino.

11 Q Who is Christine Tocalino?

12 A I have no idea. I have never heard that name
13 before.

14 Q Okay.

15 And the subject line, it says: "IXOS Arch 1,
16 48 KB."

17 MR. PULGRAM: No question. Wait for a
18 question.

19 THE WITNESS: Okay.

20 BY MS. BRILLET:

21 Q What does that mean?

22 MR. PULGRAM: Now there is a question.

23 THE WITNESS: Okay. Now there is a question.
24 Okay. Thank you. I knew you were here for a reason.

25 IXOS is an application for E-mail archiving.

1 So what happened within the E-mails at StorageTek is
2 after a certain amount of time, they would automatically
3 go into an archive, and so it would be -- it would put
4 this little "IXOS" whatever -- and the "48" is 48
5 kilobyte -- so it would name it as "IXOS" and this would
6 be "Arch 1, 48 kilobytes." It put it into an archive.

7 BY MS. BRILLET:

8 Q Okay.

9 So this means this E-mail had just recently
10 been called up, but it had to be called up from the
11 archive to be printed out?

12 A It was -- yeah, exactly.

13 Q Okay.

14 Now, if you'll look at the E-mail at the very
15 top of the first page.

16 A Uh-huh.

17 Q And that is the one that's to YDX@Netbula.com
18 from you --

19 A Yes.

20 Q -- Michael Melnick --

21 A Uh-huh.

22 Q -- on February 23rd of 2000?

23 A Yes.

24 Q And it says:

25 "Don: Here are the proposed

1 revisions. Please take some time
2 to review and give me a call to
3 discuss."

4 A It certainly does say that.

5 Q There was a Word document attached to this
6 E-mail?

7 A Originally. What happens when the E-mails get
8 archived is it turns them into like a placeholder.

9 Q Okay.

10 A Yes, there was originally.

11 MS. BRILLET: Exhibit 8.

12 (Plaintiff's Exhibit No. 8
13 marked for identification.)

14 BY MS. BRILLET:

15 Q Just handed you Exhibit 8.

16 Do you recognize this document?

17 A I do.

18 Q Does this look like a document that you sent
19 with the previous -- with Exhibit 7's E-mail?

20 A It does.

21 Q Okay.

22 Do you know who made the revisions to this
23 document?

24 A I do.

25 Q Who?

1 A That would be me.

2 Q No one else? Did anyone else participate?

3 A No.

4 Q Would you look at the very first line on the
5 first page, "By signing below...."

6 Would you please read the rest of that
7 paragraph?

8 A Certainly.

9 "By signing below, the parties
10 indicate their acceptance of the
11 following agreement between Storage
12 Technology Corporation (StorageTek)
13 and Netbula, LLC (Netbula)."

14 Q Would you read the next one, please?

15 A (Reading)

16 "Netbula ONC RPC SDK and
17 PowerRPC SDK product license, the
18 Netbula ONC RPC SDK, and the
19 PowerRPC SDK as further described
20 on Exhibit A (the SDK product)," as
21 it's defined, "is protected by
22 copyright laws and international
23 copyright treaties, as well as
24 other intellectual property laws
25 and treaties."

1 Q Okay.

2 Would you please look under Number 1 where it
3 says, "License," and read the second paragraph.

4 A The second paragraph?

5 Q Please.

6 A (Reading)

7 "This license is not
8 transferable without written
9 permission of Netbula. Such
10 permission will not be unreasonably
11 withheld."

12 Q And it says, "...of the license."

13 Does it appear that StorageTek or does it
14 appear that anyone added any language after saying
15 "without written permission of Netbula"?

16 A On this document?

17 Q Yes.

18 A It doesn't appear that way. This wasn't -- I
19 don't know if this was the final document that was
20 agreed to or not, though.

21 Q There is something --

22 There is underlining there under the words
23 where it says, "without written permission of Netbula,"
24 and then, "Such permission will not be unreasonably
25 withheld," that is underlined.

1 Why is that underlined?

2 A When you do -- when you use Microsoft Word and
3 you put it in a revision mode, what it does is when you
4 add something, it underlines it and it will put it in a
5 different color, the color of whoever is making the
6 changes.

7 If you delete something -- let me see if there
8 is anything deleted -- it puts a strike through it.

9 So that's why you have those underlines.

10 Q So who added this language --

11 A I did.

12 Q -- that's underlined?

13 A I answered that. All of this language is --
14 changed was by me.

15 Q Now, would you look at the bottom of page 1 in
16 the very last paragraph. Starts with the number 1,
17 "Limited Distribution."

18 A Got it.

19 Q Would you please read that?

20 A Certainly.

21 "Limited distribution. You
22 agree to maintain reasonable
23 records of the number of copies of
24 the supporting programs distributed
25 hereunder and to pay Netbula as set

1 forth in Exhibit C for such copies.
2 Netbula may, with reasonable notice
3 and at times that do not interfere
4 with StorageTek's business, request
5 StorageTek to conduct an internal
6 audit to count the number of copies
7 distributed. However" -- for some
8 reason, "Netbula" is spelled wrong
9 throughout the document --
10 "Netbula" is what it should say --
11 "may not request more than one
12 audit in 12 -- in a 12-month
13 period."

14 Q Okay.

15 So the portion where it says that -- "may with
16 reasonable notice and at times that do not interfere
17 with StorageTek's business request StorageTek...",
18 Those words were all added by you?

19 A They were.

20 Q And the final sentence, "However, Netbula may
21 not request more than one audit in a 12-month period,"
22 that was added by you, as well?

23 A That is correct.

24 Q Okay.

25 Why did you add the text, "...with reasonable

1 notice and at times that do not interfere with
2 StorageTek's business"?

3 A That's standard -- was standard StorageTek
4 policy, was that we want to make sure that we have got
5 notice so that, you know, we can have the people ready
6 to do the audit, the proper people there in order to do
7 that.

8 And also, we didn't want a supplier coming in
9 and asking every other week to do an audit.

10 So that's why we did that.

11 Q Okay.

12 A And that's standard terms that we used.

13 Q Not being able to request more than one audit
14 in a 12-month period, was that for the same reason?

15 A Standard terms that we used, yeah.

16 Q Okay.

17 Would you please turn to the last page of this
18 document.

19 A Exhibit C?

20 Q Yes, please.

21 And you see where it says --

22 You see places where StorageTek made the
23 changes, the underlined portion?

24 A I do, yes.

25 Q And would you state which portions were added

1 in by StorageTek, please?

2 A All the ones that were underlined.

3 Q I mean, would you state them, please?

4 A Okay. Just the underlined pieces you want me
5 to state?

6 Q Yes.

7 A Okay. I added "StorageTek"; I added "\$895 per
8 license"; I added "\$5,995"; I added "1,000"; I added "30
9 days," with "30" in parentheses, "after receipt of an
10 invoice referencing a valid purchase order number; I
11 added, "Netbula agrees that future SDK license purchases
12 will be at a mutually agreed-to price"; I added
13 "StorageTek"; I added "at the cumulative license
14 purchase prices as provided listed below. Pricing is
15 based on cumulative purchases, not single-purchase
16 events. Additional licenses purchased are subject to
17 the terms and conditions of this agreement"; and then I
18 added the volume discount matrix below that.

19 Q And this agreement was signed in 2000 by the
20 parties?

21 A Yes, it was in 2000.

22 MS. BRILLET: Exhibit 9.

23 (Plaintiff's Exhibit No. 9
24 marked for identification.)
25

1 BY MS. BRILLET:

2 Q You have been handed Exhibit 9.

3 A I have.

4 Q Do you recognize this document? I'll give you
5 a moment to review it.

6 A Thank you.

7 I do.

8 Q Did StorageTek agree to all of the terms and
9 conditions in this agreement?

10 A StorageTek signed this agreement, yes.

11 Q Did StorageTek agree that the Netbula ONC RPC
12 and the PowerRPC software are protected by copyright?

13 MR. FULGRAM: Objection. If you're reading
14 one particular sentence of the document and asking the
15 witness to opine as to whether or not there is an
16 agreement in effect as to that particular sentence,
17 that's calling for a legal conclusion.

18 MS. BRILLET: Okay. Well, I asked the witness
19 if StorageTek agreed to the terms and conditions of this
20 agreement, and part of this agreement states that the
21 software is protected by copyright laws and
22 international copyright treaties.

23 MR. FULGRAM: That's one of the things that it
24 says.

25 MS. BRILLET: Right. I said "one of."

1 BY MS. BRILLET:

2 Q Did StorageTek keep track of the usage of the
3 Netbula RPC?

4 A Yes.

5 Q Would you look at page 3, please.

6 A Okay.

7 Q I'm sorry, it's page 2 in here. It's the
8 third page in your set.

9 A Okay. Page 2 of the document. Got ya. Okay.

10 Q It says, "General Terms."

11 A "General Terms," yes.

12 Q Okay.

13 Under Number 1, "Payment" --

14 A Yes.

15 Q -- would you please read what's under
16 "Payment"?

17 A I will.

18 "You agree to pay Netbula the
19 amount set forth in Exhibit C in
20 full payment for the rights and
21 licenses granted herein 30 days
22 after receipt of an invoice
23 referencing a valid purchase order
24 number."

25 Q Thank you.

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MS. BRILLET: Exhibit 10.
(Plaintiff's Exhibit No. 10
marked for identification.)

BY MS. BRILLET:

Q You are being handed a document faxed to
Netbula on March 3rd, 2000 --

A Okay.

Q -- marked as Exhibit 10.

A Okay.

Q Would you take a moment to read that, please?

A Okay.

Q Do you recognize this document?

A I do.

Q Okay.

Is this a true copy of the StorageTek purchase
order?

A It is.

Q If you look on page 2 on the top upper right
corner.

A Page 2 of the purchase order or page 2 of
the --

Q Page 2 of the set of documents.

A Okay.

Q So it would be page 1 of 2.

A Okay. Got ya.

1 Q Where it says: "Resale Permit."

2 A Yes.

3 Q Okay.

4 What is that number?

5 A It's 10-13932.

6 Q Okay.

7 And below that, do you see where it says:

8 "Buyer/Phone"?

9 A Uh-huh, I do.

10 Q And it says: "Mike Melnick/(303) 673-2914"?

11 A It does.

12 Q Okay.

13 How did StorageTek's purchase process work?

14 A Can you be any more specific about what you
15 mean by "purchase process"?

16 Q Yes.

17 When you --

18 You send a purchase order to a vendor, and
19 then what happens?

20 A The purchase order gets sent to the supplier.
21 The supplier takes the purchase order, accepts it,
22 fulfills whatever requirements are in the purchase order
23 as far as sending whether it be a piece of hardware or a
24 piece of software.

25 And typically, if there is material that's

1 coming in, the way we set it up is when the supplier
2 sends it in -- let's just say a laptop, for instance --
3 sends in a laptop, the laptop will go to receiving, they
4 would show it as received, and that would release it for
5 payment.

6 Q Okay.

7 If you look at the left-hand side, same page,
8 the second that -- where it says: "Invoice to."

9 A Yes.

10 Q Says: "Storage Technology Corporation"?

11 A That's correct.

12 Q Says: "Attention: Accounts payable MS8183."

13 What does "MS8183" mean?

14 A That's the mail stop that the invoices get
15 sent to at StorageTek.

16 Q And if you look further down where it says,
17 "Ship to" --

18 A Uh-huh.

19 Q -- it says: "Building 5, Dock 21 or 22, MRO."

20 A Correct.

21 Q What does that mean?

22 A "MRO" means it's a nonproduction-type order,
23 so it's not equipment that's coming in for production
24 belt.

25 Q Okay.

1 I'm looking under -- just about -- almost --
2 just under the middle of that page.

3 A Okay.

4 Q Under "Order Quantity," it appears that this
5 is for eight developer licenses for the Netbula RPC.

6 A Yes, it is.

7 Q Is there a way to know the names and locations
8 of the eight developers who receive these licenses?

9 MR. PULGRAM: No foundation.

10 BY MS. BRILLET:

11 Q Well, considering that this says it's for
12 eight developer licenses and it's for Storage
13 Technology, I'm asking to whom were these sent?

14 MR. PULGRAM: And so my objection is no
15 foundation.

16 MS. BRILLET: Are you instructing him not to
17 answer?

18 MR. PULGRAM: No. I'll tell him when he's
19 instructed not to answer.

20 MS. BRILLET: Okay.

21 THE WITNESS: No -- well, no, there is not --
22 oh, I'm sorry, yes, there is. It would go to the
23 requisitioner.

24 The requisitioner in here would be -- I have
25 to look and see who the requisitioner is. But it would

1 go to the requisitioner, and then the -- I believe there
2 was a single CD that says for use for up to eight
3 developers.

4 BY MS. BRILLET:

5 Q To your knowledge, did these stay in Colorado?

6 A Yes.

7 Q Yes, to your knowledge, or yes, you are sure
8 they stayed in Colorado?

9 A To my knowledge. Thank you.

10 Q Okay.

11 Did StorageTek receive the Netbula RPC
12 software purchased with this purchase order?

13 A They got the CD, from what I understand, yes.
14 Do I have knowledge as to what was specifically on the
15 CD? No, I do not.

16 Q Okay.

17 Who actually received the software?

18 A It would have been Tracy Gagnon.

19 (Plaintiff's Exhibit No. 11
20 marked for identification.)

21 BY MS. BRILLET:

22 Q I'm sorry.

23 Before we go to 11, I'm sorry, I just had a --
24 Once the Netbula --

25 A What are we on?

1 Q 10. I'm sorry.

2 A Okay.

3 Q Once the Netbula software was received, how
4 was it delivered to the developers?

5 MR. PULGRAM: Foundation.

6 THE WITNESS: The people on the receiving dock
7 would deliver it based on the information as to who the
8 requisition was and what mail stop they were at, and it
9 would be signed for by the requisitioner.

10 BY MS. BRILLET:

11 Q If you look at page 2. I'm asking you to look
12 at page 2 of 2 of the StorageTek purchase order still in
13 Exhibit 10.

14 A Okay.

15 Q Okay.

16 Do you recognize this page?

17 A I do.

18 Q Do you see the text where it says:

19 "Right to ship 1,000 units of
20 product as specified in the
21 agreement"?

22 A I do.

23 Q Okay.

24 Can you explain, where it says, "Right to ship
25 1,000 units of product," what exactly is that?

1 A It's -- it was -- basically, it's a short
2 version of what we put in there that says an explanation
3 of what the payment is for.

4 Q And the purchase order, what does the word
5 "agreement" in the PO refer to?

6 A The agreement is specified under the PO header
7 text, where it says:

8 "This purchase order is
9 subject to the terms and conditions
10 of the Netbula software license
11 agreement." signed 3/3/00.
12 And that's page 1 of 2, midway down.

13 Q Okay.

14 And to what does the word "product" refer to?

15 A "Product" refers to the product that's being
16 distributed, which I believe is in the exhibit in the
17 agreement, the products that we were allowed to
18 distribute.

19 Q Okay.

20 Now we'll go on to Exhibit 11.

21 A Okay.

22 Q Do you recognize this document?

23 A I do.

24 Q Did StorageTek pay this invoice?

25 A I believe they did.

1 MS. BRILLET: Okay. 12.

2 (Plaintiff's Exhibit 12 marked
3 for identification.)

4 BY MS. BRILLET:

5 Q Would you take a moment to look at Exhibit 12,
6 please.

7 MR. PULGRAM: For the record, I'm going to
8 object to the introduction and use of this exhibit as a
9 violation of the confidentiality agreement between the
10 parties with respect to their discussions in 2005.

11 There was an express written agreement between
12 the Defendants and Netbula that precluded the use in any
13 proceeding of the communications between the parties
14 from that point forward. The introduction and
15 questioning about this document will violate that
16 agreement. The reference to it will violate that
17 agreement.

18 This is a -- further, this is a settlement
19 communication that is privileged and protected under
20 Rule 408 of the Federal Rules of Evidence. On page
21 STK10, it is entitled "Offer to Compromise." By
22 definition, such an offer and any communications in
23 connection with it are privileged and are irrelevant and
24 cannot be introduced into evidence. On that basis, I
25 don't believe questioning about it is proper.

1 I believe that if there is any other
2 information that you need to obtain with respect to the
3 matters discussed, those pieces of information that
4 could be relevant can be obtained without misuse and
5 violation of the confidentiality agreement between the
6 parties, and the questions should be phrased without
7 reference to the confidential and protected
8 communications between the parties.

9 MS. BRILLET: I'm looking at where it says
10 from -- "Regarding: Response to Audit Request."

11 And you said there was an agreement signed
12 between the parties in 2005?

13 MR. PULGRAM: That's my understanding.

14 MS. BRILLET: Can we take a break?

15 MR. PULGRAM: Yep.

16 (Recess taken at 9:35 a.m.

17 resumed at 9:41 a.m.)

18 MS. BRILLET: With regards to Exhibit 12,
19 understanding your objection, my questions are related
20 to --

21 This letter has a lot of different sections.
22 There is a section here called "Offer to Compromise,"
23 but I have questions about the facts that are actually
24 stated earlier in this letter.

25 MR. PULGRAM: True.

1 And Rule 408 says that any discussions in
2 connection with an offer to compromise are equally
3 privileged. I'm not objecting to inquiries about the
4 facts.

5 MS. BRILLET: Right.

6 MR. PULGRAM: I'm objecting to inquiries about
7 the document. You may ask any questions about the
8 facts.

9 MS. BRILLET: Okay. Okay.

10 BY MS. BRILLET:

11 Q Okay.

12 Mr. Melnick, did StorageTek track the
13 royalties for the Netbula RPC product?

14 A I think I answered that question already.

15 Q And your answer is yes?

16 A Yes.

17 Q Did you give --

18 Did you provide Netbula with any reports
19 regarding the royalties?

20 A When they requested them, yes.

21 Q What type of royalty agreement did you have
22 with Netbula as far as what types of royalty reports you
23 would give to them?

24 A There was --

25 MR. PULGRAM: I'm sorry. Excuse me.

1 THE WITNESS: There wasn't any agreement on
2 how the report should look.

3 BY MS. BRILLET:

4 Q Okay.

5 Were there any communications between
6 StorageTek and Netbula regarding prepaid versus
7 royalty-type agreements?

8 A There were some discussions, yes, originally.
9 You're talking about from the beginning of
10 time?

11 Q Yes.

12 A (Nods head.)

13 Q What was a prepaid agreement?

14 A Prepaid agreement is one where I'm buying a
15 block of licenses whether I use them or not. I still
16 have the rights to distribute them, but I basically have
17 to pay in advance.

18 Q Okay.

19 And what is a straight royalty-type agreement?

20 A Pay as you go. Pay as you use to distribute.

21 Q So if I go online and, say, buy like Microsoft
22 Word, is that a prepaid license?

23 MR. PULGRAM: Objection; vague, incomplete
24 hypothetical, overbroad.

25 THE WITNESS: I still answer?

1 MR. PULGRAM: Yes.

2 THE WITNESS: I don't know if you would call
3 that a prepaid license or not. I don't know what their
4 license agreement says as far as going and buying a
5 Microsoft product.

6 BY MS. BRILLET:

7 Q Okay.

8 If you go online and you pay for a computer
9 program, do you consider that a prepaid or a straight
10 royalty?

11 A That would be a pay as you use.

12 Q What is the difference between that and the
13 straight royalty type?

14 MR. PULGRAM: Objection; assumes facts not in
15 evidence, vague.

16 THE WITNESS: Can you restate the question or
17 can you just repeat the question? I'm sorry.

18 BY MS. BRILLET:

19 Q Sure.

20 What is the difference between that, as you
21 said, the pay as you use, versus the straight royalty
22 type?

23 A Well, the royalty system is set up based on us
24 doing redistribution of licenses. When I go and buy a
25 copy of Microsoft, I'm buying it for one-time internal

1 use. I have no rights to do anything else with it.

2 Q Okay.

3 The 2000 Netbula/StorageTek agreement, was
4 that a prepaid or a straight royalty-type agreement?

5 MR. PULGRAM: Object; vague.

6 THE WITNESS: I was required to purchase in
7 blocks of \$1,000 units to be able to distribute per the
8 agreement.

9 BY MS. BRILLET:

10 Q And who made that requirement?

11 A Mr. Yue.

12 MS. BRILLET: Okay. Exhibit 13.

13 (Plaintiff's Exhibit No. 13
14 marked for identification.)

15 BY MS. BRILLET:

16 Q You have been handed Exhibit 13.

17 Would you take a moment to review that
18 document, please?

19 A Certainly.

20 Q Do you recognize this document?

21 A Yes, I do.

22 Q Okay.

23 This E-mail, it's from Keith Oliver to
24 support@Netbula and it was cc'd to Jon Holdman and Gary
25 Ritzer.

1 Who are those two individuals?

2 A I do not know those people.

3 Q Have you ever heard those names before?

4 A I have never heard those names before.

5 Q Who worked on the REELs product?

6 A Tracy Gagnon.

7 Q Is she the only person?

8 A As far as I know.

9 Q Who worked on the LibAttach product?

10 A I'm not sure who the particular engineers
11 were.

12 Q Okay.

13 And the E-mail itself, would you please read
14 the first two paragraphs that start with: "My name
15 is...?"

16 A Sure.

17 "My name is Keith Oliver and I
18 work for StorageTek, and we have
19 recently purchased ONC RPC software
20 development tool kit for Windows
21 NT/95/98. The platform we run on
22 is Windows NT 4.0. It seems that
23 the customized copy you made for us
24 has defective RPC gen in it."

25 Q Okay. Thank you.

1 So it mentions the customized copy that
2 Netbula made for StorageTek?

3 MR. PULGRAM: Objection -- strike that.
4 Withdrawn.

5 BY MS. BRILLET:

6 Q Okay.

7 Does StorageTek still have a copy of the
8 software received from Netbula?

9 A Not that I'm aware of.

10 Q Who would know?

11 A Someone in engineering.

12 Q The engineering group?

13 A Yes.

14 Q Okay.

15 In this E-mail, it also says:

16 "Every time it encounters a
17 line-like string, any_command" --

18 A Where are you reading?

19 Q Just under where you read.

20 A Oh, okay. Thank you.

21 Q Okay.

22 And it says:

23 -- "(any param) = any number,
24 it cores," C-O-R-E-S.

25 A Uh-huh.

1 Q What does that mean where it says "cores"?

2 A I do not know. That sounds like engineering
3 speak to me.

4 Q Could StorageTsk fix the problem with the
5 rpcgen.exe itself?

6 MR. PULGRAM: Foundation.

7 THE WITNESS: Apparently not, because they had
8 to go to support to get help on it.

9 MS. BRILLET: 14.

10 (Plaintiff's Exhibit No. 14
11 marked for identification.)

12 BY MS. BRILLET:

13 Q You have before you Exhibit 14, which is a
14 string of E-mails.

15 Would you please review that for a moment?

16 A Okay.

17 Q Okay.

18 Would you read that -- the paragraph from you?

19 A (Reading)

20 "Thanks for the quick
21 response. Could we get an updated
22 CD sent right away so we can have a
23 completely corrected one.

24 Regards," et cetera, et cetera.

25 Q Do you agree that Netbula responded to

1 StorageTek's March 13, 2000 E-mail and solved the
2 problem with the rpcgen.exe promptly?

3 A In my opinion, yes.

4 Q Did StorageTek receive a new CD that contained
5 the fixed software?

6 A I have no knowledge of that, but I believe
7 they did.

8 MS. BRILLET: 15.

9 (Plaintiff's Exhibit No. 15
10 marked for identification.)

11 BY MS. BRILLET:

12 Q You have been handed Exhibit 15. Take a look
13 at that, please.

14 This is an E-mail from Scott Painter to
15 Support@Netbula.com. It was -- the subject is "PowerRPC
16 Portmapper," and the cc, Abrammp@louisville.stortek.com.

17 Who was Abrammp?

18 A That's Mike Abramovitz.

19 Q Would you please read that E-mail?

20 A From the top or just the content in the actual
21 section below?

22 Q The actual E-mail itself, the text.

23 A (Reading)

24 "Is it possible to customize
25 the NT service name? For example,

1 our StorageTek products install
2 some other NT services and we would
3 like all of them to show up
4 together, e.g., StorageTek
5 Portmapper, etc. We are using
6 Version 1.5 of your PowerRPC
7 Portmapper. Thanks in advance," et
8 cetera, et cetera.

9 Q At the time that this E-mail was sent, what
10 was Scott Painter's position?

11 A Scott Painter is an engineer.

12 Q Do you know which product he was working on
13 that required the Portmapper?

14 A I do not.

15 Q Okay.

16 Do you know if he was working on the LibAttach
17 or the REELS product?

18 A I do not.

19 Q Who would have this type of information? Who
20 would know which products each engineer was working on?

21 A Engineering. I'm sorry, engineering.

22 Q But you don't know who the head of the
23 engineering department was?

24 A Not at that time, no.

25 Q Okay.

1 Do you know who is the head of the engineering
2 department now?

3 A From what level?

4 Q How many levels of engineering do you have?

5 A Well, there is senior vice-president over
6 engineering.

7 Q Okay.

8 A And I'm sure there is a number of reports
9 under him, although I'm not sure how many there are.
10 There are a few.

11 Q If I wanted to find out all the engineers in
12 the company, to whom would I go?

13 MR. PULGRAM: Vague.

14 THE WITNESS: Someone in engineering.

15 BY MS. BRILLET:

16 Q You do not know who would know?

17 A I don't know who in particular could get you a
18 list like that, no.

19 MR. PULGRAM: Counsel, I just want to note
20 that I think the questioning that you're having here
21 about the development implementation of the product is
22 afield from the subjects that we're talking about in
23 this stage of the proceeding, which is the contract and
24 the license defense.

25 I haven't objected to your asking those

1 questions, but I do want to lodge for the record the
2 consideration that these are outside the scope and not
3 appropriately a subject for a 30(b)(6) inquiry.

4 MS. BRILLET: I believe that these are
5 appropriate, but I understand your objection.

6 BY MS. BRILLET:

7 Q Okay. I will hand you Exhibit 16.
8 (Plaintiff's Exhibit No. 16
9 marked for identification.)

10 BY MS. BRILLET:

11 Q Do you recognize this document?

12 A I have seen it, yes.

13 Q Do you know how many of the StorageTek
14 products use Netbula RPC?

15 MR. PULGRAM: Vague as to time.

16 BY MS. BRILLET:

17 Q During the time that this E-mail was sent.

18 A I'm trying to find the date of this E-mail.
19 October 25th, 2000 --

20 Q October 25th, 2004.

21 A Two.

22 Q What were those two?

23 A Can I go back and restate that?

24 Q Yes.

25 A At this particular time it was one, and that

1 would have been LibAttach.

2 Q And later, a second one was added?

3 A No, no. Previous to that it was REELs, and
4 that was end of lifed.

5 MS. BRILLET: I'm going to hand you
6 Exhibit 17.

7 (Plaintiff's Exhibit No. 17
8 marked for identification.)

9 BY MS. BRILLET:

10 Q Give you a moment to look that over.

11 This is a Declaration of Michael Abramovitz in
12 Support of Defendant's Opposition to Application for
13 Temporary Restraining Order and Impoundment.

14 A Okay.

15 Q Would you please read paragraph 3?

16 A Sentence Number 3 on the second page?

17 Q Yes, please.

18 A (Reading)

19 "I understand that Netbula
20 seeks an order prohibiting Sun from
21 distributing products containing
22 certain Netbula code. On or about
23 November 29th, 2005, Sun replaced
24 the code it had licensed from
25 Netbula with a free open-source

1 product available for download over
2 the Internet. Thus, the Netbula
3 code is not being included in any
4 StorageTek products distributed to
5 customers and has not been in any
6 in the last year."

7 Q When Sun completed its acquisition of
8 StorageTek, did StorageTek contact Netbula to get
9 written permission to transfer the Netbula license to
10 Sun?

11 MR. PULGRAM: Just one second.

12 MS. BRILLET: Sure.

13 MR. PULGRAM: Objection; lacks foundation.

14 THE WITNESS: Okay. At that point in time,
15 Sun hadn't even acquired StorageTek, so -- and we were
16 no longer using the code, so there was no reason to
17 notify them of anything.

18 BY MS. BRILLET:

19 Q Okay.

20 I see that you said -- okay.

21 The acquisition was January 1st of 2006?

22 A The official, yes.

23 Q But at that time, there was no written
24 permission from Netbula to transfer the Netbula license
25 to Sun?

1 MR. PULGRAM: Objection; no foundation, calls
2 for speculation.

3 THE WITNESS: Not that I'm aware of.

4 BY MS. BRILLET:

5 Q Who would have handled the permission
6 regarding the licensing from Netbula?

7 A Legal.

8 Q Okay.

9 Who was the head of the legal department at
10 that time?

11 A Who was counsel at that time? I don't recall
12 his name.

13 Q What was the name of the free open-source
14 product that Sun downloaded from the Internet to replace
15 the Netbula code?

16 A I do not know.

17 Q Who would know that?

18 A Engineering.

19 Q Did Sun delete all of the copies of the
20 software that was using the Netbula RPC in November of
21 2005?

22 MR. PULGRAM: Objection; no foundation.

23 THE WITNESS: I do not know.

24 BY MS. BRILLET:

25 Q Okay.

1 Was Sun the creator of the original ONC RPC
2 for Unix?

3 A That's my understanding.

4 Q And instead of using the free code, why didn't
5 Sun create a version of RPC for Windows and use its own?

6 MR. PULGRAM: Objection; no foundation.

7 THE WITNESS: I am not aware of the reason
8 behind that.

9 BY MS. BRILLET:

10 Q Okay.

11 Does it require any intellectual labor to
12 create a ONC RPC product for Windows from the Sun RPC
13 code?

14 A I also do not know that answer.

15 MS. BRILLET: Exhibit 18.

16 (Plaintiff's Exhibit No. 18
17 marked for identification.)

18 BY MS. BRILLET:

19 Q You have been handed Exhibit 18.

20 Do you recognize this document?

21 A Actually, no.

22 Q Do you know what LibAttach does?

23 A Specifically? Technically?

24 Q Yes.

25 A No. It's some kind of interface, but I don't

1 know all the technical things behind what it does or how
2 it works.

3 Q Do you know what a tape library is?

4 A Tape library is a silo or a piece of equipment
5 that stores tapes that as you request information, it
6 goes and pulls the tape.

7 Q Okay.

8 This document appears to be from StorageTek,
9 has the StorageTek name on the header.

10 A Uh-huh.

11 Q I see at the bottom of page 1 of 6, it says:
12 "Part Number 313442301."

13 What is that number?

14 A I don't know for sure, but I believe that's
15 probably the LibAttach release number.

16 Q Do you know what an EC number is?

17 A Engineering change. "EC" stands for
18 engineering change.

19 Q So what would this be?

20 A This would be the number that was assigned to
21 it when they did some kind of change to that particular
22 product. They do what's called an engineering change.
23 They assign a number to it and it's documented as to
24 what the change is.

25 Q Do you know what a library station is?

1 A Not specifically, no.

2 Q Do you know what ACSLS is?

3 A I'm trying to remember what the acronym stands
4 for, but I couldn't tell you what it did.

5 MS. BRILLET: I'm having a bit of difficulty
6 with this witness. You have produced a 30(b)(6) witness
7 regarding licensing and everything, but he doesn't seem
8 to know about the terms. A lot of the questions I have
9 asked, he stated that the engineering department would
10 be the ones to ask about these areas.

11 MR. PULGRAM: But you haven't asked about the
12 license. You asked what ACSLS is or what --

13 MS. BRILLET: Not just this exhibit; on
14 several others, too, the answer was, "The engineering
15 department would know. The engineering department would
16 know."

17 MR. PULGRAM: Well, I think that's because
18 this is a witness who is produced on the contract and
19 license issue and not engineering issues.

20 MS. BRILLET: I just want to put that on the
21 record, he's not able to answer a lot of the questions.

22 MR. PULGRAM: We agree to disagree.

23 MS. BRILLET: You believe he's answering the
24 question?

25 MR. PULGRAM: Certainly, he's answering them.

1 Whether or not he has all the information that a
2 30(b)(6) witness should have is I think where you're
3 suggesting he doesn't, and I'm suggesting that he does.

4 BY MS. BRILLET:

5 Q I will hand you Exhibit 19.

6 (Plaintiff's Exhibit No. 19
7 marked for identification.)

8 BY MS. BRILLET:

9 Q Take a moment to review that, please.

10 This is an E-mail dated July 11, 2000 from
11 Lori G. Richards to Support@Netbula, cc is Tracy Gagnon.

12 A Gagnon.

13 Q Who is Lori Richards?

14 A I do not know Lori Richards.

15 Q Okay.

16 Have you had time to look at the E-mail, to
17 read it?

18 A Not yet.

19 Q Okay.

20 This E-mail seems to be requesting support for
21 the REELs product using the Netbula on NT?

22 A No, I disagree. I don't believe that's what
23 this E-mail says.

24 Q Okay.

25 Could you please read the first sentence of

1 the E-mail.

2 A (Reading)

3 "Thanks for the prompt
4 response. Thank you for clarifying
5 that you provide E-mail support
6 only for RPC products unless the
7 problem cannot be resolved."

8 Q I'm sorry, can you read -- see the line on the
9 left where it says: "Hi. I work for StorageTek...?"

10 A Oh, okay.

11 "Hi. I work for StorageTek
12 and am a Tier 2/Tier 3 support for
13 the REEL product, which is
14 utilizing Netbula on NT. I have
15 been asked to test the support
16 procedure for domestic and
17 international support personnel.
18 Basically, I need to know if there
19 are limitations on who can request
20 support."

21 MS. BRILLET: I'm going to hand you
22 Exhibit 20.

23 (Plaintiff's Exhibit No. 20
24 marked for identification.)

25

1 BY MS. BRILLET:

2 Q And this is an E-mail from Anton Vatchky.
3 Who is Anton Vatchky?

4 A He is also -- he was a software engineer.

5 Q Okay.

6 Would you please read his E-mail.

7 A Without the accent?

8 "Good day, support. I would
9 like to know if you have a version
10 of PowerRPC that is supported on
11 Windows 2000. If not, do you have
12 any plans to port it to this
13 platform? If yes, in what time
14 frame? Regards," et cetera.

15 Q What was Mr. Vatchky's job function at the time
16 of this E-mail?

17 A He was a software engineer.

18 Q It appears that Mr. Vatchky is, in fact, in
19 Australia?

20 A I believe he is, yes.

21 Q Is that one of the StorageTek offices?

22 A Yes.

23 Q Okay.

24 How many engineers were in Mr. Vatchky's group?

25 A I don't think he had an actual group. I think

1 he was a support person.

2 Q Okay.

3 A I think he was an individual contributor.

4 MS. BRILLET: 21.

5 (Plaintiff's Exhibit No. 21
6 marked for identification.)

7 THE WITNESS: Okay.

8 BY MS. BRILLET:

9 Q Okay.

10 In this E-mail, Mr. Vatchy talks about the
11 REEL software.

12 A Okay.

13 Q Was StorageTek offering to sell REEL software
14 in 2001?

15 A I believe they were.

16 Q And how much did a copy of the REEL software
17 cost at that time?

18 A The software itself, I do not know.

19 Q Okay.

20 Was the REEL software shipped to Australia?

21 A No. You mean -- clarify that. You mean like
22 to a customer? Did we sell to customers in Australia?

23 Q Yes.

24 A Potentially, we could have. We sold all over
25 the world.

1 Q Now, how many copies of the Netbula RPC was
2 sold to Australia?

3 MR. PULGRAM: Foundation.

4 THE WITNESS: I don't have specifics as to
5 what was sold into what countries.

6 BY MS. BRILLET:

7 Q Did you sell the Netbula RPC to Australia --
8 to customers in Australia?

9 A I'm not aware of any that we did.

10 Q Okay.

11 Mr. Vatcky indicated that StorageTek would
12 sign a license agreement for a Windows 2000 version of
13 the Netbula RPC under certain conditions.

14 Did StorageTek sign an agreement for the
15 Windows 2000 version of the Netbula RPC in 2001?

16 MR. PULGRAM: Objection; vague.

17 THE WITNESS: Can you rephrase the question?

18 BY MS. BRILLET:

19 Q Sure.

20 Did StorageTek sign an agreement for the
21 Windows 2000 version of Netbula RPC in 2001?

22 A Are you talking about development license or
23 distribution license?

24 Q Either.

25 A My understanding or my interpretation is that

1 the agreement allows us to ship -- to distribute the
2 RPC, the OPC, whatever it's called, under any platform.

3 Q How many copies of the Netbula RPC was sent to
4 Australia?

5 A Didn't you just ask me that?

6 Q I believe I asked sold.

7 A I'm not -- I'm not aware of any.

8 Q How many were sent to Vatchky?

9 MR. PULGRAM: Foundation.

10 BY MS. BRILLET:

11 Q Were there any copies of RPC software sent to
12 Mr. Vatchky?

13 A Not that I'm aware of.

14 MS. BRILLET: Number 22.

15 (Plaintiff's Exhibit No. 22
16 marked for identification.)

17 BY MS. BRILLET:

18 Q Okay.

19 Exhibit 22, is this an E-mail sent from you
20 responding to a May 3rd, 2001 E-mail from Netbula?

21 A It is.

22 Q Okay.

23 And your job function at this time was
24 contract administration, senior consultant?

25 A That was my title, yes.

1 Q Okay.

2 Were you the right person to contact for
3 third-party software license usage information?

4 A In this particular case, I would facilitate
5 it, yes.

6 Q Okay.

7 A I did facilitate it.

8 Q Would you read what you wrote in your
9 June 22nd E-mail?

10 A Certainly.

11 "John, the license agreements
12 requires us to provide the number
13 of licenses distributed. We will
14 not provide customer information,
15 as we consider this to be
16 confidential. The license count
17 you request is 107. This gives us
18 the rights to distribute 893. If
19 you have any questions, please let
20 me know," et cetera et cetera.

21 MS. BRILLET: Okay. 23.

22 (Plaintiff's Exhibit No. 23
23 marked for identification.)

24 BY MS. BRILLET:

25 Q Do you recognize this document?

1 A Yes.

2 Q Do you recognize it as an Excel spreadsheet
3 that you sent to Netbula?

4 A Yes.

5 Q Okay.

6 And the title of this is "Netbula PowerRPC
7 Licenses Distributed For" -- well, "(Not Tracked by
8 Model-/Feature) for Support Reasons"?

9 A That's what it says, yes.

10 Q What does "for support reasons" mean?

11 A The -- our support people need to understand
12 who has the particular products so that when they call
13 in for support, we know that they are entitled to
14 support.

15 Q What other reasons would there be?

16 A Other than support?

17 Q Yes. This specifically says "for support
18 reasons," so --

19 A Right. They would use this to track a number
20 of -- of the REELs shipped, REELs products.

21 Q Is there another spreadsheet of licenses
22 distributed that does not have "for support reasons"?

23 A Not that I'm aware of.

24 Q Okay.

25 This document covers from May 24th, 2000

1 through February 1st, 2001?

2 A That's what it shows, yes.

3 Q Okay.

4 So this document says that there are 16 REELS
5 customers during this period of time?

6 MR. PULGRAM: Objection; the document speaks
7 for itself. No foundation as to this witness's
8 knowledge about this document apart from what we can all
9 see on it.

10 BY MS. BRILLET:

11 Q Did you read this document before you sent it
12 to Netbula?

13 A Did I -- I looked at it, yes.

14 Q Did you --

15 Is the document accurate?

16 A As far as I know, it's accurate, yes.

17 Q Were there any REELS licenses granted after
18 February 2001?

19 A I do not know the answer.

20 Q Does StorageTek offer to sell REELS after
21 February 1st, 2001?

22 A I'm not aware of that.

23 MS. BRILLET: 24.

24 (Plaintiff's Exhibit No. 24
25 marked for identification.)

1 BY MS. BRILLET:

2 Q This is a web page from StorageTek.com printed
3 on 8/25/2007 at 6:41 p.m.

4 Do you see that, bottom right-hand corner?

5 A I see a date and time stamp, yes.

6 Q On page 2 under "Compatibility," there is a
7 subsection, "Supported Backup Software."

8 A Okay.

9 Q And the second line of that, do you see
10 "StorageTek REEL" listed?

11 A I do.

12 MS. BRILLET: 25.

13 (Plaintiff's Exhibit No. 25
14 marked for identification.)

15 BY MS. BRILLET:

16 Q This is an E-mail string.

17 Do you recognize this E-mail -- or the string
18 of E-mails between you and Lisa Rady?

19 A Rady.

20 Q Rady.

21 A Yes.

22 Q Okay.

23 Did you send the E-mails with your name on
24 them?

25 A Did I send the E-mails with her name on them?

1 Q With your name on them.

2 Did you send these E-mails?

3 A It looks like this particular E-mail has a
4 string that I was involved in, but it was sent to me.
5 Others within it were to me.

6 There is one in here that I sent to Lisa Rady.

7 Q Okay.

8 The top E-mail is dated March 2nd, 2004.

9 A That is correct.

10 Q Okay.

11 I see in the E-mail that you sent to Lisa, it
12 says:

13 "The agreement is specific to
14 platform Win NT and 95/98
15 platforms --"

16 Do you see where that is?

17 A I do, uh-huh.

18 Q (Reading)

19 -- "types of Netbula software
20 PowerRPC SDK. This concerns me
21 greatly, as we have already told
22 them we are no longer shipping it
23 with our product. What do you need
24 for sure? MM."

25 What was the issue that you had to send that

1 E-mail?

2 A The question was -- was that they had been
3 using it in REELs and they had started using it --
4 developing it with the license agreement in place for
5 the LibAttach.

6 What had concerned me was that there was no
7 communication within engineering.

8 Q Would you look at the second page of that
9 E-mail.

10 A Uh-huh.

11 Q And at the top, the second paragraph, the end
12 of service, would you read that sentence, please?

13 A (Reading)

14 "The end of service date for
15 REELNT is year end 2003, so I am
16 not sure if there is anything we
17 need to do on the contract to
18 follow up with Netbula?"

19 Q Would you look at the last E-mail for the
20 second page. And it says: "Sorry it took a moment to
21 get this data to you."

22 A Uh-huh.

23 Q Would you read from there?

24 A (Reading)

25 "I had to first receive a full

1 product activity report from SCH
2 and then review the product
3 activity. Enclosed are the Netbula
4 licenses for the REELNT product I
5 am showing to date. I arrived at
6 these numbers by going through the
7 product testing report from SCH. I
8 am not sure if I have caught all
9 the data points but it is close to
10 accurate."

11 MR. PULGRAM: Voice up, speed down.

12 THE WITNESS: Oh, voice up, speed down. I'm
13 sorry.

14 "My understanding is that we
15 purchased 1,000 Netbula licenses up
16 front." I'm soft spoken. "We are
17 not even close to utilizing that
18 many licenses, which is why I am
19 surprised that Netbula made an
20 official request for an audit.
21 Since I am coming" --
22 Do you want me to keep going from there?

23 BY MS. BRILLET:

24 Q No, that's okay.
25 What is "SCH"?

1 A I'm not sure what "SCH" is, quite honestly.

2 Q Okay.

3 I'm going back to the first page of your
4 E-mail to Lisa.

5 And you said that you were concerned because
6 you have told Netbula that you were no longer shipping
7 the software with your product?

8 A The counts we had given to them were more for
9 REELs products, yes.

10 Q So was the number that you had given to
11 Netbula incorrect?

12 A No, that number was correct. The 107 for
13 REELs was correct.

14 Q So after this E-mail, you corrected the number
15 with Netbula?

16 A I don't think that number changed.

17 MS. BRILLET: Okay. 26.

18 (Plaintiff's Exhibit No. 26
19 marked for identification.)

20 BY MS. BRILLET:

21 Q Okay.

22 Exhibit 26 is an E-mail sent from you to
23 Sales@Netbula September 9th, 2002?

24 A Yeah. It was to John.

25 Q Okay.

1 You wrote:

2 "We no longer distribute the
3 runtimes with our products. Our
4 account remains the same as
5 provided to you in June of '01."

6 A That's what that says, yes.

7 Q Okay.

8 By "runtimes," did you mean the Netbula
9 PowerRPC runtime library with the powerpc32.dll?

10 A The product that's required to run our
11 particular program.

12 Q Is that the powerpc32.dll?

13 A It's whatever was in Exhibit B of the
14 agreement. If that's what that states in there, then
15 that's what it is.

16 Q You said, "Whatever it states." That's not in
17 this E-mail.

18 A No, no, I was noting that for you.

19 Q Okay.

20 Is it true that StorageTek no longer
21 distributed the Netbula RPC?

22 A In the REELs products?

23 Q The runtime in September of 2002.

24 A In the REELs products, which is what we were
25 aware of, absolutely, that's correct.

1 Q Okay.

2 And so there were no shipments of the REELs NT
3 program from June '01 to September 2002?

4 A Not in the REELs products.

5 MS. BRILLET: Okay. 27.

6 (Plaintiff's Exhibit No. 27
7 marked for identification.)

8 BY MS. BRILLET:

9 Q Do you recognize this document?

10 A Now I know what ACSLS stands for.

11 No, I don't. I have never seen this document
12 before.

13 Q It's a StorageTek document. I see StorageTek
14 in the lower right-hand corner.

15 A Okay.

16 Q Okay.

17 The metadata that's PDF shows the author being
18 Roxanne Rackner.

19 Do you know who Roxanne Rackner is?

20 A Probably someone in marketing, but, no, I do
21 not know her.

22 Q Would you please look at the last page on the
23 right-hand side that's in gray.

24 A Okay.

25 Q Is that all of the international offices of

1 StorageTek?

2 MR. PULGRAM: Vague and lacks foundation.

3 BY MS. BRILLET:

4 Q If you look at the right-hand side of this
5 last page, do you see a list of international offices?

6 A Yes, I do.

7 Q Okay.

8 And it says at the top: "About StorageTek"?

9 A It does.

10 Q Under that, the next heading is: "World
11 Headquarters"?

12 A It is.

13 Q And the next heading under that is what?

14 A "International Offices."

15 Q How did StorageTek track sales made by the
16 international offices?

17 A All orders were placed through a single
18 entity, which is the software manufacturing distribution
19 group, through a sales tool.

20 Q How did StorageTek keep track of licenses --
21 the software licenses made by its resellers?

22 A Those orders were placed the same way as
23 direct sales.

24 MS. BRILLET: 28.

25 (Plaintiff's Exhibit No. 28

1 marked for identification.)

2 BY MS. BRILLET:

3 Q Do you recognize this document?

4 A No, I do not.

5 Q Okay.

6 It appears to be a slide by StorageTek?

7 A Appears that way, yes.

8 Q Titled "StorageTek Libraries in a TSM
9 Environment."

10 What does "TSM" stand for?

11 A At the bottom, if you see right underneath
12 "Oxford University, TSM," it's Tivoli Storage Manager.

13 Q Here, it says: "Michael Klatt is the manager
14 of solution design."

15 Is this the first time you have seen this
16 document?

17 A This is the first time I have seen this
18 document.

19 MS. BRILLET: 29.

20 (Plaintiff's Exhibit No. 29
21 marked for identification.)

22 BY MS. BRILLET:

23 Q Do you recognize this document?

24 A No, ma'am.

25 Q Could you tell me, what's the revision date of

1 the documents on the first page?

2 A September 2003.

3 Q Okay.

4 Would you turn to page 4 and under Number 2,
5 it says: "Search the local registry for the following
6 entry."

7 Do you see that?

8 A I do.

9 Q Okay.

10 Do you see where it says: "This entry
11 contains a list..."?

12 A I do.

13 Q Would you read that, please?

14 A (Reading)

15 "This entry contains a list of
16 all registered dlls on the system.
17 LibAttach 1.0 did not register the
18 dlls; LibAttach 1.1 does. Find the
19 entry libacs.dll containing the
20 text libacs.dll and the entry
21 pwrpc32.dll containing the text
22 pwrpc32.dll. Test for the presence
23 of the files libacs" -- that's
24 L-I-B-A-C-S -- ".dll and
25 pwrpc32.dll in the Windows System32

1 directory."

2 Q Thank you.

3 MS. BRILLET: Okay. 30.

4 (Plaintiff's Exhibit No. 30
5 marked for identification.)

6 BY MS. BRILLET:

7 Q Do you recognize this document?

8 A No, I do not.

9 Q Okay.

10 Now, this one has -- it's a StorageTek
11 document. It says: "Second Edition, EC: 128995."

12 Again, that's an engineering change?

13 A Engineering change number.

14 Q The number under that, 312580002, do you know
15 to what that number refers?

16 A I do not.

17 MS. BRILLET: Okay. This is 31.

18 (Plaintiff's Exhibit No. 31
19 marked for identification.)

20 BY MS. BRILLET:

21 Q Do you recognize this document?

22 A No, ma'am.

23 Q Do you know if LibAttach 1.3 used the Netbula
24 RPC?

25 A I do not.

1 Q Do you know if LibAttach 1.4 used Netbula RPC?

2 A No.

3 Q Would you look on page 3 of that exhibit.

4 Do you see where it has: "Tool Kit Version
5 2.3"?

6 A I do.

7 Q What is a CSC developer's tool kit?

8 A CSC developer's tool kit would be a CD that we
9 send with the LibAttach in order for a customer to make
10 whatever changes he needs to make sure that our
11 equipment works within his heterogeneous environment.

12 Q What is ACSAPI?

13 A That, I do not know.

14 Q Okay.

15 Look at page 5.

16 A Okay.

17 Q Okay.

18 Under "Windows Support," do you see Windows
19 2003 being supported?

20 A I see Windows Server 2003, yes.

21 MS. BRILLET: Okay. 32.

22 (Plaintiff's Exhibit No. 32
23 marked for identification.)

24 BY MS. BRILLET:

25 Q Do you recognize this document? Do you

1 recognize this document?

2 A No.

3 Q Okay.

4 The document says: "Case Study." It's a
5 StorageTek document regarding a company Darden
6 Restaurants.

7 Do you see that in the upper left-hand corner?

8 A I do.

9 Q Industry is restaurant.

10 Do you see in the fifth box in the left-hand
11 side where it says: "StorageTek Solutions"?

12 A I do.

13 Q Could you tell me, what are the fifth and
14 sixth bullets?

15 A "Library Station Software" and "Library Attach
16 Software."

17 Q If you look on the second page of this
18 document --

19 A Okay.

20 Q -- and lower right-hand corner, do you see
21 text "MZ 9290 A e/p 12/02"?

22 A I see that, yes.

23 Q What does that mean?

24 A I have no idea.

25 Q Okay.

1 The metadata of this document shows it was
2 created on December 17th, 2002 by Cindy Laun, L-A-U-N.

3 Who is Cindy Laun?

4 A I don't know.

5 Q Okay.

6 This document says that Darden Restaurants
7 used the LibAttach software, right?

8 MR. PULGRAM: Document speaks for itself.

9 BY MS. BRILLET:

10 Q One of those bullets that you read on the
11 first page?

12 A No, actually, it doesn't say that. What it's
13 saying is that these are the StorageTek solutions. I
14 don't see that it says it's using those specific pieces
15 of software.

16 Q So you don't believe that they use the
17 software? Okay.

18 A I don't know that they did or not. I'm just
19 saying what it says is "StorageTek Solutions" on the
20 side here.

21 Q Would you look on the second page. The last
22 column and three lines down, it says:

23 "With StorageTek Library

24 Attach software, Microsoft Windows

25 2000 and Windows NT users can take

1 full advantage of the many time,
2 money, and resource-saving features
3 of StorageTek tape libraries using
4 a TCP/IP network. Library Attach
5 software provides a seamless
6 connection between Windows 2000 or
7 Windows NT backup applications and
8 StorageTek library manager, ACSLS,
9 or library station software."

10 Do you see that?

11 A I do see that, yes.

12 Q Do you know if any copies of LibAttach were
13 installed at Darden Restaurants?

14 A I have no knowledge of that, no.

15 MS. BRILLET: 33.

16 (Plaintiff's Exhibit No. 33
17 marked for identification.)

18 BY MS. BRILLET:

19 Q Take a moment.

20 Do you recognize this document?

21 A No.

22 Q Okay.

23 Netbula asked StorageTek to identify Swedish
24 Tax Board in the usage report provided by StorageTek for
25 verification purposes; is that right?

1 A I believe that's correct, yes.

2 Q Did StorageTek do that?

3 A Yes, they did. I believe they did, yes.

4 MS. BRILLET: Okay. 34.

5 (Plaintiff's Exhibit No. 34
6 marked for identification.)

7 BY MS. BRILLET:

8 Q Do you recognize this document?

9 A Yes.

10 Q Do you recognize this as a document that you
11 E-mailed to Netbula?

12 A Yes.

13 Q Who is Holly M. Wagner?

14 A Holly Wagner works in the software
15 manufacturing and distribution group, or did.

16 Q And what exactly did she do?

17 A She would -- she was responsible for -- her
18 and her group -- for putting the orders in, creating the
19 software disks themselves, if that were the case, and
20 shipping and tracking them.

21 Q Okay.

22 Looking at the headings for this spreadsheet,
23 I want you to identify, please, what the headings mean.

24 Now, "Material"?

25 A "Material" is the part number associated with

1 the -- with the material itself.

2 Q That was the part number?

3 A Yeah, was the part number.

4 Q "Order Number"?

5 A Would have been the order, in fact, that
6 the -- this particular material was placed under.

7 Q The order number, is it related to a purchase
8 order or just an order number that your -- that
9 StorageTek assigned?

10 A The order number would have come through our
11 Siebel program through sales. That's how it would have
12 gotten assigned.

13 Q The next column?

14 A That's the "Order" line number. So within
15 this particular Order Number 182224, there may have been
16 a number of other products nonrelated to LibAttach on
17 that.

18 So they may have ordered LibAttach, they may
19 have ordered some third-party software, or they may have
20 ordered a number of things. So that's what that is.

21 Q Okay.

22 "Model Number"?

23 A "Model Number" is specific to the actual
24 product itself.

25 Q Okay.

1 I understand "Model Description."

2 A Okay.

3 Q Is that actual shipping date?

4 MR. PULGRAM: Objection; compound, no
5 foundation.

6 BY MS. BRILLET:

7 Q Okay.

8 Is the column actual shipping date?

9 A I do not know if that's the actual date
10 shipped, no.

11 Q What do you understand that to be?

12 A It could be very well the date that it was
13 ordered.

14 Q Okay.

15 Who prepared this spreadsheet?

16 A Holly.

17 Q Okay.

18 Did you participate at all in the preparation
19 of it?

20 A No, I did not.

21 Q "Serial Number" is for the part, as well?

22 A That is correct.

23 Q I see number of clients.

24 What is the last column?

25 A That's "Features" -- "Feature CD" -- "Feature

1 Code." I'm sorry.

2 Q What is that?

3 A The feature code is related to the model
4 itself.

5 Q Okay.

6 Did this data come from a database? Was this
7 prepared from a separate database?

8 MR. PULGRAM: Foundation.

9 THE WITNESS: I believe that to be correct.

10 BY MS. BRILLET:

11 Q Okay.

12 Do you know how this information was compiled?

13 A Holly Wagner put it together using her
14 database.

15 Q Did you request her to prepare this?

16 A Some of them, yes.

17 Q Some of them?

18 A Yes.

19 Q Was there another report other than this one?

20 A There was a number of reports that was
21 requested by Don, so I would relay the information.

22 Q To Miss Wagner?

23 A Yes.

24 Q I believe you stated Miss Wagner is no longer
25 employed?

1 A No, I said she's no longer in SMD. She still
2 works at Sun.

3 Q What is her position now?

4 A I'm not sure what she does.

5 MS. BRILLET: This is 35.

6 (Plaintiff's Exhibit No. 35
7 marked for identification.)

8 BY MS. BRILLET:

9 Q Do you recognize this document?

10 A No, I do not.

11 Q Okay.

12 Would you look --

13 I guess look towards the bottom third of the
14 document under the column "Model Feature."

15 A Okay.

16 Q There is a notation of "1191NLC-0000"?

17 A You are correct.

18 Q Do you know what those are underneath the
19 model numbers?

20 A I can look at the product name and tell you
21 what it is.

22 Q Okay.

23 A Would you like me to read the product name?

24 Q So the model number just goes along with
25 whatever the product name is?

1 A That's my understanding.

2 Q Okay. Thank you.

3 A I'm not sure how they constructed this
4 particular piece of information, so...

5 Q Okay.

6 I'm looking at the seventh from the bottom,
7 and it has the model number "1191NLC-SENT."

8 What does that mean? It has "SENT" after --
9 what does the "SENT" stand for?

10 A I don't know if that's an acronym for anything
11 at all. It might be something that they just made up.
12 I'm not sure what "SENT" means.

13 MS. BRILLET: Okay. 36.

14 (Plaintiff's Exhibit No. 36
15 marked for identification.)

16 BY MS. BRILLET:

17 Q Do you recognize this document?

18 A No, I do not.

19 Q Would you review it, please?

20 A Okay.

21 Q Would you read the title for this document?

22 A "StorageTek Price List for New York State
23 Systems and Peripherals Hardware and Software (Storage)
24 Contract."

25 Q Okay.

1 Would you look towards the, say, bottom
2 quarter of this document under "Description" and "Part
3 Number."

4 And you see that under "Part Number," it has
5 again the "1191NLC-" and then four characters?

6 A Uh-huh.

7 Q Okay.

8 And are these the same ones that were in
9 previous Exhibit 35? Do you recognize --

10 A The description is the same.

11 Q Yeah. Okay.

12 MS. BRILLET: Would you like to take a break?

13 THE WITNESS: Up to you. If you would like
14 to.

15 MS. BRILLET: Yeah, let's take a break.

16 (Recess taken at 10:45 a.m.)

17 resumed at 10:55 a.m.)

18 THE WITNESS: I just want to make a
19 clarification on this "SENT" part number and description
20 is that while I don't understand what the "SENT" is for,
21 I am aware that it's for unlimited clients, as well as
22 these others where there are multiple clients.

23 I just wanted that to be understood, that I
24 don't know what the "SENT" is for, but I understand the
25 intent of the license themselves.

1 BY MS. BRILLET:

2 Q You understand, you said, the intent of the
3 license?

4 A Of what they were selling, yes.

5 Q Okay. Thank you.

6 Okay. I will hand you Exhibit 37.

7 (Plaintiff's Exhibit No. 37
8 marked for identification.)

9 BY MS. BRILLET:

10 Q Take a moment to look at that E-mail, please.

11 A Okay.

12 Q Okay.

13 It's a string --

14 It's an E-mail string. The first part of
15 this --

16 Actually, the second part of the string looks
17 like it's a string between Lisa Rady, you, Michael
18 Melnick, and Holly Wagner?

19 A Right.

20 MR. PULGRAM: Mischaracterizes the document.

21 BY MS. BRILLET:

22 Q Okay.

23 I see Lisa Rady -- from Lisa Rady to Michael
24 Melnick on Tuesday, March 2nd, 2004; from Holly Wagner
25 to Lisa Rady and David McGovern on Tuesday, March 2nd,

1 2004; and from Lisa Rady to Holly Wagner on Monday,
2 March 1st, 2004.

3 Do you see those three strings?

4 A I do.

5 Q Okay.

6 And the original message that is from Holly
7 Wagner to Lisa Rady says:

8 Hi, Holly. Do you know or do
9 you know who I could ask to find
10 out how many copies of the
11 LibAttach software has been sold?
12 I need a total number from the
13 first shipment until now. Can you
14 help or point me in the right
15 direction?"

16 And Holly Wagner responded:

17 "Here is a copy of a LibAttach
18 report. Total number is 1,365."
19 Do you see that?

20 A I do.

21 Q Okay.

22 Then Lisa Rady sent you an E-mail on
23 March 2nd, 2004. Would you please read the first
24 paragraph of that E-mail?

25 A Certainly.

1 "I have just found out a bit
2 more about LibAttach and Netbula.
3 Below is a report from SMD on the
4 number of LibAttach software we
5 have sold. As you can see, we have
6 exceeded the 1,000 distributions
7 that we had right to with Netbula.
8 I just inherited this program, so
9 don't shoot the messenger. I think
10 it is obvious that engineering has
11 not and did not monitor the
12 distributions on this product. Now
13 that I own this product, I do not
14 want engineering responsible for
15 monitoring the distributions. We
16 need to come up with some process
17 where SMD may be able to provide
18 reports similar to that below on
19 how many -- on how many LibAttach
20 softwares are being sold."

21 Q Okay. Thank you.

22 Who is David McGovern?

23 A David McGovern?

24 Q He's included in the string of E-mails.

25 A He is. I'm not sure.

1 MS. BRILLET: 38.

2 (Plaintiff's Exhibit No. 38
3 marked for identification.)

4 BY MS. BRILLET:

5 Q Would you take a moment to review this string,
6 please?

7 This is a -- original E-mail is from Tracy
8 Gagnon to Michael Melnick on Thursday, June 21st, 2001.
9 There is a second E-mail that says "Original Message"
10 once again from Michael Melnick to Tracy Gagnon, sent on
11 September 6th, 2002. Another one says "Original
12 Message" from Tracy Gagnon to Michael Melnick on
13 September 9th, 2002.

14 A Didn't we already look at this one or is this
15 just someone who responded much later? I think we -- of
16 course, it could be a lot of them were running together.

17 Q No, this is a different one.

18 A Is it? Okay.

19 Q Yes.

20 A Okay. Yes, I see this.

21 Q Okay.

22 Would you please look at the Tuesday,
23 March 2nd, 2004 -- it's at the top of the first page --
24 and that first paragraph where it says: "Hi, Mike. It
25 looks like Tracy G...."

1 A Uh-huh.

2 Q Okay.

3 Look six lines down. In the middle is a
4 sentence that begins: "I have a CD...."

5 A Yes.

6 Q Would you read that sentence, please?

7 A Certainly.

8 "I have a CD in my hand called
9 'Netbula ONC RPC for win32
10 Development Tool Kit' licensed to
11 StorageTek (1605) eight developers,
12 1,000 runtime."
13 Do you want me to read the rest of that
14 sentence?

15 Q Please.

16 A (Reading)

17 "Inside the CD was the receipt
18 that included the PO number,
19 CCOL122576, your name as the buyer,
20 and a date of 3/24/2000. That is
21 all I know."

22 Q Thank you. Okay.

23 Now, in the bottom half of the document under
24 "Original Message" where it says, "From Michael Melnick
25 to Lisa Rady, March 2nd, 2004," would you please read

1 the E-mail that you sent to Lisa?

2 A I'm sure I read this once before, but I can
3 read it again if you would like.

4 Q Thank you.

5 A (Reading)

6 "Lisa, I can get a quote, but
7 original purchaser relayed the
8 following information below to me
9 in 2002. 'The agreement is
10 specific to platform (Win NT and
11 95/98 platform.) Types of Netbula
12 software (PowerRPC SDK)" --

13 We have talked about this before, because it
14 says, "This concerns me greatly," and I'm saying that we
15 have already discussed this one particular piece right
16 here.

17 MS. BRILLET: Okay. 39.

18 (Plaintiff's Exhibit No. 39
19 marked for identification.)

20 MR. PULGRAM: Can we go off the record?

21 (Discussion held off record.)

22 BY MS. BRILLET:

23 Q You have before you Exhibit 39?

24 A I sure do.

25 Q Okay.

1 Would you please take a moment to look at
2 that?

3 Do you recognize this E-mail?

4 A Yeah. Yes. Excuse me.

5 Q Okay.

6 Would you please --

7 There is --

8 At the very bottom of the first page, there is
9 an E-mail from Lisa Rady to Janet Rooney, cc Terry
10 Schmitt and Michael Abramovitz.

11 Would you please read that paragraph, please?

12 A Certainly.

13 "Janet, Tom, below is the
14 number of LibAttach sold from SMD.
15 As you can see, we have exceeded
16 our 1,000 distributions of Netbula,
17 so that is one issue.

18 "Next, it is obvious that we
19 will need to purchase the rights to
20 distribute more. Mike Melnick said
21 they sell in 1,000 increments at
22 \$6,000 per 1,000 distributions."

23 Q Thank you.

24 Could you also look at the first page, the
25 E-mail from Lisa Rady to Janet Rooney and cc to you,

1 Michael Melnick. Would you read the third sentence in
2 that E-mail?

3 A I'm sorry, which one?

4 Q The third sentence.

5 A From which E-mail?

6 Q The very top one: "The CD you gave...."

7 A Oh, okay.

8 "The CD you gave me was for
9 Windows NT, 95, 98. Do we need to
10 request a more current windows
11 version?"

12 Q Thank you.

13 What is "SMD"?

14 A Software manufacturing and distribution.

15 MS. BRILLET: Okay. 40.

16 (Plaintiff's Exhibit No. 40
17 marked for identification.)

18 BY MS. BRILLET:

19 Q Do you recognize this as an E-mail being sent
20 by you on March 3rd, 2004?

21 A Yes.

22 Q Okay.

23 Would you please read your E-mail from
24 March 2nd, 2004? Just that first paragraph.

25 A Yes.

1 "Could you provide me with the
2 StorageTek sales representative or,
3 if possible, give me a quote on
4 distributing an additional 1000
5 units of RPC? The platform used
6 will need to be Windows 2003."

7 Q Thank you.

8 Why did StorageTek ask for the additional
9 licenses for Windows 2003?

10 A We weren't asking for it. What we were
11 asking, the quote we were getting was -- I believe at
12 the same time was for the new development license for
13 2003. In addition to that, we were asking for an --
14 additional licenses to distribute.

15 Q So you wanted an additional 1,000 units of RPC
16 plus something for Windows 2003?

17 A Back somewhere in the E-mail records, you'll
18 find that I had asked for a quote. And that's when the
19 new agreement came about of doing the Windows 2003
20 platform, which was what we were looking to develop on.

21 At the same time as looking to do that, we
22 were asking for an additional 1,000 distribution
23 licenses.

24 Q So you would have had them for two platforms?

25 A We would have had them --

1 MR. FULGRAM: Vague.

2 THE WITNESS: -- for all platforms -- I'm
3 sorry.

4 We would have had them for all the platforms
5 listed in the contract.

6 BY MS. BRILLET:

7 Q Okay.

8 So in this E-mail where you ask for an
9 additional 1,000 units of RPC and this says, "The
10 platform used will need to be Windows 2003," for this
11 additional 1,000, it was just for Windows 2003?

12 A No. No. We were looking for a development
13 license for the 2003 and additional 1,000 licenses to
14 distribute on any platform.

15 Q Okay.

16 Where does it state that it will be for any
17 platform? And I don't see anything about developer
18 license on here.

19 A It does not say that in here.

20 Q So how do you know this was for a developer
21 license?

22 A Personal knowledge from the E-mails that we
23 have got before, that I knew that's what we were going
24 out and --

25 This was right before we did the new 2004

1 contract or the amended/extended 2004 contract where we
2 added the platforms.

3 Q So although this says distributing the 1,000
4 units, it's actually for developing? It's actually for
5 a developer's license?

6 MR. PULGRAM: Mischaracterizes the witness's
7 testimony.

8 BY MS. BRILLET:

9 Q I'm sorry, what did I get wrong?

10 A What we did is we were asking for a quote on a
11 development license for the 2003 platform, as well as an
12 additional thousand distribution units, period.

13 Q Thank you.

14 Did you inform Netbula that StorageTek had
15 been distributing the PowerRPC runtime?

16 MR. PULGRAM: Vague.

17 BY MS. BRILLET:

18 Q Was StorageTek distributing the PowerRPC
19 runtime at the time of this E-mail?

20 A I believe that they were doing the RPC ONC.

21 Q Did you inform Netbula of this fact?

22 MR. PULGRAM: Vague as to time.

23 BY MS. BRILLET:

24 Q At this time.

25 A I don't believe I was asked.

1 Q During the time of this E-mail, did you inform
2 Netbula that StorageTek had exceeded the 1,000-unit
3 limit?

4 A No, I did not, as I was placing an additional
5 thousand units that was to cover what we had exceeded,
6 as well as going forward.

7 Q You didn't think it was necessary to tell them
8 that you had exceeded the 1,000, just to buy another --

9 A We were paying for the distribution license,
10 so I was following the rules of the contract.

11 Q Under the contract, there was nothing that you
12 had to notify them of exceeding the limit?

13 A I had to notify them -- and I can look at the
14 contract and go through that if you like.

15 Q But you don't recall having to tell them --

16 A There was nothing specific in there that says
17 that I have to contact them and let them know. It says
18 that I have to pay for licenses used.

19 Q Thank you.

20 MS. BRILLET: That is 41.

21 (Plaintiff's Exhibit No. 41
22 marked for identification.)

23 BY MS. BRILLET:

24 Q Do you have Exhibit 41 before you?

25 Do you recognize this E-mail?

1 A Yep. It's Sales@Netbula's response from John
2 Young.

3 Q Okay.
4 Would you please read that first paragraph?

5 A (Reading)

6 "Michael, the original
7 agreement covers Windows NT/98/95
8 only, but we are going to honor the
9 \$5,096 price for 1,000 client
10 licenses for Windows 2003 server
11 this time."

12 Q Okay.

13 Did StorageTek and Netbula agree that the year
14 2000 license was for NT, 98 and 95?

15 MR. PULGRAM: Vague.

16 THE WITNESS: Are you talking for development
17 or distribution?

18 BY MS. BRILLET:

19 Q I'm sorry?

20 A He said, "Vague."

21 Q Oh, okay.

22 A And I said are you talking about the
23 development license or the distribution license?

24 Q Either.

25 A The development license was specific to these

1 platforms. The distribution license, there was no
2 exclusions.

3 MS. BRILLET: Okay. 42.

4 (Plaintiff's Exhibit No. 42
5 marked for identification.)

6 BY MS. BRILLET:

7 Q Take a moment to look at this E-mail, please.

8 A Okay.

9 Q Okay.

10 According to this E-mail, is Lisa Rady stating
11 that StorageTek might need to purchase a new SDK?

12 A That's what she's stating, yes.

13 Q Okay.

14 Who is Thomas Murray?

15 A Tom Murray is an engineering manager who
16 actually took over a lot of this when someone went on
17 medical leave. So he's an engineering manager,
18 basically.

19 Q Is he still with Sun?

20 A Yes, he is.

21 Q Who is Janet Rooney?

22 A Janet Rooney was the person who was the
23 program manager in engineering that went on medical
24 leave and subsequently left, and Tom Murray took her
25 place.

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(Whereupon, the following
portion of the transcript was
deemed confidential and bound
separately.)

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(Plaintiff's Exhibit No. 44
marked for identification.)

BY MS. BRILLET:

Q Do you recognize this E-mail, Mr. Melnick?

A Yes, I do.

Q Okay.

This is an E-mail where Netbula is asking
whether StorageTek uses RPC for server or client; is
that correct?

A That's what the first sentence says, yes,
first question is.

MS. BRILLET: Okay. 45.

(Plaintiff's Exhibit No. 45
marked for identification.)

BY MS. BRILLET:

Q Do you recognize these E-mails?

A Yes.

Q What is the general substance of this E-mail?
What's the subject?

A My take on that is it's a question on how the
RPC works from a client server side.

Q Okay.

I see on here from Terry Schmitt to you, it
says:

"We use both sides. We make

1 RPC calls from our application and
2 depend on PowerRPC to do the work."

3 A That's what his response was, yes.

4 MS. BRILLET: 46.

5 (Plaintiff's Exhibit No. 46
6 marked for identification.)

7 BY MS. BRILLET:

8 Q I'm sorry, I have another question for 45.

9 A Okay.

10 Q In the middle of the first page where it says,
11 "Mike" -- this is from Sales@Netbula to Mike Melnick.

12 It says:

13 "Mike, there are two sides in
14 RPC. An RPC server is an
15 application that runs the RPC
16 server loop to serve RPC calls and
17 RPC client is an application that
18 calls the functions on the server."

19 And you say: "We use both sides."

20 So you used the RPC server and the RPC -- at
21 that time, you used the RPC server and the RPC client?

22 MR. PULGRAM: Objection; mischaracterizes the
23 document, assumes facts not in evidence, and is without
24 foundation.

25

1 BY MS. BRILLET:

2 Q Okay.

3 Do you feel I misread this document?

4 A Do I feel you misread the document?

5 Q Did I misspeak on this document?

6 A He thinks so.

7 Q Okay.

8 I'm looking at the document. "From
9 Sales@Netbula.com to Michael Melnick."

10 A Okay.

11 Q (Reading)

12 "Mike, there are two sides in
13 RPC. An RPC server is an
14 application that runs the RPC
15 server loop to serve RPC calls...."

16 Is that correct?

17 A That is --

18 MR. PULGRAM: Are you asking whether that
19 correctly recites the document?

20 MS. BRILLET: Yes.

21 MR. PULGRAM: You may answer.

22 BY MS. BRILLET:

23 Q Is that what you see here in this E-mail?

24 A That's what I see here, yes.

25 Q (Reading)

1 "...and RPC client is an
2 application that calls the
3 functions on the server."

4 Do you see that in this document?

5 A I do.

6 Q Okay.

7 Do you see --

8 Now, just above that, there is from you to
9 Terry Schmitt on March 12th, says:

10 "Terry: Here is their take on
11 the differences. Let me know where
12 we fall." Then it says, "MM."
13 And then Terry wrote to you:

14 "We use both sides. We make
15 RPC calls from our application and
16 depend on PowerRPC to do the work."

17 Does --

18 At this time, did StorageTek use the RPC
19 server and the RPC client?

20 MR. PULGRAM: No foundation.

21 THE WITNESS: I'm not aware specifically of
22 how that particular product works, so I do not know.

23 BY MS. BRILLET:

24 Q Okay.

25 On the E-mail from Terry Schmitt, it says:

1 "We use both sides."

2 So what did that mean?

3 MR. PULGRAM: No foundation.

4 THE WITNESS: I'd have to understand what
5 Terry was talking about.

6 BY MS. BRILLET:

7 Q Well, I see the E-mail from Netbula says,
8 "There are two sides," and it says the two sides are the
9 RPC server and the RPC client, and then Terry Schmitt
10 says, "We use both sides."

11 A Uh-huh.

12 Q Do you see that?

13 A I do see that, yes.

14 Q Let's go to 46.

15 And the E-mail string in the middle from
16 Thomas Murray, sent March 15th, 2004 to Jeffrey
17 McGonigle, cc'd to you, Michael Melnick, Thomas Murray,
18 Lisa Rady, and Russell Kennedy. The subject is:
19 "LibAttach Update."

20 Who is Jeffrey McGonigle?

21 A Jeffrey McGonigle is the financial person in
22 engineering that has to approve all purchase
23 requisitions.

24 Q In this E-mail, it says:

25 "We either need to increase

1 the Netbula license or put a stop
2 ship on the LibAttach product,
3 because we have shipped LibAttach
4 copies up to the limit of the
5 current Netbula license. Netbula
6 is embedded in our LibAttach
7 product."

8 Do you see that?

9 A I do.

10 Q And that's signed from Tom?

11 A It is.

12 Q And that refers to Thomas Murray?

13 A It does.

14 Q Okay.

15 What is the stop ship?

16 A What Tom was saying, Tom is making some
17 inferences here on something that he wasn't involved in
18 and doesn't know.

19 He had no idea what the Netbula license read,
20 so for him to say that he had to put a stop ship on,
21 what he was saying is he was telling finance, "We're
22 going to have to stop shipping this product unless you
23 sign this thing." He was going to finance.

24 Because I had a piece of paper on my desk to
25 purchase this product and I had no account number to do

1 it with. So basically, he was saying, "You're holding
2 us up. You're holding up manufacturing and development,
3 because you are not getting Mike this information."

4 So he was basically --

5 I'm going a little too fast, aren't I?

6 He was basically trying to light a fire under
7 the finance people.

8 Q Is Tom McGonigle still with the company?

9 A That would be Jeff McGonigle, and I do not
10 know if Jeff is still there or not.

11 Q Okay.

12 Is Thomas Murray still with Sun?

13 A Yes.

14 MS. BRILLET: 47.

15 (Plaintiff's Exhibit No. 47
16 marked for identification.)

17 BY MS. BRILLET:

18 Q Do you recognize this document?

19 A Yes.

20 Q Who is Carmel Gill?

21 A Carmel Gill is -- was an attorney for
22 StorageTek.

23 Where do you see that?

24 Q In the header, first page.

25 A Oh, these are -- she works in legal for

1 StorageTek, or did work in legal.

2 Q Okay.

3 Would you look at the very bottom of the
4 third-to-the-last page where it says "Exhibit A"?

5 Do you see that page?

6 A I do.

7 Q Okay.

8 Would you read that last sentence?

9 A The one in parentheses?

10 Q The one that's underlined.

11 A (Reading)

12 "I have to trust you on this,
13 as I do not know if this changes
14 for the" -- and I put a "for" there
15 which shouldn't be there --
16 "platform we will be using."

17 Q Again, this was underlined, so this is
18 something you added?

19 A It was -- I was looking for clarification with
20 whoever it was on this particular one, whether it was
21 John or Don or whomever, about understanding what comes
22 in the SDK.

23 Q Okay.

24 A Because I didn't know specifically what came
25 in the SDK. It was listed at here and I asked John to

1 make sure that this was correct, basically, is what I
2 was asking.

3 Q Okay.

4 So does this indicate that you intended the
5 agreement for new software for the new platform? Is
6 this for a new platform?

7 A This was to add platforms.

8 Q Okay.

9 Which platforms?

10 A It was to -- what does it say? Should be
11 right there on the front.

12 Yeah, the ones that are underlined. "Server
13 2003." I believe it also added ME, 2K, and XP, because
14 originally it was NT, 95 and 98.

15 Q Okay.

16 Can you turn to the last page of this exhibit?

17 A Exhibit C?

18 Q Yes, please.

19 A Uh-huh.

20 Q Okay.

21 Do you see where the changes are indicated --

22 A I do.

23 Q -- in the right corner?

24 And do you see where there is an underline of
25 \$5,096?

1 A Uh-huh.

2 Q And do you see the line that goes from there
3 to the right?

4 A I do.

5 Q What's in that comment box?

6 A It says, "Deleted, 18,000."

7 Q Do you see where it says -- right under that,
8 the next line where it says, "60 days"? Do you see how
9 the "60" is underlined?

10 A "60 days after receipt," yes.

11 Q And do you see the comment that goes along
12 with that?

13 A Yes.

14 Q What is that comment?

15 A It says:

16 "Deleted: any one-time fee of
17 \$800 for the right to distribute up
18 to one unit of ONC RPC server
19 runtime license for the supporting
20 programs 30."

21 Q Thank you.

22 A And keeping in mind that this is not the final
23 document --

24 Q Okay.

25 A -- and there is limits to negotiation.

1 MS. BRILLET: This is 48.
2 (Plaintiff's Exhibit No. 48
3 marked for identification.)
4 BY MS. BRILLET:
5 Q Do you recognize this document?
6 A So far.
7 Q I'll give you a moment to look through it.
8 A Thank you.
9 Okay.
10 Q Okay.
11 Do you know who was supposed to be the
12 recipient of this fax?
13 A Someone named John that I was working with.
14 Q What's the last name listed on this document?
15 A The last --
16 Q The last name?
17 A John Young, Y-O-U-N-G.
18 Q Okay. Thank you. Looked like "Yang."
19 A No. Obviously, I have great handwriting.
20 Q Okay.
21 Please look at page 4, paragraph 7, where it
22 says: "Governing Law/Arbitration."
23 A Uh-huh.
24 Q Would you read that first part of that
25 sentence?

1 A You want me to just read the first part or the
2 whole paragraph?

3 Q Up to the comma.

4 A (Reading)

5 "Governing Law/Arbitration.

6 This agreement will be governed by

7 the laws of the State of

8 California."

9 Q Okay. Thank you.

10 And if you look towards the end of this
11 document, these last two pages?

12 A The exhibits?

13 Q Yes, please, last two pages of the exhibit.

14 A Oh, you're talking about the purchase order?

15 Q Yes.

16 A Okay.

17 Q That's a correct purchase order?

18 A Appears to be.

19 MS. BRILLET: Okay. 49.

20 (Plaintiff's Exhibit No. 49

21 marked for identification.)

22 MR. EISEMAN: This is the one you said you
23 were going to have Mr. Yue leave the room.

24 MS. BRILLET: Yes.

25 (Whereupon, Mr. Yue left the

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conference room.)

MR. PULGRAM: So we are back in the AEO part of this.

MS. BRILLET: Well, I want you to look at it to make sure, because he had to make some changes last time.

MR. PULGRAM: Now, this is appropriately AEO.

MS. BRILLET: Okay.

(Whereupon, the following portion of the transcript was deemed confidential and bound separately.)

1 (Plaintiff's Exhibit No. 50
2 marked for identification).

3 BY MS. BRILLET:

4 Q Do you recognize this document?

5 A Yes, I do.

6 Q Appears to be an E-mail from you to
7 Sales@Netbula, October 26, 2004?

8 A To John, yes.

9 Q Did you send this E-mail?

10 A I did.

11 Q Would you please read your E-mail?

12 A Says:

13 "I'll check, but as it took
14 two years for me -- took two years
15 to go through the first 1,000
16 licenses, I doubt we have gone
17 through the thousand we just
18 purchased in March. Give me a
19 couple of days to pull it
20 together."

21 Q Did StorageTek provide a report for this audit
22 request?

23 A We did not provide a report specifically, but
24 as we checked later, we found that we hadn't gone
25 through the first 2,000 licenses until later into 2004.

1 Q Did you then provide a report?

2 A We provided a report for the first time that
3 John asked after that.

4 Q When was that?

5 A I don't recall the date. There were a number
6 of requests. I don't remember the specific dates for
7 those requests.

8 Q Do you recall a general time?

9 A No.

10 Q Do you think it would have been in January?

11 A Of 2004?

12 Q Yes.

13 A Could have been --

14 Q Do you recall the year that you provided the
15 report?

16 A 2005.

17 Q Was it the first half or second --

18 A First part of the year.

19 Q Okay.

20 So it was between January and June of 2005
21 that you provided it?

22 A It could have been.

23 Q That's the first half of the year.

24 A Yeah. Well, it could have been. Without
25 looking at the documents, I don't know specifically when

1 I sent those.

2 MS. BRILLET: 51.

3 (Plaintiff's Exhibit No. 51
4 marked for identification.)

5 BY MS. BRILLET:

6 Q Do you recognize this document? This is a
7 two-string E-mail between Sales@Netbula and Michael
8 Melnick.

9 Did you send this E-mail dated June 16th, 2005
10 to Sales@Netbula?

11 A I did.

12 Q Would you please read this E-mail starting at
13 the second paragraph, "I'll check on...?"

14 A Certainly.

15 "I'll check on the usage as a
16 courtesy, as the agreement does not
17 obligate us to do so. That being
18 said, we do keep close watch on the
19 usage, so I should be able to get
20 it."

21 Q Continue, please. Would you continue, please?

22 A Oh, I'm sorry.

23 "As far as Sun, it should be
24 completed by the end of the summer.

25 As they have said, as they have

1 just put the integration/transition
2 teams together, we will not have
3 that information for a while.
4 Assuming I stick I think that the
5 acquisition will be a good thing.
6 The only thing that you and I may
7 have to do is to allow assignment
8 of the agreement to Sun. The
9 agreement calls for your approval.
10 I assume that you would --" and it
11 says "sallow," but it should be
12 "allow this. If you did not, the
13 agreement will be terminated."

14 Q Okay. Thank you.

15 Did StorageTek ask Netbula for authorization
16 to transfer the license to Sun?

17 A I think I answered that question early on.
18 I'm not aware of that being done.

19 Q Earlier, you testified that you sent the
20 report and it was in 2005, you're not exactly sure when.
21 Were there any reports before that 2005 report
22 that you sent to Netbula?

23 A I don't recall time frames for reports, quite
24 honestly.

25 Q Was that the first report that you sent to

1 Netbula?

2 A First report I sent was, I think, that -- when
3 we started the license discussion issues that started
4 this whole thing.

5 Q Approximately when was that?

6 A It was the summer of 2005, I believe.

7 Q So that's after the report that I asked you
8 about. You said --

9 Before, you said it was 2005, the first part
10 of the year, the first half, but the summer would have
11 been closer to the second half.

12 So there was something before the summertime?

13 A Not that I recall. I'm just saying -- I'm
14 going to say that I don't honestly know when those
15 reports were sent.

16 Q But how many reports did you send?

17 MR. PULGRAM: Vague as to time.

18 THE WITNESS: As many as was requested.

19 BY MS. BRILLET:

20 Q Did you send any reports to Netbula in 2004?

21 A Not that I recall.

22 Q Did you send any reports to Netbula in 2003?

23 A Not that I recall.

24 Q Did you send any reports to Netbula in 2001?

25 A There was a report that we sent that was in

1 the E-mails, was via E-mail, the 170 units for the
2 REELS.

3 Q Thank you.

4 MS. BRILLET: 52.

5 (Plaintiff's Exhibit No. 52
6 marked for identification.)

7 BY MS. BRILLET:

8 Q Do you recognize this document? This is a
9 string of E-mails from June of 2005.

10 A I do.

11 Q Okay.

12 In the middle or just above the middle, there
13 is an E-mail from you to Michael Abramovitz, Lisa Rady,
14 and Michael Williams --

15 A Uh-huh.

16 Q -- Thomas Murray, cc to Holly Wagner.

17 A Correct.

18 Q Would you read that first paragraph, please?

19 A (Reading)

20 "The number that Holly has
21 provided and thought it may be low
22 causes quite a problem for you. We
23 have only made two purchases for
24 the rights to distribute a total of
25 2,000 licenses."

1 Q Thank you.

2 Who is Michael Williams?

3 A Michael Williams became the manager of that
4 particular group.

5 Q Is he still with Sun?

6 A I believe he is, yes.

7 Q Okay.

8 The E-mail at the bottom of the first page
9 from Holly Wagner to Michael Melnick, Michael
10 Abramovitz, Lisa Rady, and Michael Williams, the subject
11 is "Netbula." It's from June 20th, 2005, and it says:

12 "The SAP query I ran this
13 morning shows 2,386 models shipped.
14 This number is low due to the fact
15 that the query does not have the
16 capability of pulling the client
17 feature quantities that were
18 released in November of last year."

19 Was this query ever corrected?

20 A We went back and looked at it and pulled the
21 query based on those 1191 product numbers and actually
22 went back on -- like the ones that were unlimited, went
23 back to the customers for the two that we sold to them
24 and verified what their counts were. So yes.

25 Q Did you provide this information to Netbula?

1 THE WITNESS: Can I ask a question of you?

2 MR. PULGRAM: He's got a question about
3 privilege.

4 MS. BRILLET: Sure. Okay. We can go off
5 record for a moment.

6 (Discussion held off record.)

7 THE WITNESS: So the answer to your question
8 is yes, we did, in the contents of settlement
9 discussions.

10 BY MS. BRILLET:

11 Q Did you say that you sold unlimited licenses,
12 two unlimited licenses?

13 A We had sold two product numbers that were
14 listed as unlimited licenses, and those are the ones
15 that we went to and found out that there were actually
16 just the two, capped them at a certain amount, and added
17 those quantities into that quantity or that amount that
18 was given.

19 Q What amount did you cap them at?

20 A The amount was -- I believe it was 500. I'm
21 not exactly sure what that count was.

22 Q To whom were they sold?

23 A Pardon me?

24 Q To whom were they sold?

25 A I don't recall who the customers were. It was

1 in that settlement agreement --

2 Q Okay.

3 A -- or that settlement discussion.

4 MS. BRILLET: 53.

5 (Plaintiff's Exhibit No. 53
6 marked for identification.)

7 BY MS. BRILLET:

8 Q Do you recognize this document?

9 A I sure do.

10 Q Okay.

11 These are E-mails between Sales@Netbula and
12 Michael Melnick, June 15th, 2005 and July 7th, 2005.

13 Would you please read the E-mail that you sent
14 to Sales@Netbula on July 7th, 2005?

15 A Certainly.

16 "We would like to get a quote
17 on having an unlimited distribution
18 model. Is this available?
19 Tracking usage is becoming
20 burdensome and we want to ensure
21 that we continue to be in
22 compliance."

23 Q Thank you.

24 A "Let me know. Thanks."

25 Q Were there other communications about

1 unlimited license with Netbula before the sending of
2 this E-mail?

3 A No. This was done to try to fix the problem
4 that we had, try to come to some middle ground.

5 Q Okay.

6 MS. BRILLET: This is 54.

7 (Plaintiff's Exhibit No. 54
8 marked for identification.)

9 BY MS. BRILLET:

10 Q Do you recognize this string of E-mails
11 between you and Sales@Netbula.com?

12 A Between me and John, yes.

13 Q And the E-mail says: "To Sales@Netbula.com"?

14 A Yes, it does.

15 Q Okay.

16 There is an E-mail that you sent to
17 Sales@Netbula.com on July 11th, 2005, and that's the one
18 that starts just below the middle of the page on the
19 first page.

20 A Okay.

21 Q Would you read that first paragraph?

22 A (Reading)

23 "John, I think you'll need to
24 point that audit clause to me in
25 the agreement that was signed

1 between the parties on 3/12/04 by
2 Don Yue and I. There is nothing in
3 the agreement that allows any kind
4 of audit, nor was there one in the
5 previous agreement. We would love
6 to pay you on a royalty basis -- a
7 royalty 'as we use basis,' but when
8 this was requested, we were
9 reminded that this was not your
10 model and that we must prepay."

11 Q Thank you.

12 Did you ever tell Netbula that you were
13 selling unlimited licenses?

14 MR. PULGRAM: Vague as to time.

15 BY MS. BRILLET:

16 Q In 2005, did you tell Netbula that you were
17 selling unlimited licenses?

18 A I am not aware of that, no.

19 Q In 2004, did you tell Netbula that you were
20 selling unlimited licenses?

21 A Not that I'm aware of, no.

22 Q In 2003, did you tell Netbula that you were
23 selling --

24 A Not that I'm aware of.

25 Q How about 2002?

1 A We didn't actually even introduce the 2000 --
2 or the unlimited licenses until November of 2004 or '5.
3 I don't remember which year it was.

4 Q Okay.

5 Did you make Netbula aware that you were
6 selling the unlimited licenses?

7 A Not that I'm aware of, no.

8 MS. BRILLET: 55.

9 (Plaintiff's Exhibit No. 55
10 marked for identification.)

11 BY MS. BRILLET:

12 Q Do you recognize this E-mail?

13 A Yes.

14 Q Okay.

15 Would you please read paragraph 3 in that
16 first page just above the half-point line?

17 A The one to me? So Number 3 of the first
18 E-mail?

19 Q Yes, where it says: "2004
20 Agreement--Inconsistency...."

21 A (Reading)

22 "2004 Agreement --

23 Inconsistency in StorageTek's
24 responses -- we felt that we were
25 misled and were being taken

1 advantage of when signing the 2004
2 agreement. We were told in 2002
3 the StorageTek product was
4 terminated and fewer than 200
5 licenses of the 1,000 were used
6 (with 800+ wasted), so when we were
7 contacted in 2004 about Netbula RPC
8 for Windows 2003, we were eager to
9 make it up to you by using the
10 original pricing, even though our
11 pricing model had been changed
12 since 2001. The prices were raised
13 and made closer to the offerings of
14 other vendors (our prices are still
15 lower). In 2004, our price for
16 Netbula RPC was \$3500 if purchased
17 in blocks of 100, or 18,000 if
18 purchased in blocks of 1,000.
19 Going forward, we would like to
20 redo an agreement based on our
21 current licensing and pricing
22 models."

23 Q Thank you.

24 MS. BRILLET: 56.

25 (Plaintiff's Exhibit No. 56)

1 marked for identification.)

2 BY MS. BRILLET:

3 Q Do you recognize this document? These are a
4 string of E-mails.

5 A Yes, I do recognize this.

6 Q Okay.

7 And the very middle of the first page is an
8 E-mail from Michael Abramovitz, sent on July 27th, 2005
9 to Michael Melnick, Lisa Rady, David Schenck (sic),
10 Michael Williams, Holly Wagner, Jay Nakagawa, regarding
11 Netbula.

12 Who is David -- I mean, sorry, Donald Schenck?

13 A Donald Schenck was our program manager.

14 Q Is he still with Sun?

15 A I believe he is.

16 Q Okay.

17 Who is Jay Nakagawa?

18 A Marketing guy.

19 Q Is he still with Sun?

20 A Jay, I do not know if he is still with Sun or
21 not.

22 Q Would you please read the content of that
23 E-mail?

24 A Certainly.

25 "LibAttach 1.0 used the

1 Distinct Portmapper. Netbula's
2 Portmapper has been in since 1.1.
3 Netbula was chosen at the time
4 because Distinct never called us
5 back regarding upgrading versions
6 and licensing and Netbula was
7 already in-house as part of the
8 REELs project. The GA date for 1.1
9 was October 31, 2000. The GA date
10 for 1.2 was December 18th, 2003."

11 Q Further, please.

12 A (Reading)

13 "The Distinct Portmapper in
14 theory should work as well as
15 Netbula's. They charge \$1,495 for
16 a developer's license and \$50 each
17 for runtime licenses."

18 Q Thank you. Okay.

19 Now, would you please look at the
20 second-to-the-last page. The bottom half, there is an
21 E-mail from you to Michael Williams and Lisa Rady on
22 July 27th, 2005.

23 A Okay.

24 Q Would you please read that E-mail?

25 A Certainly.

1 "Okay. Now they are getting a
2 little testy. Did we ship any RPCs
3 on Windows platform? They want a
4 detailed royalty report, including
5 product names, platform
6 information, version of Windows
7 (month and year of deployment). I
8 think that they are thinking they
9 have us over a barrel. They claim
10 their new pricing is much higher
11 now. I will work that."

12 Q Did you provide that detailed royalty report,
13 including all of this information from this E-mail?

14 A I did.

15 Q Okay.

16 When did you provide that one?

17 A I don't know what the day was. It was shortly
18 after this.

19 MS. BRILLET: Okay. 57.

20 (Plaintiff's Exhibit No. 57
21 marked for identification.)

22 BY MS. BRILLET:

23 Q Do you recognize that E-mail? Do you
24 recognize the E-mail string?

25 A From the parts of it that I can actually read

1 and discern, yes.

2 Q Did you actually send these E-mails?

3 A This first one, definitely; the second one,
4 definitely.

5 Q Are there any that you did not send that have
6 your name on them?

7 MR. PULGRAM: Do you mean that have his name
8 shown as from?

9 MS. BRILLET: Yes.

10 THE WITNESS: Anything shown from me would
11 have been sent by me.

12 MS. BRILLET: Thank you.

13 MR. PULGRAM: I would note that there are
14 places that the E-mails are merged together and
15 difficult to decipher and difficult to determine who or
16 what was sent by which person.

17 MS. BRILLET: Okay. But the question was
18 anything that said that it was from Michael Melnick was,
19 in fact, sent by Michael Melnick.

20 MR. PULGRAM: Right. But the problem is that
21 when you get deep into the document and it has
22 formatting problems, there will be places that say
23 Melnick and you can't tell what it's about.

24 MS. BRILLET: Understood. This is the way
25 Defendants produced the document, so...

1 Okay. This is 58.

2 (Plaintiff's Exhibit No. 58
3 marked for identification.)

4 BY MS. BRILLET:

5 Q Do you recognize this string of E-mails? I'll
6 give you a moment to look at them.

7 A Yes, but the same comment, because this is one
8 of those E-mails where some of the allegations that were
9 put in here by John I responded to within his
10 allegation, and you can't tell the difference between
11 what I answered and what the actual statement was.

12 Q Okay.

13 My question was: Anything that states it was
14 sent from Michael Melnick, you sent it?

15 A That would be a correct statement, yes.

16 Q Thank you.

17 MR. PULGRAM: I think subject to that
18 qualification that he gave, so that we're clear.

19 MS. BRILLET: This document is exactly as
20 produced by Defendants. There were no changes made to
21 it.

22 This is Exhibit 59.

23 (Plaintiff's Exhibit No. 59
24 marked for identification.)

25

1 BY MS. BRILLET:

2 Q Do you recognize these documents?

3 A I actually had never seen these before now,
4 but I was aware of them.

5 Q Okay.

6 Can you tell from this letter how --

7 There was an amount on here for an enclosed
8 check of \$22,480. It's on the first page.

9 A That?

10 Q It's on the first page, on the letter.

11 A Okay.

12 Q The first sentence?

13 A Uh-huh.

14 Q Can you tell from this letter how that amount
15 was determined?

16 A I know how it was determined. It was all part
17 of the settlement discussions and the information that
18 we had put into that particular -- that letter was sent
19 previous to Don.

20 Can I tell you specifically how this number
21 came about?

22 Q Yes.

23 A I don't have the specifics on it.

24 Q What can you tell me about how that number was
25 derived?

1 A We came up --

2 MR. PULGRAM: Asked and answered.

3 THE WITNESS: Pardon me?

4 MR. PULGRAM: I'm sorry, I said asked and
5 answered. If you have further testimony, you can
6 provide it.

7 MS. BRILLET: He indicated that he did.

8 THE WITNESS: Okay.

9 We came up with the information as far as what
10 actually had been shipped up to that point, to the time
11 we stopped using it, and subtracted out the number of
12 units that we had already paid for to come up with this
13 total number of 3,492 that was actually distributed, and
14 then based that on the rate per the agreement that we
15 got for 4,492 copies, which is 4,496 per copy there.
16 That's how we came up with that.

17 BY MS. BRILLET:

18 Q Did Ms. DeCecco offer to purchase five
19 1000paks to make up for this 4,492?

20 A I'm not aware that she made any offer on that.

21 Q Is this number a true count, 4,492?

22 A That's my understanding.

23 Q Did StorageTek prepay for the 4,492 licenses?

24 A No. Per the agreement, they didn't have to
25 prepay for those.

1 Q Per the agreement, how was payment supposed to
2 be made?

3 A The agreement was that we had to buy in blocks
4 of 1,000, but the distribution agreement says that we'd
5 pay for what we use and that we'll provide a purchase
6 order once -- and it gets paid once we get invoiced.

7 MS. BRILLET: Okay. I think this is a good
8 time to stop for lunch.

9 MR. PULGRAM: Okay.

10 (Lunch recess taken at 12:03
11 p.m. - resumed at 1:06 p.m.)

12 BY MS. BRILLET:

13 Q Okay.

14 Mr. Melnick, I will take you back, please, to
15 Exhibit Number 4. It's an E-mail of February 7th,
16 2000 --

17 A All right.

18 Q -- from you to Sales@Netbula.

19 Do you have the E-mail that preceded this one
20 or the string that preceded this E-mail?

21 A Not that I'm aware of, no.

22 Q Was this part of a discussion over the
23 telephone and then you took it to E-mail?

24 A You mean as far as talking to Netbula?

25 Q Right, about this particular issue.

1 A I don't recall that I ever had a conversation
2 with Netbula on this. This was probably after the
3 original purchase requisition was laid on my desk from
4 the engineering folks to start initiating discussion.

5 Q Okay. Thank you.

6 And earlier, you testified that StorageTek had
7 identified the Swedish Tax Board to Netbula.

8 Can you tell me when that was?

9 A I'm sorry, I testified what?

10 Q That StorageTek identified the Swedish Tax
11 Board to Netbula. I showed you a spreadsheet and I
12 asked you if you had identified the Swedish Tax Board to
13 Netbula, and you stated that you had.

14 A I think what I stated was that it was in the
15 accounting that was put together by Carmel Gill at one
16 point in time. I think that's what I said.

17 Q Instead of going back -- okay.

18 Did you identify the Swedish Tax Board to
19 Netbula?

20 MR. PULGRAM: Vague and ambiguous.

21 THE WITNESS: Within that document.

22 BY MS. BRILLET:

23 Q Yes, you did?

24 A Yes.

25 Q Okay.

1 And when was this?

2 A I don't know what the date was.

3 Q Okay.

4 We discussed earlier about the prepaid
5 agreements and royalty agreements.

6 A Uh-huh.

7 Q And would you tell me the differences between
8 the two? How do you begin a prepaid agreement? How
9 does that -- just tell me from inception to end.

10 MR. PULGRAM: I'm going to object as an
11 incomplete hypothetical and as vague, ambiguous, and
12 overbroad.

13 THE WITNESS: Can you ask the question again?

14 BY MS. BRILLET:

15 Q Sure.

16 We had discussed prepaid agreements and
17 royalty agreements with regards to one of the documents
18 in the exhibits, so I'm asking you: How does a prepaid
19 agreement work? How does StorageTek treat prepaid
20 agreements?

21 MR. PULGRAM: And I've got the same
22 objections.

23 THE WITNESS: StorageTek typically doesn't do
24 any prepaid agreements.

25 A prepaid agreement basically is you're going

1 to pay for everything you're going to do up front and
2 not do it on an ongoing basis.

3 That's -- in this particular case, what we did
4 was because we had to get started with the thousand
5 units, we paid for those thousand. But beyond that, the
6 agreement for the distribution license is clear, is that
7 you pay for what you have used.

8 So for the first thousand, there was nothing
9 to pay for. So beyond that, you pay for what you use.

10 BY MS. BRILLET:

11 Q So it was --

12 The first thousand was prepay and then
13 anything after that was just based upon whatever usage
14 StorageTek had of the software?

15 MR. PULGRAM: Objection; mischaracterizes the
16 testimony.

17 BY MS. BRILLET:

18 Q Please correct my characterization.

19 A Well, it's not a true prepay, in that it's --
20 you can call it a prepay because we paid for them up
21 front, but that wasn't in the spirit of what we thought
22 we were doing with the distribution license itself.

23 Q What did you think you were doing with it?

24 A Other than the first thousand to get us going?

25 Q Yes.

1 A That we were paying as we used them, just like
2 the agreement states.

3 Q And in what increments were you making the
4 payments as you went? Was it on a monthly basis?

5 A No. We were told to go in and because of --
6 the model is to do 1,000 at a time, so when we go in and
7 as we use X amount, we go in and, you know, then we
8 would buy a block of 1,000.

9 Q Okay.

10 And how does StorageTek treat the royalty
11 agreements?

12 MR. PULGRAM: Same objection; overbroad,
13 vague, hypothetical.

14 THE WITNESS: What do you mean by "treat"?
15 BY MS. BRILLET:

16 Q When you enter into a royalty agreement, do
17 you have a specific model of how you pay the royalties?
18 Do you pay them on an annual basis? Do you pay them
19 every six months?

20 MR. PULGRAM: Vague, ambiguous, overbroad.
21 Go ahead to the extent you can answer that
22 question.

23 THE WITNESS: Yeah.

24 The process for StorageTek is to pay on a
25 quarterly basis for product used, and then the payments

1 were set up to pay 45 days after the end of each
2 quarter. So it was done on a quarterly basis.

3 BY MS. BRILLET:

4 Q Was a report given along with the payments
5 that are done quarterly?

6 A To the supplier?

7 Q Yes.

8 A I don't believe it was done to the supplier.
9 The reports were generated for royalty accounting.

10 Q Okay.

11 So --

12 And in Netbula's case, if there was a royalty
13 agreement, would -- they would get a check every quarter
14 from StorageTek for the usage?

15 A If there was a royalty payment in place, they
16 would have been 45 days after the end of each quarter.

17 Q Would they also receive a report with that
18 check?

19 MR. PULGRAM: Objection; incomplete
20 hypothetical, assumes facts not in evidence.

21 BY MS. BRILLET:

22 Q Would they also receive a report with that
23 check?

24 A If it would have been set up that way, they
25 could have gotten a report with their check.

1 Q Do you have a boilerplate royalty agreement
2 for your clients -- I'm sorry -- for the suppliers?

3 A StorageTek did, yes.

4 Q Okay.

5 Did you have a royalty agreement with Netbula?

6 A A royalty agreement? A StorageTek royalty
7 agreement?

8 Q Yes.

9 A No. We used his paper, license terms.

10 So to clarify that, if you look at the
11 distribution piece itself, the inference there that we
12 saw was that we're paying on a royalty-type basis
13 because after the thousand, we were paying for what we
14 used. But we did not use StorageTek's paper, no.

15 Q How do you normally set up a royalty
16 agreement?

17 A Within a larger --

18 MR. PULGRAM: Vague and ambiguous.

19 THE WITNESS: Within a larger distribution
20 agreement.

21 BY MS. BRILLET:

22 Q Is it always individually negotiated?

23 A Well, the actual terms for the royalty
24 payments and the structure and process are within the
25 overall -- what we would call a distribution agreement.

1 Q Okay.

2 You have already Exhibit 60?

3 A And 61, yes, I do.

4 Q Okay.

5 60 was a document that Defendants produced
6 earlier today in this deposition, and Exhibit 60 has
7 "James Phan" in the upper left-hand corner.

8 Do you see that?

9 A I do.

10 Q Who is James Phan?

11 A I have no idea.

12 (Plaintiff's Exhibit No. 60
13 marked for identification.)

14 THE WITNESS: Nor could I name any of these
15 people in the "To" line.

16 BY MS. BRILLET:

17 Q You don't recognize any of the names in the
18 "To" line?

19 A Just a few, but most of them I do not.

20 Q Okay.

21 Well, I see Anton Vatchy, but you recognize
22 that name.

23 Benjamin Shern, do you know who that is?

24 A No.

25 Q Bridget Schmitt?

1 A No.

2 Q Chris Groves?

3 A No.

4 Q Daniel Spratt?

5 A No.

6 Q David Lupo?

7 A No.

8 Q G.M. Bouricius?

9 A No.

10 Q No?

11 A No.

12 Q Jack Miller?

13 A No.

14 Q Janet Patching?

15 A No.

16 Q Jess Gypin?

17 A No.

18 Q Kenneth Yanke?

19 A Yes.

20 Q Who is Kenneth Yanke?

21 A He was a support person.

22 Q Is Kenneth Yanke still with Sun?

23 A That, I do not know.

24 Q Lori Richards?

25 A No.

1 Q Louise Richardson?
2 A No.
3 Q Paul Arnold?
4 A No.
5 Q Richard McCutchen?
6 A No.
7 Q Salvemarie Reyes?
8 A No.
9 Q Scott Thurston?
10 A No.
11 Q Vaughn Howard?
12 A From the E-mails, I know of Vaughn.
13 Q Okay. I believe we talked about that person.
14 A Right.
15 Q Dan Shern?
16 A I think that's Benjamin Shern, same as above.
17 I don't know what he was --
18 Q There is a Benjamin Shern and then there's a
19 Dan E. Shern.
20 A I'm sorry. No, I don't know.
21 Q Lannis Fason?
22 A No.
23 Q And we went over Janet Bridges?
24 A Right.
25 Q Okay.

1 Look at Exhibit 61, and that's another
2 document that was produced today at this deposition.

3 (Plaintiff's Exhibit No. 61
4 marked for identification.)

5 BY MS. BRILLET:

6 Q It's "Storage Technology Corporation" in the
7 upper right-hand corner?

8 A That is correct.

9 Q Do you recognize this document?

10 A I have looked at it today, yes.

11 Q Okay.

12 And would you look over this document and tell
13 me what it is?

14 A It looks like a master agreement for the sale
15 of product -- what does it read here? -- StorageTek
16 products and services and software to a customer.

17 Q And which customer is that?

18 A From here, it says, "Darden Restaurants."

19 Q Would you look at the last page?

20 A Okay.

21 Q Darden restaurants is a customer for this
22 contract?

23 A Apparently.

24 Q Okay.

25 I'm sorry. Back on 61, in the subject, I know

1 you did not participate in this E-mail, but do you know
2 what "RBNT2" is?

3 A Back on 60?

4 Q Yes, I'm sorry, back on 60.

5 Under the attachment for that E-mail, it says,
6 "SST Support Process for RBNT 2."

7 A NT 2.5.

8 Q What is "SST"?

9 A Let me see if it's defined anywhere in here
10 and I'll tell you.

11 I think -- I can honestly say I do not know.
12 It's support related.

13 Q Okay.

14 Do you know what "RB" is? I guess it's "RBNT
15 2.5." Do you know what that is?

16 A No, I don't know what "RB" is.

17 MS. BRILLET: Thank you for your time,
18 Mr. Melnick.

19 THE WITNESS: Thank you.

20 MS. BRILLET: I'm done unless you have further
21 questions for him.

22 MR. PULGRAM: I do not have questions.

23 MR. EISEMAN: Nor do I.

24 MS. BRILLET: All right. Thank you.

25 MR. PULGRAM: Okay.

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(Deposition session concluded at
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I, MICHAEL MELNICK, do hereby declare under penalty of perjury that I have read the foregoing transcript; that I have made any corrections as appear noted, in ink, initialed by me; that my testimony as contained herein, as corrected, is true and correct.

EXECUTED this _____ day of _____, 2007, at

(city)

(State)

MICHAEL MELNICK

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I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:


That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the foregoing transcript is a true record of the testimony given.

Further, that if the foregoing pertains to the original transcript of a deposition in a Federal Case, before completion of the proceedings, review of the transcript [] was [] was not requested.

I further certify I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: OCT 03 2007


KELLI COMBS
CSR No. 7705