

1 individual.

2 A. Well, I would -- I would say that perhaps Otis
3 Wilson had discussed it with them.

4 Q. Okay.

5 A. I do not recall having a conversation with the
6 University with -- regarding that paragraph.

7 Q. Okay. Why don't you look through this briefly
8 and tell me whether you have any specific recollection of
9 having communications with the University of California
10 regarding any paragraph in this document? I know we're
11 short on time, but if you could do that for me I would
12 appreciate it.

13 A. I really do not recall having any -- any
14 conversation with anyone at the University regarding this
15 agreement.

16 Q. How about any conversation with anybody within
17 AT and T regarding any of these provisions in this draft
18 agreement?

19 A. (No verbal response.)

20 Q. Do you have any specific recollection of
21 having any conversations in 1984 with anybody at AT and
22 T, about any of these provisions?

23 A. Let me start from the -- I recall talking with
24 -- with the attorney that I primarily worked with within
25 AT and T -- we had three attorneys -- regarding the

1 proper credit and recognition. I recall talking to a
2 gentleman who works for Mike Defazio called Tony Baresse
3 -- named Tony Baresse, about this. I was trying to gain
4 an understanding of . . .

5 Q. By "this," you mean the credit provisions?

6 A. Yes, ma'am.

7 I just wanted to have an understanding of --
8 of what it was.

9 Q. Tony -- how do you spell Baresse?

10 A. I believe it was B-A-R-E-S-S-E, if I'm not
11 mistaken.

12 Q. Okay. And what was Tony Baresse's role?

13 A. He was a -- a -- I'm not sure what level he
14 was. But he worked for one of the people that reported
15 directly to Mike Defazio and he had a number of manager
16 level people that reported to him.

17 Q. Well, before I go on to the next person could
18 you tell me the substance of the conversations, if you
19 recall them?

20 A. Just trying to gain an understanding of what
21 the intent was here and carrying it out.

22 Q. What was your understanding of the intent
23 here?

24 A. It was my understanding that if the credits
25 and recognition names of individuals or whoever was

1 provided with -- with the source code or with any
2 documentation, that it -- it would be carried forth if AT
3 and T published it or used that code it would be in the
4 source code as well as in any documentation.

5 Q. Do you have any other recollection of any
6 conversations you've had with anybody at AT and T and the
7 University, those two organizations, regarding any other
8 provision in this draft agreement, regarding the meaning
9 of the terms in this agreement?

10 A. The only other thing that I recall was talking
11 about the indemnification paragraph, but I don't recall
12 the substance of the conversations. They were strictly
13 with the -- with the attorney. I . . .

14 Q. Okay. Okay. So -- I just want to make sure.
15 There is no other provision in this draft license
16 agreement that you recall discussing with anybody at the
17 University or AT and T?

18 A. I have no -- no recollection of any other
19 conversations.

20 Q. Do you know whether you made telephone calls
21 and had conversations with anybody at the University
22 during the process of negotiating this particular
23 agreement?

24 A. To the best of my knowledge I do not.

25 MS. SHAPREAU: All right.

1 *****

2 CROSS-EXAMINATION of MR. FRASURE by MR. KENNEDY:

3 Q. Mr. Frasure, during your involvement with the
4 licensing of UNIX system software, did you have any
5 involvement in decisions on the part of AT and T to grant
6 or deny software licenses to applicants who were seeking
7 a license?

8 A. Yes.

9 Q. What was the nature of your involvement,
10 generally?

11 A. Well, generally we tried to look at an
12 applicant to see if they -- if they really needed a
13 license. There were a number of companies for various --
14 that applied for a license that we denied them to. We
15 felt they had no valid reason for it or we felt for some
16 reason the license would not be protected. There was
17 really a number of reasons that we would use as criteria
18 to deny a license. We would deny -- I was involved in
19 the denial of a couple licenses because of the Dunn and
20 Bradstreet reports that came in on the -- on the
21 companies; they had bad credit reports. When requested
22 to produce some type of records or recordings they --
23 they could not produce them. They were behind in payment
24 of royalty fees to other companies for other products.
25 We decided that it was not a wise decision to provide

1 them with a license.

2 I denied licenses to companies that were
3 really -- there were individuals within the company who
4 wanted to obtain a license, rather than the company
5 itself. We felt that a binary product would be suitable
6 for them, either from AT and T or from one of our
7 licensees. There was a number of times we would direct a
8 -- a customer -- if you want to call them a customer --
9 inquiry of a license to -- to one of our competitors,
10 based on what their product need was. We would deny them
11 a license because we felt that they -- they really didn't
12 have a valid reason for it or a need for it.

13 There were large corporations who would apply
14 for a license who wanted to -- let me restate that.

15 There were large corporations who,
16 individuals within the corporation would want a license.
17 They would want to negotiate the license themselves or
18 have their department head license it, rather than their
19 corporate general counsel. They did not want to take the
20 license to that high a level in the company. We would
21 deny really working with them because we felt that it was
22 the desires of an individual rather than the desires of
23 the company to obtain the license.

24 We participated in a lot of trade shows and
25 that would stimulate interest in UNIX licenses. There

1 was number of them that we would turn down. I recall
2 turning down a license to -- I'm not sure how to refer to
3 it as a company or what, but someone who came to us for
4 an educational license. Because they had a -- they said
5 they were running a non-profit organization and they
6 really had no charter from the state that they were in
7 saying that they were an educational institution. He
8 produced -- the individual produced a couple of pieces of
9 paper that said they were non-profit, but we felt like
10 that they were after a license for other than using it
11 for educational purposes. They were denied.

12 So there was a number of cases where we would
13 deny licenses to -- to a -- to a company or I guess a
14 corporation if they applied for one.

15 Q. Let me deal first with the instances that
16 you've referred to in which licenses were denied based on
17 the results of a Dunn and Bradstreet review.

18 Did you conduct that Dunn and Bradstreet
19 review yourself?

20 A. No.

21 Q. Who conducted that?

22 A. We had two paralegals in the organization.
23 One's -- the lady's name was Ruth Rideout; and the other,
24 I can see her plain as day but I don't recall her name
25 right now. But they -- when the request for license

1 would come in, one of the first things that we would do
2 would be to run a Dunn and Bradstreet, the paralegals
3 would do that. If the results come back that they were -
4 - they were satisfactory, we would -- we would pursue
5 with the next step and try to ensure that the company
6 applying for the license had a valid reason for the
7 license and just did not want to obtain it.

8 Back during the time that I was with the
9 organization it -- in some respects it seemed to be a fad
10 to be able to try to get a license with some companies.
11 So we had to weed out those requests to really protect
12 the software because in some of those requests we just
13 felt like the software would not be protected.

14 I've lost track of your question. I guess I
15 digressed.

16 Q. How did they results of the Dunn and
17 Bradstreet check come to your attention in those
18 instances in which you ended up denying license
19 applications?

20 A. I'm not really sure. It was that the Dunn and
21 Bradstreet come back and typically if it come back
22 unfavorable, the account executive would relay that to
23 the licensee. If the licensee continued to push for it,
24 I always wanted to make the account executive the good
25 guy and I was the bad guy. I always wanted to provide an

1 order of escalation. So I would get involved in -- so
2 not to jeopardize any customer relations, if it was easy
3 for the account executive to blame it on his boss rather
4 than tell the individual themselves. So I would get
5 involved in talking with the customer and review it and
6 question them. I have questioned them on the things in
7 the Dunn and Bradstreet report, in terms of their
8 financial position and their ability to -- to pay for the
9 license.

10 In one case there was a corporation who
11 wanted a sublicensing agreement and although they would
12 not get that agreement until they paid us, we had
13 questions -- I had questions in my mind that they would
14 be able to pay the fees if they did sublicense a product.
15 So I denied those -- those requests for licenses.

16 Q. The denials that you're referring to that grew
17 out of the unfavorable Dunn and Bradstreet reviews, were
18 the companies making those applications based in the
19 United States?

20 A. Yes.

21 Q. You referenced as well denials of a new
22 license where a licensee was behind on royalty payments.

23 Do you remember that?

24 A. The licensee? Yes. We would -- we would go
25 after -- one of the provisions of the sublicensing

1 agreement required that you pay your -- your royalties on
2 a quarterly basis. We tracked those and if the licensee
3 would get behind, then we would start sending registered
4 letters to them as reminders. We reminded them of what
5 they owed and we did not get even a report from them as
6 to how many copies that they sold. We would -- in
7 several cases took action to suspend their sublicensing
8 of a product until the fees were caught up and paid.

9 Q. And in those instances were those companies or
10 licensees ones that were based in the US?

11 A. To my knowledge they were all based in the
12 United States; yes.

13 Q. You mentioned as well cases in which licenses
14 were denied because based on AT and T's investigation AT
15 and T concluded that it was individuals who were really
16 interested in acquiring source code licenses rather than
17 the companies for which they were employed.

18 Were those instances as well ones in which
19 the companies were doing business in the US?

20 A. Yes.

21 Q. You referred as well to a case in which a
22 license was denied to an entity because AT and T was not
23 satisfied with its proof, if you will, regarding its not-
24 for-profit status.

25 Was that a licensee that was operating, doing

1 business in the US?

2 A. Yes, it was.

3 Q. All of the instances that you've referred to,
4 did they involve licenses by US based entities seeking to
5 use UNIX system source code in relation to their US
6 operations?

7 A. Yes.

8 MR. KENNEDY: I've got nothing further.

9 *****

10 RE-DIRECT EXAMINATION of MR. FRASURE by MS. FITHIAN:

11 Q. Okay. Now, you had talked about -- are you
12 finished?

13 MR. KENNEDY: Yes.

14 Q. Okay. You talked about companies being denied
15 aid for source co-license because they had an unfavorable
16 Dunn and Bradstreet report.

17 What did you mean by an unfavorable Dunn and
18 Bradstreet Report?

19 A. They owed people a lot of money. They were
20 late in their payments beyond terms of contracts they had
21 entered into. Normally a company, when it does business
22 with a supplier or something like that, it enters into
23 sometimes the terms that they are going to pay and a
24 certain time frame. So if they are ninety days or six
25 months overdue in that, there is no reason for me think

1 they are going to treat me any better or A T and T any
2 better than they did someone else.

3 Q. Okay. And you mention people being denied --
4 actually you talked about licenses being suspended or
5 sublicensing of product being suspended because people
6 were behind in payment of royalty fees.

7 A. Yes.

8 Q. In those instances, those were customers who
9 already had a license?

10 A. Yes.

11 Q. And the license was then suspended?

12 A. Well, there was action taken to suspend the
13 license and you know, we would -- we would start
14 enforcement of that and generally agreements were made to
15 remedy the situation. But we would take action to do
16 that because they were not in accordance with their
17 sublicensing agreement.

18 Q. Okay. And you said in some instances you
19 decided that a prospective license, you did not have a
20 valid reason . . .

21 A. Yes.

22 Q. . . .for pending license.

23 What was a valid reason?

24 A. Well . . .

25 Q. Or what did you mean by a valid reason? Let

1 me put it that way.

2 A. What I meant by an invalid reason, normally we
3 provided the license to a corporation because they were
4 either going to use the product internally for their own
5 use and there's a term called port. They would modify it
6 to run on certain selected group of hardware that they
7 had and they wanted to take the advantages of a UNIX
8 operating system and use that within the company. Then
9 those companies would enter the corporate level with an
10 agreement. As I indicated there were individuals within
11 corporations who just wanted to get their hands, I felt,
12 on the source code so that they could play with it
13 themselves and do things that were not in the company's
14 interest. When they would refuse to take the agreement
15 to the appropriate level within the company so an
16 individual who was designated to negotiate on behalf of
17 the company, and when they refuse to take it to that
18 level, we would deny all license. I did not feel that it
19 was a good business practice to negotiate an agreement
20 with some organization that was way down in the corporate
21 structure.

22 Q. But in those instances, if the company -- if
23 the company did take it to the appropriate levels for
24 negotiating agreements that would not be a problem;
25 right?

1 A. That's right. If we understood what they were
2 going to do with the product.

3 Q. So assuming if they took it to the appropriate
4 level that would not be a reason for deny it?

5 A. That's true, if -- yes, that's right.

6 MS. SHAPREAU: That being what, I'm unclear?

7 MS. FITHIAN: The fact that an individual
8 who was not appropriated in the initial . . .

9 MS. SHAPREAU: Thank you.

10 A. We have to be careful here because a lot of
11 these companies were not big companies, they were very
12 small companies that were made up of a few individuals
13 and we had to exercise caution in those companies as
14 well. So one individual in a company could wear a lot of
15 different hats and we wanted to ensure that the software
16 was going to be protected and we tried to the best of our
17 ability to determine if they were going to fold up within
18 three months or six months and things get dispersed to
19 the wind. We -- you lose control of it that way, so we
20 had to satisfy ourself that the licensee was going to
21 indeed be able to fulfil the requirements of the
22 contract. Anyone can sign a contract, but you don't know
23 where you're going to stand in a few months if they go
24 belly-up in bankruptcy.

25 Q. So assume that you were dealing with your

1 appropriate person within a company to enter into
2 contracts, and that you felt that they were able and
3 willing to protect the software and you felt they were
4 able to pay for it in those instances, there would be no
5 reason for denial of the license; is that correct?

6 MR. KENNEDY: Objection to form.

7 Q. In those instances there was no reason for
8 denial?

9 MR. KENNEDY: Objection to form.

10 A. I think that's probably true.

11 Q. Now, I've marked as Exhibit D 55, a letter to
12 you from someone named John W. Wake from Prentiss Hall,
13 Inc., dated July 23, 1986.

14 Do you recall receiving this letter?

15 A. Yes.

16 Q. I'm sorry; let me identify it by Bates number
17 as well. It's produced by Prentiss in this action and
18 it's Bates number is P -- P 12-158 through P 12-156. I'm
19 sorry.

20 And do you recall receiving this letter?

21 A. Yes.

22 Q. Okay. And it says:

23 . . . Enclosed is a copy of the manuscript as
24 we discussed, Guide to Writing A UNIX Device Driver by
25 people at MassCom.

1 And the second paragraph says:

2 . . .Please let us know if, one, AT and T has
3 no reason to bar publication of this work and, if AT and
4 T finds this to be a helpful contribution to existing
5 literature.

6 Do you recall responding to this letter?

7 A. To my knowledge, it was -- it was responded
8 to; yes.

9 Q. Do you recall what the response was?

10 A. No.

11 Q. I'm sorry?

12 A. No.

13 Q. You don't recall?

14 A. I -- no, I don't recall.

15 Q. So you don't recall whether AT and T objected
16 to the request?

17 A. Not in this case; no, I don't. I mean, I'd
18 really have to look at the correspondence dating back to
19 this.

20 Q. Are you aware of any instances in which AT and
21 T or its affiliated company reviewed code submitted by
22 third parties to determine whether it contained any AT
23 and T proprietary code?

24 A. Yes.

25 Q. How many such instances are you aware of?

1 A. I couldn't give you a specific number. If I
2 had to guess, I would say five to six instances.

3 Q. And do you recall whether any of those
4 instances you informed the person making the request that
5 the code did not contain any AT and T proprietary code?

6 A. Yes, there were some that we said did not
7 contain any.

8 Q. Can you identify any specific instances?

9 A. By names, no.

10 Q. What was done to make that determination?

11 A. The code that would be provided to us similar
12 to what text was -- that came from Prentiss Hall here,
13 was sent to Summit, New Jersey. Again, it was Mike
14 Defazio's organization and the code was reviewed by the
15 applicable people there to determine if -- if it looked
16 like it had any AT and T code in it or methods and
17 concepts or whatever and they would make a determination.
18 They would send me back their findings in writing and
19 then I would just really paraphrase or use the paragraphs
20 that they provided to me to respond to the customer. I
21 was a customer interface. We did not want the customer
22 working with them. You lose control of things that way,
23 so I was a customer interface. So I myself or my people
24 made no determination of that whatsoever.

25 Q. Do you know what criteria were applied by the

1 people who were making the determination?

2 A. No. They were the experts in the system. I
3 had not idea what they used.

4 Q. Do you know whether in any of the instances
5 the person submitting the code who had written the code
6 being submitted had access UNIX source code?

7 A. I really can't call -- recall specifically. I
8 do recall that there was some add-on type applications or
9 products that would run with the operating system and
10 they were a license. So they had developed something off
11 on the side. I don't know if it was attached process or
12 what it was but them being a licensee did want
13 confirmance (sic) from AT and T that it was okay to
14 provide that product and that AT and T had no interest in
15 the product.

16 Q. And do you recall any such instances in which
17 the response was that AT and T had no interest and . . .

18 A. Yes.

19 Q. And that it was not subject to AT and T
20 licensing?

21 A. Yes.

22 MS. FITHIAN: Go ahead.

23 *****

24 RE-EXAMINATION of MR. FRASURE by MS. SHAPREAU:

25 Q. Who in the technical department reviewed the

1 code in this code review process we were just discussing?

2 A. I don't know. The -- Mike Defazio's
3 organization, and he reported to a gentleman by the name
4 of Bill Shay. They had access to people with an AT and T
5 Bell Laboratories who were still writing code for the
6 UNIX operating system and somehow they made a
7 determination by looking at the code and what its
8 application was, what it was to do to funnel it to the
9 right development organization for its review.

10 Q. So AT and T Bell Labs determined which
11 development organization to send . . .

12 A. No. AT and T -- someone would -- they would
13 look at it and they would actually go out to the
14 individuals responsible for that part of the code in the
15 operating system.

16 Q. So it would depend on who originally developed
17 that part of it?

18 A. Yes.

19 Q. Do you remember the names of any of those
20 specific developers who were involved?

21 A. I had very little interface with -- with those
22 people. I had talked with a number of individuals but I
23 don't know if they were the ones who actually reviewed
24 the source code or not.

25 Q. Do you remember the names of the individuals

1 that you talked with?

2 A. Brian Kernigan was a gentleman I had talked
3 with on several occasions.

4 Q. Was he a technical person?

5 A. Yes. He was one of the original developers of
6 the UNIX operating system.

7 Q. Do you know if he still with AT and T?

8 A. I have no idea. I don't know.

9 Q. So he might have reviewed the code in some
10 circumstances?

11 A. He may have. I don't know whether he did or
12 not.

13 Q. Any other developers that you remember the
14 names of?

15 A. I can't place one right now. They are hanging
16 around the tip of my tongue but I can't come up with a
17 name right now.

18 Q. I want to bounce back to the licensing
19 discussion earlier, just to clarify.

20 You talked about a hypothetical where an
21 individual in a corporation might apply for a license?

22 A. Yes.

23 Q. Is there an individual who wasn't part of a
24 corporation but he met the financial criteria who wanted
25 to use the UNIX operating system for his or her own

1 internal business uses, would AT and T license to that
2 kind of individual?

3 MR. KENNEDY: Objection to the form to the
4 extent you characterized Mr. Frasure's testimony as
5 hypothetical. He talked about instances in which
6 licenses were in fact denied.

7 Q. Okay. What I -- do you understand my
8 question?

9 A. Yes. To my knowledge, we never licensed an
10 individual for the software. I mean, I'm not aware
11 personally that we ever granted a license to an
12 individual.

13 Q. Do you know whether an individual ever applied
14 for a license?

15 A. I don't recall if one ever did.

16 Q. Based on what you know or your experience with
17 AT and T, and this is a hypothetical, if an individual
18 had applied for a license at the time you were employed
19 at AT and T and it was for an individual's internal
20 business purpose and they had good credit, do you have
21 any reason to believe that AT and T would not have
22 granted them a license to use UNIX operating systems?

23 A. Probably -- I feel they would have been denied
24 a license.

25 Q. Why is that?

1 A. It would determine to what they wanted to use
2 the product -- the product for. I would feel . . .

3 Q. If it was for internal business uses.

4 MR. KENNEDY: Excuse me.

5 Q. I clarified.

6 MR. KENNEDY: No, I'm sorry. I just didn't -
7 - I thought Mr. Frasure had not finished his answer. I
8 thought that he was interrupted.

9 MS. SHAPREAU: I was trying to -- I think
10 that maybe he hadn't recalled that I had said what the
11 purpose was. So just to make things -- to try to get
12 clarified.

13 A. In that case, we would have tried to steer
14 them to one of the sublicensees to buy a binary product
15 and for them to use it for their own internal business
16 applications and we did that on a number of occasions
17 with companies. We would refer them to either our AT and
18 T information sales people as a sales lead or we would
19 refer them to someone like Unisoft or to MicroSoft or to
20 IBM. It would be a hardware company or a software
21 company to try and find a computer and a software that
22 would fulfill the needs.

23 Q. Okay. So if an individual didn't qualify for
24 whatever reason for your source product, you would in
25 many circumstances direct them to give an object or use?

1 A. That's it.

2 Q. Okay.

3 A. That's why we would always do that. We would
4 direct them to a -- we would try to understand what they
5 were really wanting to do and direct them to someone who
6 provided an object module that we thought would satisfy
7 the need.

8 Q. You don't actually have any specific
9 recollection of an individual on their own running their
10 own business making a request?

11 A. I do not recall.

12 Q. Okay. Forgive me, I'm going to take a minute
13 to look at my notes.

14 (Brief Pause.)

15 There were two ways in which an AT and T
16 licensee who had an AT and T license, for example,
17 precluded to -- excuse me. Let's say an AT license -- an
18 AT and T licensee had a license for a System 5.

19 My understanding from your prior testimony
20 that there are two ways that AT and T licensee for System
21 Five could have gotten a copy of Thirty-two B to use.
22 One is they could have paid a fee to AT and T and gotten
23 a copy that way or they could have gone through an
24 exchange with another AT and T licensee and gotten a copy
25 of Thirty-two B by that means; is that correct?

1 A. Yes. I believe in one of the exhibits or
2 whatever we're calling these things that we looked at
3 earlier today, I think that it says the Thirty-two B was
4 no longer available from AT and T. So if I -- it seems
5 to me that one of the schedules that we looked at said
6 that Thirty-two B was no longer available. Maybe I
7 misread it, maybe it was B Six or B Seven that wasn't
8 available. But . . .

9 Q. Well, the documents will speak for themselves
10 in terms of the schedule.

11 A. Yeah, but you could obtain it one way or the
12 other.

13 I mean you could obtain it from a licensee
14 or from AT -- if AT and T still made a distribution of
15 it.

16 Q. Okay. Do you know whether AT and T ever
17 reviewed the shrinkwrap licenses that any of its licensee
18 used for binary distributions?

19 A. We received the licenses for review of the
20 shrinkwrap agreements; however, we refused to comment on
21 them.

22 In other words, we would send them back and
23 we said as long as your company and your attorneys feel
24 that they are meeting the terms of the sublicensing
25 agreement, then that's your decision. We will not give a

1 yes or no on that.

2 We did not want to be party, I guess, to
3 something that could happen in the future.

4 Okay?

5 MS. SHAPREAU: Mr. Frasure, thank you very
6 much for your time.

7 -----
8 WHEREUPON, the Deposition of David Frasure was concluded.

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1 STATE OF NORTH CAROLINA

2 COUNTY OF DARE

3 C E R T I F I C A T I O N

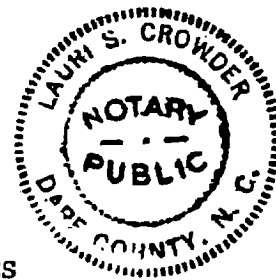
4
5 I, Lauri S. Crowder, a North Carolina Court
6 Reporter and Notary Public, do hereby certify that the
7 foregoing pages, numbered one through _____, are, to
8 the best of my knowledge, a true and accurate
9 transcription of the testimony of David Frasure which was
10 taken by me in the Stenomask method on December 8, 1992;
11 and was transcribed under my personal supervision.

12 I further certify that I have no financial interest
13 in the outcome of this action. Nor am I a relative,
14 employee, attorney or counsel for any of the parties.

15 WITNESS my Hand and Seal on this 16th day of
16 December, 1992.

17 My Commission Expires on July 12, 1995.

18
19 *Lauri S. Crowder*
20 _____



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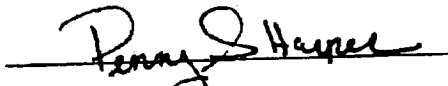
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5 I, Penny S. Harper, a North Carolina Court Reporter
6 and Notary Public, do hereby certify that the foregoing
7 pages are, to the best of my knowledge, a true and
8 accurate transcription of the testimony of: David Frasure
9 taken by me in the Stenomask method on: December 8th,
10 1992; and was transcribed under my personal direction.

11 I further certify that I have no financial interest
12 in the outcome of this action. Nor am I a relative,
13 employee, attorney or counsel for any of the parties.

14 WITNESS my Hand and Seal on this 16th day of
15 December, 1992.

16 My Commission Expires on October 25, 1997.

17 

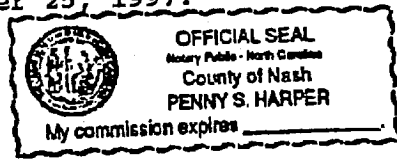
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