

Exhibit 3

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MARYLAND

3
4 NOVELL, INCORPORATED,

5 Plaintiffs,

6 vs.

MDL Docket No. 1332

7 MICROSOFT CORPORATION,

8 Defendant.

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12 DEPOSITION OF

13 ROGER G. NOLL, Ph.D.

14
15 September 10, 2009

16 9:02 a.m.

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19 1870 Embarcadero Road
20 Palo Alto, California

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24 Rebecca L. Romano, CSR-12546

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1 Novell is complaining about.

2 That wouldn't -- that wouldn't be the case in
3 terms of somebody estimating damages, because all that
4 they're interested in is what was the harm to Novell.
5 From the point of view of liability analysis, one has to
6 take into account the economic facts of the software
7 business, and that forces you to consider things other
8 than Novell's products.

9 Q. (By Mr. Tulchin) And you did consider lots of
10 things other than Novell's products?

11 A. Yes, many things other than Novell's
12 products.

13 Q. All right. Let me try this, and I hope this
14 helps clarify things, and maybe not.

15 MR. JOHNSON: It's getting rather repetitive,
16 David.

17 Q. (By Mr. Tulchin) Professor, do you contend,
18 in your report or in your reply report, that Microsoft
19 engaged in anticompetitive conduct that was directed
20 against Novell's office productivity applications and
21 that that conduct had any significant or substantial
22 impact on competition in the market for operating
23 systems?

24 MR. JOHNSON: Objection. Calls for a legal
25 conclusion.

1 THE DEPONENT: The -- that is not an accurate
2 characterization of how I think about the complaint and
3 the case.

4 I think about the case instead of, Did
5 Microsoft engage in anticompetitive conduct that reduced
6 competition in the market for operating systems, and
7 that had a harmful effect on Novell. And some of that
8 conduct is directly aimed at Novell and some of that
9 conduct is aimed at other people.

10 So I don't disaggregate their actions act by
11 act and company by company; instead, I -- my focus is on
12 the market, as opposed to Novell. I think the
13 difference between me and a damages expert is that the
14 damages expert focuses on -- solely on Novell, specific
15 things.

16 From my perspective, what I'm interested in is
17 the state of competition in the market. And so I have
18 to have a broader net, because I'm interested in Novell
19 as a player in a larger market.

20 Q. (By Mr. Tulchin) I hear you, and I understood
21 that from your prior answer. In fact, I think I
22 understood that from your report.

23 A. Uh-huh.

24 Q. My question was different, and forgive me, but
25 let me try to do it again.

1 My question is whether you contend -- and
2 maybe your answer is "I didn't address this," so I don't
3 want to argue with you. I'm just asking.

4 Do you contend, in either your report or your
5 reply report, that Microsoft engaged in anticompetitive
6 conduct that was directed against Novell's office
7 productivity applications, however that phrase should be
8 defined, and that that conduct in and of itself had some
9 significant or substantial impact on competition in the
10 market for operating systems?

11 MR. JOHNSON: Same objections. Calls for a
12 legal conclusion.

13 Q. (By Mr. Tulchin) I'm just asking what you
14 contend in your report.

15 MR. JOHNSON: Now it is getting repetitive.
16 It's the same question. It's been asked and answered.

17 THE DEPONENT: I have not analyzed the effect
18 of each specific act by Microsoft on competition in the
19 market for operating systems. I have analyzed the
20 pattern, the totality of actions by Microsoft on the
21 market for operating systems.

22 Q. (By Mr. Tulchin) And by that, you mean the
23 totality of actions directed against any of the products
24 or companies that you talk about in your report?

25 A. Well, I wouldn't -- I mean, I have analyzed

1 the totality of actions in the markets in which Novell
2 participates and also in markets for products that are
3 complements to the products that Novell produced.

4 Q. Okay. Two answers ago, you said that you
5 hadn't analyzed each act of Microsoft in this
6 connection. Let me ask you this: Have you analyzed the
7 aggregate of Microsoft's conduct that was directed
8 against Novell's office productivity applications in
9 order to ascertain whether that universe, that smaller
10 universe, just conduct against Novell's office
11 productivity applications, had some adverse impact on
12 competition in the market for operating systems?

13 MR. JOHNSON: Same question again. Objection.
14 Calls for a legal conclusion. This is the fourth time.
15 It's time to move on.

16 THE DEPONENT: Had Microsoft behaved
17 differently to all other kinds of applications of
18 middleware vendors than it behaved towards Novell. Had
19 the actions toward Novell been purely a result of
20 somebody at Microsoft didn't like somebody at Novell and
21 so they refused to deal with them in some way.

22 But all the other producers of middleware and
23 applications had -- they had dealt with them in a
24 pro-competitive way and -- and facilitated the
25 development that -- of high-quality applications of

1 middleware that were not produced by Microsoft that ran
2 on the Windows platform, then -- then I suspect there
3 would have been no adverse effect of knocking Novell out
4 of the industry from the actions against Novell, but
5 that's -- that's counter actual.

6 Q. In your last answer when you said "no adverse
7 effect," you mean no adverse effect in the operating
8 system market?

9 A. There would have been no adverse effect on
10 competition in the operating system market; for example,
11 if nothing had been done to Lotus, if nothing had been
12 done to Netscape, nothing had been done to all the other
13 competitors' vendors in those markets.

14 Q. So, Professor, if I understand your answer,
15 what you are saying is that the Microsoft conduct, it
16 was directed specifically against Novell and Novell's
17 office productivity applications, would not have had in
18 the aggregate any impact on competition in the operating
19 system market?

20 MR. JOHNSON: Objection.

21 THE DEPONENT: First of all, it's a stronger
22 statement than I made. Secondly, I should say I haven't
23 analyzed the case in that way, so I don't have a
24 technically derived opinion from analysis. I said I
25 suspect that there would have been --

1 Q. (By Mr. Tulchin) Fair enough.

2 A. -- no such effect, but I haven't analyzed that
3 question.

4 Q. I got you. I apologize; you did say "I
5 suspect." And my question turned it into something
6 slightly stronger, and I didn't mean to do that.

7 A. Okay.

8 MR. JOHNSON: Slightly stronger.

9 THE DEPONENT: It's okay.

10 (Discussion off the record.)

11 Q. (By Mr. Tulchin) All right. Professor, just
12 to sort of set the bookends, can we agree that Novell's
13 acquisition of WordPerfect Corporation took place in
14 June of 1994?

15 A. Yes, I think we can agree on that one.

16 Q. Okay. And the sale to Corel closed on
17 March 1st of '96?

18 A. That's correct.

19 Q. Okay. In your report, I noticed that there
20 were a number of instances of Microsoft conduct that, at
21 least as far as I understand the facts, took place after
22 March 1st, 1996; is that fair?

23 A. That's correct.

24 Q. Is it your contention the conduct that took
25 place after Novell sold WordPerfect to Corel on

1 March 1st, '96, that that conduct is relevant to a
2 determination of either liability or damages?

3 A. Under the hyp- -- under the assumption that
4 messaging software is part of the case, then one has to
5 continue the analysis beyond that point. Because the
6 Microsoft -- excuse me, Novell did not sell GroupWise.
7 It retained -- indeed, it still sells it.

8 So to the extent that GroupWise is in the
9 case, then obviously one has to examine the issues
10 Novell complained about with respect to GroupWise that
11 occurred after March 1st, 1996.

12 Q. Okay.

13 A. I think the second point is that one has to
14 examine the facts about even the products that were sold
15 after March 1st by Corel, because the -- that's related
16 to the question of the damage to the product that
17 occurred. I mean, to what extent did the actions by
18 Microsoft actually affect the sales of the products that
19 were sold. That hinges on the facts after the product
20 was actually sold. Because the -- the product that runs
21 on Windows 95 was -- whereas, it was mostly developed by
22 Novell; it was released by Corel.

23 So if you are going to say how did that
24 product fare in the market and why did it fare the way
25 it did, you have to address the period in which Corel

1 owned it.

2 Q. Okay. Fair enough. I was talking about the
3 conduct -- Microsoft conduct after March 1st, 1996, that
4 you say in your report was anticompetitive.

5 MR. JOHNSON: Is that a question?

6 MR. TULCHIN: It was meant to be, but it
7 wasn't put in the form of a question.

8 THE DEPONENT: Yes, I did address conduct that
9 took place after '96; March 1st, '96.

10 Q. (By Mr. Tulchin) Is it your understanding
11 that that's part of this case, that it's in this case,
12 that conduct?

13 A. It has -- it has to be if your focus is on
14 certain markets and what you want to do. And what I
15 think is correct economically is to say that there was a
16 pattern of conduct towards a family of products that
17 reduced the value of the products that were owned and
18 produced by Corel, but as -- more importantly, from my
19 perspective, that had this long-term effect on what was
20 going on in the operating system market.

21 Q. Okay. Could you look at page 83 of your
22 report, Exhibit 1? Just below the middle of the page,
23 there's a sentence that begins this way -- I think it's
24 the third sentence of that paragraph.

25 This litigation is concerned with how

1 Microsoft enhanced and maintained its monopoly power and
2 operating systems and GUIs, G-U-I, after May 1994. And
3 I realized that this litigation does not address the
4 harm to Novell and others arising from Microsoft's
5 conduct prior to that date, unquote.

6 Do you see that, sir?

7 A. Yes.

8 Q. Are you satisfied that this litigation -- as
9 of today, this was written on May 1st -- or signed on
10 May 1st -- are you satisfied that as of today,
11 September 10th, 2009, that this litigation does not
12 address the harm to Novell and others arising from
13 Microsoft's conduct prior to May of '94?

14 A. Well, when one then adds the next sentence,
15 which is that you can't really understand how these
16 markets work without considering a longer time period,
17 that that window of time is insufficient to understand
18 the underlying economics of these markets.

19 Q. I understand the next sentence is there, and
20 I'm not trying to argue that I -- that's what you say.

21 But my question is, and maybe a yes-or-no
22 answer to this, if it's convenient, would help.

23 MR. JOHNSON: Well, now don't instruct the
24 witness how to answer the question. Just ask your next
25 question.

1 MR. TULCHIN: There was no instruction,
2 Mr. Johnson.

3 MR. JOHNSON: Sounded like at least a
4 suggestion.

5 MR. TULCHIN: Suggestion, maybe. Instruction,
6 certainly not.

7 Q. (By Mr. Tulchin) Let me start over.
8 Professor, is it the case that as of today, it's your
9 understanding that although it is useful to understand
10 what happened in the marketplaces prior to May 19, 1994,
11 it's your understanding that, quote, This litigation
12 does not address the harm to Novell and others arising
13 from Microsoft's conduct prior to May 1994?

14 A. The complaint is about acts that took place in
15 this window of time. But one cannot understand the
16 effect of those acts and -- either in the market for
17 operating systems or in terms of the impact on Novell,
18 without considering the broader question outside of that
19 window. That's the point.

20 From Novell's perspective, the case is about
21 recovering damages for certain acts taken while it owned
22 these products. And from the perspective of harm to
23 competition, this is only one event or one series of
24 events towards one firm.

25 And it can't be understood. It would be

1 impossible to understand what -- first of all, what
2 happened in the market for operating systems and,
3 secondly, what happened to Novell even, without taking
4 into account other things as well.

5 One would get a wrong answer to the question
6 "What was the impact on Novell?" and "What was the
7 impact on the competition in operating systems?" if one
8 just focused on what Novell complained about.

9 Q. Okay. I'm just trying to understand, in your
10 last answer you referred to, quote, this window of time,
11 I think was your phrase?

12 A. That's correct.

13 Q. And what is the window of time?

14 A. From the '94-'96 period when Novell owned the
15 set of products that it acquired from others and then
16 sold to Corel. Plus a longer window of time for the set
17 of products that it retained after March of 1996 and
18 continued to sell to others.

19 Q. All right. And, again, just so that we are
20 clear, what is that set of products that Novell retained
21 that you think are relevant to the issues in the case?

22 A. Well, the -- in the complaint, the reference
23 is made to messaging systems. But you can't understand
24 messaging systems without also taking into account
25 networking software in general. So although the

1 complaint is about messaging software, because it's
2 strongly complementary to network software, you can't
3 understand it without understanding the network
4 software.

5 Q. Have you formed any view, Professor Noll,
6 either in reliance on Mr. Alepin or otherwise, as to
7 whether or not it's proper to characterize messaging
8 software as a form of office productivity application?

9 A. Until this case happened, it never occurred to
10 me you wouldn't call messaging software a category of
11 office productivity applications. All right. In terms
12 of the stuff that sits on a client.

13 The problem, of course, is that the category
14 messaging software also includes products that sit on
15 servers. And so the -- the boundary as to what is
16 productivity application versus what isn't is, I've now
17 realized from this case -- I didn't realize before -- is
18 somewhat fuzzy, and I don't think there's agreement, as
19 far as I can tell, on what -- precisely what the line
20 is.

21 It is the case that the mode, standard mode
22 for selling this material, includes -- including it in
23 office productivity suites, as Novell did and then for a
24 while Corel did. But it certainly is a separate product
25 market and -- as witnessed by the fact that Corel did

1 not acquire GroupWise, that it was sold -- it still was
2 a Novell product and still is a Novell product. So
3 that -- it is distinct in that regard.

4 I would -- to me, it seems natural to think of
5 e-mail and scheduling and calendars and things like that
6 as an application, but I realize some other people don't
7 agree with that.

8 Q. Where should the line be drawn, do you think,
9 that products that sit on servers should be on the other
10 side of the line; that is, they are not office
11 productivity applications?

12 A. No, that would clearly be a mistake to say it
13 has to be sitting on the PC, because although today
14 it's -- well, let me do it the other way.

15 In the mid-1990s, there was a widespread
16 expectation that a perfectly plausible way for corporate
17 software to develop was to have most of the application
18 software sit on a server and be accessed by what is
19 called a dumb client, which means it doesn't have much
20 of its own capacity, and it doesn't have most of the
21 software sitting on it.

22 And Novell was a believer in that possibility.
23 And so they, indeed, for a while I did -- when I was at
24 the Brookings Institution, they actually implemented
25 that, so that much of the applications software was

1 "all." I thought --

2 MR. JOHNSON: I thought that's what you
3 said.

4 THE DEPONENT: I thought that's what you said.

5 Q. (By Mr. Tulchin) I'm going to ask it again.

6 MR. JOHNSON: And you might want to tell us
7 market power and what, if you are going to ask about
8 market power.

9 Q. (By Mr. Tulchin) I want to ask about market
10 power and operating systems, because that's what you are
11 addressing on page 23 of your reply report.

12 A. Is that what I am addressing on page 23? I
13 didn't read carefully the rest of that paragraph. I
14 just read what you quoted me. Wrong report.

15 MR. JOHNSON: Why don't you read that
16 paragraph so you know what he's talking about.

17 THE DEPONENT: Well, the previous sentence is
18 about operating systems.

19 Q. (By Mr. Tulchin) Right.

20 A. But until you get to that sentence, it's about
21 everything.

22 Q. All the markets involved in the case?

23 A. All the markets in which Microsoft
24 participates, yes.

25 Q. All right. With apologies, then, if I asked a

1 bad question. Let me try again.

2 I'm just looking at the last sentence on
3 page 23 of your reply report.

4 Is it the case that at least some of
5 Microsoft's market power in the market for operating
6 systems in the mid-1990s was attributable to superior
7 efficiency, intellectual property, and/or a good
8 reputation?

9 A. Yes, it is true that some of Microsoft's
10 market power was attributable to efficiency effects,
11 yes.

12 Q. Have you made any effort in this case or in
13 any other case to attempt to make some sort of estimate
14 as -- as to what extent of Microsoft's power in the
15 mid-1990s in operating systems was attributable to those
16 efficiency effects and what extent of its power was
17 attributable to acts that you believe were
18 anticompetitive?

19 MR. JOHNSON: Objection.

20 THE DEPONENT: That's not the way I posed the
21 question in this or in any other case. The way I pose
22 the question here is we are not litigating what
23 Microsoft's market power and operating systems was prior
24 to the release of Windows 95.

25 And so regardless of whether it's

1 anticompetitive acts or efficiency benefits, we're
2 taking that as a given.

3 And then if you recall way earlier on, in
4 cases that went all the way back into the '80s, I
5 assumed that the position of Microsoft as the leader in
6 operating systems as of 1988, '89, was purely for
7 efficiency reasons. All right.

8 So I -- I have never attempted to figure out
9 sort of from the very beginning was there anything
10 anticompetitive about Microsoft's position as of
11 January 1st, 1989.

12 I know of nothing that would cause me to
13 suspect that it didn't -- that used anticompetitive acts
14 to achieve its position in operating systems as of then,
15 but I don't see that it's relevant for me to try to
16 figure that out. I just accept it.

17 Q. (By Mr. Tulchin) Well, let me be more
18 specific about the time period, then. If I could, for
19 my next question, focus on the time, let's say, between
20 the release of Windows 95, which was August 24th, I
21 think, 1995, from that point until March 1st, '96, when
22 Novell sold WordPerfect to Corel, just for the sake of
23 this question.

24 Is it your view that in that period, at least
25 some of Microsoft's market power in operating systems

1 was attributable to anticompetitive acts?

2 A. Yes.

3 Q. And you have said, I think, that you are not
4 asserting that all of its market power was attributable
5 to such acts?

6 A. Yes.

7 Q. All right. Have you tried to quantify, to
8 make some estimate as to whether or not 50 percent of
9 its power was market power, in operating systems in this
10 same period, was attributable to lawful efficiency
11 effects or whether it's 80 percent or some other
12 number?

13 A. I have not, in this or any other case, been
14 responsible for quantifying the impact.

15 Q. So is it fair to say that you haven't looked
16 into this question at all?

17 A. I haven't looked into the question of
18 quantification. I looked into the question of the
19 presence and the effects on others, but you know, as of
20 August of 1995, the -- the issues about Windows 95
21 instantaneous market power are far broader than at
22 issue -- than the issues here.

23 I mean, it has to do with prior acts to bundle
24 Windows 4.0 with MS-DOS 7.0, and it has to do with the
25 contractual activities with regard to DR DOS. It has to

1 do with the behavior towards OS/2. So the main
2 competitors for -- in the operating system market in,
3 say, '92, '93, were the targets of other activities that
4 don't really have anything to do with Novell.

5 So I don't know why that would be a relevant
6 question as to figure out why what fraction of MS-DOS
7 6.0 and Windows 3.1 was attributable to the acts against
8 DR DOS and OS/2 versus attributable to efficiency.

9 I do believe that Microsoft would have been an
10 extremely important player in operating systems,
11 regardless of its own acts. And I don't -- I don't -- I
12 don't see any reason to believe it would have
13 disappeared or been a minor player.

14 Q. Okay. I want to focus now, let's say, on 1995
15 and 1996, but this time I want to ask you about market
16 power in the market for word processing software. And,
17 if I can at the same time, in the market for spreadsheet
18 software.

19 And my question is: Have you made any effort
20 to try to quantify your estimate, the extent to which
21 Microsoft's market power in either or both of those two
22 markets was attributable during that time to any
23 anticompetitive acts that Microsoft had engaged in or
24 attributable to efficiency effects?

25 A. Well, I'll answer that partially.

1 first instance, as part of the bundled product in the --
2 in the suite and, secondly, its interactions with
3 Netscape Java.

4 So I think if you are going to say what is the
5 middleware platform, you could say PerfectOffice was the
6 middleware platform, you can say Netscape Java was a
7 middleware platform, and you could say the combination
8 of the two was even a bigger middleware platform.

9 Q. I guess I understood your report to say that
10 PerfectOffice, when combined with Navigator and Java,
11 should be considered middleware; is that fair?

12 MR. JOHNSON: Objection.

13 THE DEPONENT: I said for certain that is a --
14 that is a much bigger platform than any of the
15 components standing alone, sure. And all of them do
16 expose some APIs.

17 So the more APIs you have, the more
18 comprehensive a platform you are creating, but -- I
19 mean, the way most people think about middleware is not
20 that it -- that the APIs it exposes necessarily have to
21 be all or even most of the APIs that an application were
22 requires. It is just that a particular category of
23 application would use -- make use of the significant
24 number of APIs that weren't in the operating system.
25 And that's sort of the definition of what a middleware

1 product is.

2 Q. Sorry, I may just have missed that. Could you
3 tell me what the definition is, the definition you were
4 proposing of a middleware product?

5 A. It is a product that, on the one hand, doesn't
6 connect directly to the microprocessor -- that connects
7 through the operating system -- and, on the other hand,
8 exposes APIs that other applications make use of that --
9 you know, in a substantial way.

10 The reason about it being fuzzy, of course, is
11 if you are going to have interoperability between two or
12 three applications, they must connect with each other.
13 They must communicate with each other in some way, but I
14 don't think that is a reasonable basis for defining a
15 product as middleware.

16 I think the more reasonable basis is another
17 kind of application can be thought, of in the layer-cake
18 phenomena, as sitting on top of the middleware and using
19 some of those APIs to achieve its functionality.

20 Q. Okay. To be middleware, among other things,
21 the software in question has to expose APIs that other
22 applications can make use of in at least some
23 substantial way; is that fair?

24 MR. JOHNSON: Objection.

25 THE DEPONENT: Yeah, I think that's roughly

1 correct, yeah.

2 Q. (By Mr. Tulchin) So you wouldn't consider
3 something to be middleware just because it exposed,
4 let's say, a very small number of APIs or APIs that were
5 not in any way significant?

6 MR. JOHNSON: Objection.

7 THE DEPONENT: Yeah, I think that's roughly
8 right.

9 Q. (By Mr. Tulchin) So to back up, I think I
10 understood you to say that WordPerfect standing alone
11 should not be considered middleware?

12 A. I didn't think of it that way; although, I
13 don't want to testify on software engineering issues.
14 From my understanding is that the -- the -- by far the
15 most important middleware being produced by Novell at
16 this time consisted of the PerfectOffice shell and the
17 other things that were in the suite.

18 Q. Along with Navigator and Java, is that --

19 A. Well, I think PerfectOffice was middleware.
20 But --

21 Q. Right.

22 A. But PerfectOffice plus Netscape Java was a
23 much bigger middleware platform, a much more
24 comprehensive middleware platform than just
25 PerfectOffice by itself.

1 Q. When you say Netscape Java, are you referring
2 to Netscape Navigator and Java?

3 A. Yeah. There's a timing issue. In the
4 beginning, it would be just Navigator. But as time
5 progressed, the APIs exposed by Navigator, that included
6 some Java material as well.

7 Q. And on page 89 again, around the middle of the
8 page, you say "In 1995" --

9 A. Uh-huh.

10 Q. -- "Netscape included Java in Navigator."
11 Do you see that?

12 A. Yes.

13 Q. Before 1995, Java was not included --

14 A. That's correct.

15 Q. -- in Navigator?

16 A. Right.

17 Q. All right. Would you consider Quattro Pro
18 alone to be middleware, Quattro Pro without the addition
19 of the PerfectOffice shell and Netscape Navigator and
20 Java?

21 A. Well, I'm going to say no, but I can tell you
22 why someone might disagree with me, which is statistical
23 analysis packages plug into Quattro Pro and use them for
24 database management. And, in fact, one of the -- one of
25 the uses that my colleagues make of Quattro Pro is

1 simply a place to store data that's accessed by a
2 statistical analysis package. So in that sense, there's
3 a -- it's serving a platform function.

4 But having said that, I would not regard
5 Quattro Pro -- I don't think "middleware" is a useful
6 word to apply to Quattro Pro, but I'm not going to be
7 upset by somebody who claims otherwise.

8 Q. Okay. All right. And would you agree with
9 me, Professor Noll, that not all middleware posed any
10 threat to Microsoft's operating systems in the middle of
11 the 1990s?

12 A. The threat is more -- it's not immediate. The
13 threat that middle -- a middleware product of any kind
14 can pose to Microsoft's operating system business is
15 that the middleware keeps growing until it gets -- and
16 it gets to be more and more of a platform. And if the
17 middleware product is cross-platformed itself, it can
18 eliminate the application's bear to entry.

19 So middleware is two kinds of threats. On the
20 one hand, it can eventually become a direct threat to
21 the operating system as an alternative operating system.
22 The other threat is that it can eliminate the
23 application's bear to entry once it becomes extensive
24 enough.

25 Q. You say on page 28 of your reply report that

1 even --

2 MR. JOHNSON: Would you like him to turn to
3 that?

4 Q. (By Mr. Tulchin) If you like. You don't need
5 that for purposes of my question.

6 A. Okay.

7 Q. You say on page 28 of your reply report --
8 it's two or three lines from the bottom of the page --
9 that "Even Netscape's browser by itself posed no threat
10 to Microsoft."

11 Do you see that?

12 A. Yes.

13 Q. And that's a correct assertion, as far as you
14 are concerned?

15 A. Yes.

16 Q. Would you say that certainly Quattro Pro by
17 itself posed no threat to Microsoft, the same threat
18 we're talking about here?

19 A. I agree. I agree. By itself, Quattro Pro was
20 not a threat to the Microsoft operating system. It
21 had -- you have to see the threat in a much larger
22 context.

23 Q. And WordPerfect by itself would pose no such
24 threat?

25 A. That's correct.

1 Q. Would PerfectOffice alone, let's say prior to
2 the time that it included Navigator and Java,
3 PerfectOffice alone, would that pose such a threat to
4 Microsoft?

5 MR. JOHNSON: Objection. Asked and
6 answered.

7 THE DEPONENT: Comes closer, particularly
8 before Novell discontinued DR DOS. But, again, it's a
9 matter of degree as opposed to yes or no. The threat of
10 PerfectOffice is primarily in conjunction with other
11 products. It's not primarily independent.

12 Q. (By Mr. Tulchin) And the other products are
13 what?

14 A. The other -- the other products can be thought
15 of as other things that provide middleware platforms
16 that collectively could grow into an operating system;
17 that's Category No. 1.

18 And Category No. 2 would be call activities of
19 products themselves that are cross platform and can
20 threaten the application's bear to entry.

21 Q. In order to pose such a threat, those software
22 products must become relatively ubiquitous, would you
23 say?

24 A. They have to -- they have to be able to cover
25 a large enough number of PCs that writing to the

1 middleware is an attractive alternative to writing to
2 Windows. And that comes about from a combination of two
3 things. One is the size of the platform itself, and the
4 other is the functionality of the APIs.

5 If you are -- if you are -- if you have some
6 middleware that is functionally better than anything
7 that's on Windows than a -- than an applications vendor
8 and a consumer can face a choice, you know, something
9 not as good, based on, say, the Windows 95 platform or
10 something better built on a narrow program platform but
11 that performs better. So both dimensions have to be
12 taken into account as to whether middleware represents a
13 threat.

14 Q. In this case, in connection with the
15 conclusions and opinions that you offered in your report
16 and in your reply report, did you consider what other
17 operating system might have gained significant market
18 share in the but-for world where PerfectOffice, in
19 conjunction with other products, exposed APIs that were
20 widely used by other applications?

21 A. Well, I think at the time of the acquisition
22 of the office productivity applications the -- it was --
23 it was at that moment not known that all of the
24 then-existing operating system competitors to Windows
25 4.0 come MS-DOS 7.0 would be defunct.

1 So cross-platform, that's something different
2 in 1994 than it meant in 1996 when it was clear that
3 nobody was going to be left standing except Microsoft.

4 Q. Well, let me back up one step, Professor Noll,
5 if I could.

6 First of all, is it correct that there have
7 not been any full-featured applications that were ever
8 written to the APIs exposed by PerfectOffice or
9 PerfectOffice in conjunction with other products?

10 MR. JOHNSON: Objection.

11 THE DEPONENT: What is the definition of a
12 full-featured application?

13 Q. (By Mr. Tulchin) Well, let's try it this way.
14 I don't want to quibble about the definition. But how
15 about any application that has been widely available
16 commercially over, let's say, the entire period of time
17 in question?

18 MR. JOHNSON: Objection.

19 THE DEPONENT: I don't think you mean to say
20 widely available. I think you mean to say substantially
21 successful commercially. I mean --

22 Q. (By Mr. Tulchin) Fair enough. Fair enough.

23 A. It is the case that PerfectOffice, during the
24 period owned by Novell, did not support, to my
25 knowledge, any major success application software, other

1 I do know, obviously, that Microsoft's thought
2 that the namespace extensions were important because
3 they added them, and that meant -- what that did is make
4 certain that once they'd withdrawn them, nobody else
5 could just do it themselves without infringing.

6 So they must have thought it was important,
7 but whether they actually used that particular code or
8 some other equivalent code to achieve the results, I
9 have no way of knowing.

10 Q. Does it have any significance to you if -- if
11 it turns out that Microsoft didn't use the namespace
12 extensions itself?

13 MR. JOHNSON: Objection.

14 THE DEPONENT: Does it have any significance
15 to me?

16 Q. (By Mr. Tulchin) In your analysis of the
17 issues in the case?

18 A. No. It seems to me that the -- that the -- we
19 know that there were -- that Novell had certain plans
20 for implementing them that Microsoft regarded as
21 important and -- and attractive. And whether -- and
22 that Microsoft hadn't done. And whether they decided to
23 do it that way or create other kinds of functionality,
24 operating functionality to implement the same thing
25 isn't terribly crucial, because what -- what was

1 motivating them was the fact that there was this
2 potential to use namespace extensions in a way, in a way
3 that they hadn't foreseen and that they thought Novell
4 had a high probability, at least, of being able to do.

5 Q. Do you have any understanding, Professor Noll,
6 as to when, if ever, Novell was informed by Microsoft
7 that Microsoft would not support the namespace extension
8 APIs?

9 A. I don't remember the precise date.

10 Q. You have an understanding that it did occur?

11 A. It did occur, and I don't remember. I mean,
12 it was -- it was sort of -- it wasn't an event. It was
13 a sequence of things where they sort of figured it out.
14 But I don't -- so I remember there was a period when it
15 wasn't exactly clear what was going on. And so that's
16 part of the reason I just can't answer the question.

17 When they -- when they definitively knew for
18 sure that this was not a problem that was going to be
19 ironed out, that in fact was going to be a complete
20 withdrawal of support for namespace extensions.

21 Q. Is it your understanding that it was at least
22 several months before August 1995 when Windows 95 came
23 out that Novell knew that Microsoft was going to
24 de-document, if I can put it that way, the namespace
25 extension APIs?

1 A. I agree with you. But that's -- that's --
2 there's, again, two parts of the story. The first is
3 the de-documentation, and the second is are they
4 actually going to complete the functionality and
5 document it later. And the first half was before the
6 second, and that was where the confusion and uncertainty
7 lied. But that all did take place several months before
8 the release of Windows 95.

9 Q. Is it your understanding that software
10 engineers, if they wanted to create some sort of
11 functionality in the Novell product, could have used
12 some other paths towards obtaining that functionality,
13 if they chose?

14 MR. JOHNSON: Objection.

15 THE DEPONENT: Well, I'm not the one to ask
16 that question of. I -- Mr. Alepin is the one to ask
17 that question of.

18 It's my understanding that given enough people
19 in enough time, you can achieve the same functionality.
20 The -- the issue, of course, the factual issue, is
21 whether, with the resources that Novell had and the
22 amount of time it had, could it have depleted all the
23 other parts of PerfectOffice and plus do this, plus deal
24 with the printing problem and still have been timely.
25 And my understanding from Mr. Alepin is that he thinks

1 that was unrealistic.

2 Q. (By Mr. Tulchin) And from Mr. Richardson?

3 A. I don't know that I ever was present when that
4 question was posed to him. I can't remember whether he
5 said anything like what I just said to you.

6 Q. Okay. Is it your understanding today that in
7 1994 and 1995, Novell understood that it was highly
8 important for the PerfectOffice product to get it out to
9 market as soon as possible after Windows 95 was
10 introduced?

11 A. Well, yes and no. Right. The yes part is you
12 know you are going to lose substantial market share if
13 you're not timely. The no part is you also know you're
14 going to lose substantial market share if you have an
15 inferior product.

16 So what they knew is you can't -- a bad
17 product that's released roughly simultaneously within a
18 month or two, Windows 95 is going to fail. And a
19 terrific product that comes out a year later is going to
20 fail. So those are the things they know.

21 Q. Okay. Fair enough.

22 So let me put it this way -- I will amend my
23 question -- is it your understanding now that Novell
24 believed in 1994 and 1995 that it was highly important
25 for the success of the PerfectOffice product that it get

1 out to market timely and that it be a high-quality
2 product?

3 A. Yes, I agree with that.

4 Q. All right. And so if you are informed, let's
5 say, months and months in advance of the introduction of
6 Windows 95, that some APIs are going to be
7 de-documented. Presumably what a businessman would do
8 is to devote as many resources as possible within the
9 framework of what's feasible to getting your software
10 engineers to get that functionality into your product
11 through some other method; isn't that right?

12 MR. JOHNSON: Objection.

13 THE DEPONENT: Well, within the constraints
14 you stated, it may not be possible. That's the --
15 that's the whole problem, is that you -- you need people
16 who understand the product you are developing and who
17 know how to write a component of it that can integrate
18 well with the rest of it, and those people have to be
19 able to do it in a very short time horizon.

20 And -- and, you know, if -- if the facts are,
21 as cited from Richardson and Harral, are accurate, that
22 this is 7 to 11-1/2 man years, that's a large number.
23 It means if you are going to do it in six months, you
24 have got to double that.

25 And there's limits to the degree which you can

1 high-markup industry, so that the most logical response
2 to -- for Microsoft or any other company in a market
3 like this, when they face a more elastic demand curve,
4 is to cut their price and pretty much retain their
5 market share. It's not like markets that have very high
6 marginal costs relative to price.

7 So I don't think market share is the right
8 focus. So I think the right focus is what would the
9 price have been, and I think the price would have been
10 lower. But having said that, the focus of my concern
11 isn't just Novell, because I -- I think that's
12 inappropriate.

13 I think that you can't get to the issue of
14 whether Novell suffered harm that needs to be
15 compensated through anticompetitive -- through damages
16 until you first address the question about competition
17 in the market. And that question can't be addressed by
18 focusing exclusively on Novell.

19 Q. All right. I hear you.

20 But am I right in thinking that you are not
21 offering the view that Microsoft's market share in 1996
22 or 1997 would have been significantly below 90 percent
23 in the absence of the three acts: The print processor
24 issue, the Logo certification program, and the namespace
25 extension issue --

1 MR. JOHNSON: Objection.

2 Q. (By Mr. Tulchin) -- in the absence of those
3 three acts --

4 MR. JOHNSON: I'm sorry.

5 Q. (By Mr. Tulchin) -- against Novell's
6 WordPerfect?

7 A. And you said market share in the operating
8 system market. I think that's probably roughly right,
9 that the act against a single firm is -- is relatively
10 small compared to the effect of the acts against all the
11 firms that were the potential threats.

12 Q. Okay. Could you look, please, sir, at page 28
13 of the reply report.

14 In the first paragraph at the top, the last
15 sentence says, quote, If no single cross platform
16 application vendor was sufficiently important to
17 threaten the dominant operating system vendor, it does
18 not follow that, collectively, all cross-platform
19 applications vendors could not pose such a threaten,
20 unquote.

21 A. Right.

22 Q. And I think that's related to your last
23 answer.

24 A. Precisely.

25 Q. My question is this: Is it your view that

1 during the period '94 through March 1st, 1996, no single
2 cross-platform application was sufficiently important to
3 threaten Microsoft's position in the operating system
4 market?

5 A. The answer to that depends on how you classify
6 Netscape. I think Netscape combined with Java towards
7 the end of this period was such a threat by itself, but
8 I think by -- by this period, none of the others taken
9 of themselves.

10 If we go back earlier to -- you know, to the
11 late '80s, I think there -- that, you know, both
12 WordPerfect -- WordPerfect, in particular, and word
13 processors was dominant, and so the answer would have
14 been different in an earlier period.

15 Q. I got you, but I want to stick with the period
16 1994, 1995, 1996.

17 Is it correct to say that no single
18 cross-platform application vendor, with the possible
19 exception of Netscape combined with Java, was
20 sufficiently important to threaten Microsoft's position
21 in the operating system market?

22 A. All by itself?

23 MR. JOHNSON: Objection.

24 Q. (By Mr. Tulchin) Correct.

25 A. That's probably true. I agree with that.

1 MR. TULCHIN: All right. I don't think I have
2 asked for a break today, and I wonder if that would be
3 okay with you.

4 MR. JOHNSON: You bet.

5 MR. TULCHIN: Off the record.

6 (Recess taken.)

7 MR. TULCHIN: Back on the record.

8 Q. (By Mr. Tulchin) Professor Noll, you did
9 testify in trial in Minnesota back in 200- -- I think it
10 was 2004 or '5. I forget.

11 A. How fast time flies. That's right.

12 Q. We're having fun.

13 That Windows 3.0, which came out in May of
14 1990, was a revolutionary technological leap.

15 Do you remember that testimony?

16 A. Yes.

17 Q. Is that still your view today?

18 A. I actually think I say it here, too,
19 somewhere.

20 Q. I don't remember those words. But you did say
21 it was a good product.

22 A. Yeah.

23 Q. It was an important product.

24 A. A significant technological event.

25 Q. And you're comfortable with that phrase,

1 "revolutionary technological leap"?

2 MR. JOHNSON: Why don't you show it to him if
3 he actually said it.

4 THE DEPONENT: I -- I mean --

5 MR. TULCHIN: He did say it.

6 THE DEPONENT: Yeah. I mean, I think what I
7 said here is that -- in this -- in this report -- with
8 the reply report was similar to that. I said that
9 the -- the market power enjoyed by Windows 3.0 was
10 largely the result of the quality of the product.

11 And had Windows 3.0 instead of being Windows
12 3.0 been the components of OS/2 and OS/2 been released
13 at the same time, the same statement would have been
14 true. That would have been the dominant product.

15 Q. Do you want to see your testimony of April
16 15th, 2004, where you say that --

17 A. Only if you think what I just said isn't
18 enough.

19 Q. Oh, I think it's enough. But Mr. Johnson --

20 A. Okay.

21 Q. -- seems to want me to show it to you. So I'm
22 asking you if you want to see it.

23 A. I don't -- I don't see any reason to look at
24 it.

25 Q. All right. And I think you have also

1 a different method, he doesn't explicitly reject my
2 method and adopt another one, but he nonetheless
3 disagrees with me, and so I find that a puzzle.

4 Q. Well, would you agree that there are a lot of
5 things that Professor Murphy said in his report that you
6 don't address in your reply?

7 A. That's correct.

8 Q. A lot of factual assertions.

9 A. There's factual assertions in there I do
10 not -- and I'm not going -- I mean, I suspect, I don't
11 know, but I doubt that he's lying about the facts. I
12 think the disagreements we have are over analysis, how
13 do you interpret the facts.

14 Q. All right. So you didn't go back and check
15 his facts and try to find some that you thought might be
16 wrong.

17 A. No, that's a lawyer game. If he made a
18 mistake or two, then he may have made a mistake or two,
19 I may have made a mistake or two, but that's not --
20 that's not a good way. Unless they are really crucial
21 and, you know, pivotal, that's not a useful exercise.

22 Q. Is it correct that at the time -- as far as
23 you know, that at the time Microsoft decided to
24 de-document the namespace extension APIs, Novell at that
25 point did not yet have an agreement with Netscape to

1 distribute Navigator?

2 A. Well, I don't know what the date of the
3 agreement was. They weren't yet distributing it. I
4 don't know when they -- I don't know at what point in
5 time they reached a decision that they were going to do
6 it. So I can't answer that question.

7 Q. Mr. Alepin says at page 73 of his report that
8 that was February 2nd, '95.

9 A. That's the formal date. But I don't know how
10 much before then the two companies were collaborating.
11 I don't know the end of it. I don't know the answer to
12 that.

13 Q. All right. Let's just take the formal date.
14 The decision to de-document the namespace extension APIs
15 took place before February 2nd, '95.

16 MR. JOHNSON: So stipulated.

17 MR. TULCHIN: Okay.

18 THE DEPONENT: Yes. The decision -- there
19 is -- there is some vagueness as to when the people sort
20 of really took them seriously, but yeah, that was when
21 the decision was made.

22 Q. (By Mr. Tulchin) Okay. So would you agree
23 with me then that Microsoft didn't decide to de-document
24 those APIs in consideration of the Netscape Novell deal?

25 A. Oh, I agree with that. That wasn't done to do

1 anything to Netscape, in particular. It was done to do
2 something to WordPerfect.

3 Q. Microsoft didn't know about that deal when it
4 made the decision to de-document?

5 A. I don't know. Because I -- I mean, I don't
6 know -- I have never done a search of the trade press to
7 know when it was sort of in the air that Netscape was
8 going to form some mode of collaborative relationship
9 with Novell. I don't know when that became known.

10 Q. When you prepared your reply report, had you
11 looked at and spent some time reviewing the tables that
12 were attached to Professor Murphy's report?

13 A. Yes, I did.

14 Q. Did you attempt to obtain any information
15 about the market share data that he set forth in those
16 tables?

17 A. My recollection -- again, my recollection is
18 that the economist at Bates White, you know, replicated
19 all the information he had.

20 Q. When you say "replicated," they confirmed that
21 Murphy's data was correct?

22 A. More or less. I mean, there might have been
23 small errors, but nothing -- nothing huge.

24 Q. Other than a quibble or two, it was pretty
25 much right.

1 A. I think that's right, but I don't remember
2 in -- I mean that...

3 MR. TULCHIN: Give me a minute. I'm sorry.

4 MR. JOHNSON: You want to take a little break
5 while you look for it.

6 MR. TULCHIN: Sure.

7 (Recess taken.)

8 MR. TULCHIN: Back on the record.

9 Q. (By Mr. Tulchin) Page 73.

10 A. Page 73 of which one?

11 Q. Oh, that's a good question. I think it's the
12 reply.

13 A. Okay. Yeah. It's the smaller one.

14 Q. Yeah, it's the reply.

15 You are talking here about background printing
16 and Windows 95 logo. The second paragraph, third
17 sentence says, "Corel knew that it could not use the
18 logo with PerfectOffice and knew" -- I guess that should
19 be with a K.

20 A. Yeah, that should be with a K.

21 Q. -- "and knew that WordPerfect would be delayed
22 and of lower quality due to the withdrawal of namespace
23 extensions amid" -- sorry -- "and the failure of
24 Microsoft to deliver operating system support for
25 WordPerfect background printing."

1 Now, it's a long sentence. But in it,
2 Professor Noll, you say Corel knew several things. And
3 I'm just wondering if you could tell me what the
4 evidence is that Corel knew any of those things.

5 A. Well, they were already -- it was already
6 well known that they -- that the product didn't have the
7 functions that it was promised to have and that it was
8 delayed.

9 The argument is simply the following: That
10 if -- an informed buyer and seller doing a transaction
11 in 1994 would have taken into account everything that
12 had happened before and, likewise, an informed buyer and
13 seller in 1996 would have taken into account everything
14 that had gone on before.

15 So the buyer in 1996 would have known that the
16 delay and qualitative effects of not being implement --
17 being able to implement the namespace extensions and the
18 printing process would have reduced the future sales
19 prospects of the product even though it hadn't been
20 released yet.

21 Q. Well, that's my question, and you sort of
22 jumped over it, if I may.

23 You say that Corel knew that WordPerfect would
24 be delayed and of lower quality due to the withdrawal of
25 namespace extensions. And I just want to stop there.

1 Is there any evidence in the record of which
2 you know that shows that Corel knew that the reason
3 WordPerfect would be delayed and of lower quality was,
4 at least in part, due to the withdrawal of namespace
5 extensions?

6 A. That's -- that's not the interpretation of the
7 sentence that I intended. What I meant to say was that
8 the product quality and delay was known in March of '96.
9 That's all that I meant to say.

10 Q. You didn't mean to say that Corel knew that
11 this was because of either the withdrawal of namespace
12 extensions or the failure of Microsoft to deliver
13 operating system support for WordPerfect background
14 printing or both.

15 A. If -- I don't know what Corel knew about the
16 causes of whatever the quality and delay characteristics
17 of the product were. What it knew about was the quality
18 in the product and the delay.

19 Q. All right. Could you look at page 54 also of
20 the reply.

21 This is a page in which you are talking about
22 product reviews in a period from January '93 through
23 December '96, correct?

24 A. Yes.

25 Q. All right. And you say, a little more than

1 acquisition to 5 percent in 1995 and 15 percent in
2 1998.

3 Q. Well, you don't say that it went to that. In
4 fact, what you say is that Novell planned --

5 A. That they planned.

6 Q. -- to increase it to that?

7 A. That's right.

8 Q. From 0.5 to 5.

9 Do you know what it actually was in 1995?

10 A. I don't believe I've ever seen that number,
11 but maybe I have. I certainly don't remember it.

12 Q. Did Microsoft prohibit any OEM from
13 distributing Novell's office productivity applications
14 in 1994 or 1995?

15 A. "Prohibit" is not the right word.

16 Q. Well, why don't you start with that, prohibit.

17 A. Yeah. To my knowledge, it's not the case that
18 the word "prohibit" would apply to anything Microsoft
19 did with respect to anybody's other software product.

20 Q. Okay. Second question. Is there any evidence
21 that you know of that OEMs that installed non-Microsoft
22 office productivity applications paid higher prices for
23 Windows as compared to OEMs that did not install the
24 non-Microsoft office productivity applications?

25 A. IBM.

1 Q. Okay. And you say that IBM paid a higher
2 price than others?

3 A. Yes.

4 Q. And when was that? When did that occur?

5 A. Again, roughly this time period. I don't
6 remember the precise date, but roughly '95.

7 Q. Other than IBM, do you know of any such
8 example?

9 A. The only other example that's in the back of
10 my mind, but I'm not sure it's in the right time period,
11 is Gateway.

12 Q. Gateway?

13 A. But I -- I don't remember the details about
14 that. IBM is much more clearer in my mind because
15 it's -- we have a lot more information about it. But I
16 seem to recall that there was a Gateway experience as
17 well, but I'm not sure of that.

18 Q. Do you know of any evidence or information
19 that Microsoft either refused or threatened to refuse to
20 grant a license to Windows to OEMs if that OEM
21 distributed non-Microsoft office productivity
22 applications?

23 A. Well, there is no evidence in my mind that it
24 ever actually happened. There's only evidence that it
25 was discussed or threatened, and then -- and that's

1 disputed.

2 Q. Do you rely on that evidence about it being
3 discussed in any way in connection with the opinions you
4 form?

5 A. What I have done in terms of the opinions I
6 formed is simply talk about what were the facts.
7 Because whatever the nature of the disincentive was, it
8 had an effect; that there were OEMs who would not sell
9 non-Microsoft products.

10 Q. Do you know of any testimony by any
11 representative of any OEM that would support the notion
12 that the OEM was pressured in any way by Microsoft not
13 to distribute Novell's office productivity
14 applications?

15 A. Novell, in particular, I don't recall seeing
16 testimony about Novell.

17 Q. Do you know of any evidence of any
18 representative of any OEM that indicates that Microsoft
19 threatened to cut off Windows to that OEM if the OEM
20 distributed any of Novell's product?

21 A. Well, you don't mean any of Novell's products
22 because they are DR DOS, so -- and that was owned for a
23 while by Novell.

24 Q. Again, office productivity applications.

25 A. Yeah. I mean -- well, you just said product.

1 You didn't qualify it.

2 Q. You're right. You're right, yeah. It's
3 tiring. I'm tired.

4 A. And I'm more awake than you are, so I remember
5 DR DOS.

6 If we exclude DR DOS, no.

7 MR. TULCHIN: Let me just have one more
8 minute. I think I'm finished.

9 No, I do have one other thing. It probably
10 won't be too long.

11 Q. (By Mr. Tulchin) Corsair. Is it correct, as
12 far as you know, that Novell never marketed Corsair to
13 the public?

14 A. As far as I know, Corsair was not -- never
15 made part of PerfectOffice, yes.

16 And I think I -- again, I know nothing that is
17 in Alepin's report about Corsair, so I'm relying on him
18 completely for Corsair.

19 Q. Do you have any -- strike that.

20 As far as you know, was Corsair ever
21 commercialized by Novell or anyone else?

22 A. No, I don't think it was. But I'm not --
23 again, I will defer to him. If he says no, then I have
24 no reason to disagree with that.

25 Q. Okay. Are you aware of whether or not in

1 1994, 1995, Novell concluded that Corsair needed to be
2 abandoned because it was doomed to failure?

3 A. Well, I agree that they decided not to market
4 it. And I assume that, you know, I -- I'm sure it's on
5 the basis that it wasn't worth it. So that's why you
6 would abandon a product, because you didn't think it was
7 going to succeed.

8 Q. Do you have any information that -- to the
9 effect that the decision to abandon it was as a result
10 of any anticompetitive conduct by Microsoft?

11 A. I mean, there's no -- there's no statement of
12 the form, We're abandoning Corsair because of Microsoft.
13 There are statements, We're abandoning the productivity
14 applications because we don't want to be in a business
15 where we are dependent upon Microsoft anymore.

16 So at that -- at the higher level of
17 generality, there are relevant statements. But there's
18 nothing at the level of Corsair in particular.

19 MR. TULCHIN: Thank you very much for your
20 time today. I appreciate it.

21 THE DEPONENT: Thank you.

22 MR. TULCHIN: Off the record.

23 (Deposition concluded at 5:01 p.m.)

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