

1 THE COURT: Get the jury.

2 What's next? Another witness?

3 MR. JOHNSON: We'll be going to the videotape
4 after this witness.

5 (Jury present)

6 THE COURT: Mr. Schmidtlein.

7 MR. SCHMIDTLEIN: Thank you, Your Honor.

8 BY MR. SCHMIDTLEIN:

9 Q Mr. Gibb, I'm going to tell you one of the great lawyer
10 fibs. I only have a couple questions more for you.

11 If you can pull up Defendant's Exhibit 635, which I
12 believe you were asked about.

13 MR. SCHMIDTLEIN: Defendant's Exhibit 635. We
14 just got this one today, so we haven't loaded it yet.

15 BY MR. SCHMIDTLEIN:

16 Q This was an e-mail that you wrote in March of 1995; is
17 that right?

18 A Yes.

19 Q And I believe you were asked some questions about the
20 paragraph that began, I appreciate Alan Hansen's
21 perspective, down there about two-thirds of the way down on
22 the bottom?

23 A Yes.

24 Q That part right there. Thank you.

25 Can you sort of explain to the jury what the subject

1 matter here is and sort of what the interaction here is?

2 A Well, best recollection is that Alan -- well, Alan

3 Hansen -- I knew Alan Hansen real well. Great guy.

4 Actually worked on the engine team for awhile. But then he

5 was over linguistics and he -- I think he wrote a big

6 document about how we should write a whole bunch of

7 additional linguistic features, and that should be the

8 future. So I was replying to that and saying I think

9 linguistics is important, but I think these other like eight

10 things are more important. And so that was kind of the gist

11 of this interchange.

12 So he sent an e-mail saying we should focus on these

13 things, and I said I think this is important, but I think

14 these other eight things are more important.

15 Q Are the things that you all are sort of discussing

16 here, are these core features of PerfectOffice 95 or are

17 these sort of -- I don't want to say add-on features, but

18 are these sort of more optional features that you all were

19 considering?

20 A These were additional things that we were talking about

21 adding. So it was like the new help system, strategy for

22 the future of info central, yeah -- I mean obviously --

23 Q Sort of the shared code or the file open dialog, that's

24 not listed here, right?

25 A Not explicitly, no.

1 Q And the shared -- did you consider the file open dialog
2 to be a core feature?

3 A Oh, absolutely, yeah. It's much more important than
4 any of these.

5 Q Can we take a look at PX-322? This is the panic mode
6 document we talked about before.

7 If we can turn to page 4, and under the namespace
8 browser section there under justification, the paragraph
9 that begins, this does not mean -- focusing on this -- I'm
10 sorry. Under proposal.

11 I think you were asked some questions about this,
12 deliver NSB, the namespace browser, component implemented
13 with the common open dialog by required code complete date.
14 The application programming interface will be locked down at
15 that time too. Deliver a fully functional NSB, including a
16 functional namespace provider for the file system during
17 beta.

18 And I believe you were asked -- in response to a
19 question that you were asked before as to whether this
20 reflected that you all decided to use Microsoft's common
21 open dialog, you described that as a place holder. Do you
22 recall that?

23 A Yes.

24 Q What did you mean by a place holder?

25 A Place holder is just -- it was useful for testing and

1 debugging. So if a developer wanted to open a WordPerfect
2 document that had a bunch of things in it already set up,
3 you would hit open dialog. That's what we did. We couldn't
4 test the other functionality in file open, but we could at
5 least open the document.

6 Q Why couldn't you test the other functionality at that
7 point?

8 A Because the new open dialog was not code complete, was
9 the real one that we wanted to include in the suite, but it
10 wasn't ready yet.

11 Q Is that the one that Mr. Harral and Mr. Richardson's
12 group was working on?

13 A Yes.

14 Q You were asked -- I think you were shown a portion of
15 your deposition when you were asked about, you know, the
16 various reasons or the reasons why the PerfectOffice Suite
17 shipped late. And I believe one of the things you
18 referenced was sort of the integration across all the
19 products. Do you remember that in your deposition?

20 A Sure.

21 Q And when you refer to integration across all the
22 products, did that include integrating technology like file
23 open dialog and things like that?

24 A Yeah, integration -- when I refer to that, I'm thinking
25 of shared code because that's how we integrate across

1 products.

2 Q And do you remember being asked in your deposition what
3 was critical path?

4 A Yes.

5 Q What did you tell the counsel for Microsoft during your
6 deposition what critical path was for PerfectOffice?

7 A I think it was the same thing. I think I told them it
8 was, you know, the open dialog and the PerfectFit team on
9 top of that. So shared code and specifically underneath it
10 was open dialog.

11 MR. SCHMIDTLEIN: That's all I have, Your Honor.

12 THE COURT: Thank you, Mr. Schmidtlein.

13 Any recross?

14 MS. NELLES: Very quickly, Your Honor.

15 RECCROSS-EXAMINATION

16 BY MS. NELLES:

17 Q Can we put up DX-635 one more quick time? And the
18 bottom paragraph on the first page.

19 I just want to confirm that you just told Mr.
20 Schmidtlein that all of these items were add-on features,
21 correct?

22 A Well, these weren't the core features that we were
23 saying, because I think what the brainstorm was is that Alan
24 was saying, these are the next things we should be adding.
25 And I was saying, these are the more important things to be

1 adding.

2 Q Not the core features?

3 A Not the core features.

4 Q Let's look at DX-4, which Mr. Schmidtlein showed you on
5 redirect. This was the August 3, 1994 plan submitted by
6 Quattro Pro?

7 A Yes.

8 Q Can we go to page 1, please. And under key points, the
9 third bullet down -- some key points, filling the holes that
10 were left with the acquisition of the Quattro Pro business.
11 The positions of the development and marketing people that
12 did not make the transfer were never filled.

13 It is correct, sir, isn't it, that development and
14 marketing people left and were never replaced?

15 A I assume this is accurate, so I think so.

16 Q And if we could turn to page 5, please. Under business
17 applications, you see these are the key issues. The very
18 first one, getting company resources focused on supporting
19 Quattro Pro, including within our business unit. Biggest
20 issue is that there is very little support currently for
21 Quattro Pro within international sales.

22 That was true in August 3rd, 1994, wasn't it?

23 A I assume it's true. Like I said, international sales,
24 I don't even work with those guys, per se.

25 Q And it was also true that there were very few resources

1 on Chicago at this time, right?

2 A At this time they were working -- yeah. I think they
3 were focused on international.

4 Q And to go back to the slide -- opening slide 27. And I
5 apologize that PerfectOffice is not on there. So if you can
6 all imagine PerfectOffice at the end of 1994, and if you can
7 imagine it in red, it would be nice.

8 Mr. Gibb, you testified on redirect that, in fact, one
9 of the reasons for the merger, the acquisition of Quattro
10 Pro was to assist you in better putting together and
11 marketing the suite product, right?

12 A Yes.

13 Q You would agree with me, wouldn't you, that what this
14 demonstrative shows, particularly when you add in the
15 PerfectOffice, is the classic tradeoff between product
16 features and product release date, right?

17 A Sure.

18 Q And last question, on redirect you made the following
19 statement, being there on the platform was a much higher
20 priority than a feature war. It was -- yeah. We had done
21 features wars for a long time -- a long, long time, and that
22 wasn't a priority?

23 A Right.

24 Q You stand by that testimony, don't you?

25 A Yes, I do.

1 MS. NELLES: Thank you.

2 THE COURT: Thank you very much.

3 I think the next witness is by deposition,
4 correct? You're going to resume the videotape -- or is it a
5 new one?

6 You can step down, Mr. Gibb.

7 MR. JOHNSON: Before we -- actually we're going to
8 go back to Mr. Silverberg, which you may recall we didn't
9 complete before. But before we do that, I would like to
10 read in the document request and our response that Your
11 Honor allowed me to.

12 THE COURT: Of course, of course. This is what we
13 talked about yesterday?

14 MR. JOHNSON: Yes, precisely, Your Honor.

15 This is a document request during discovery in
16 this case. This is document request number three contained
17 in Microsoft's second set of requests for production and our
18 objections and responses thereto.

19 Document request number three, all specifications,
20 documentation, source code and object code for any software
21 program developed by Novell that relied on or invoked any of
22 the following APIs exposed by any version of the PC
23 operating system referred to as Chicago or Windows 95. And
24 it goes on to list the particular APIs, IShellBrowser,
25 IShellFolder, IShellView, IPersistFolder and

1 ICommDlgBrowser. I'm sure I'm mispronouncing that.

2 Novell's response is as follows. Response:
3 Novell objects to this request as unduly burdensome. The
4 burden and expense of searching for, retrieving, and
5 producing documents responsive to this request would
6 outweigh any potential benefits stemming from such
7 production. Novell also objects to this request to the
8 extent it seeks electronically stored information not
9 reasonably accessible because of undue burden or cost.

10 Novell further objects to this request on the
11 grounds that it is vague, ambiguous, and overbroad. Novell
12 objects to this request on the grounds that it is vague,
13 ambiguous, overbroad, and unduly burdensome in its use of
14 the terms relied on and invoked.

15 In addition, Novell objects to this request
16 because it seeks source code. As indicated in its
17 objections and responses to this Microsoft's first set of
18 requests for production, Novell will not produce documents
19 containing source code absent a protective order between the
20 parties governing the production of such information.

21 Subject to and without waiving its objections,
22 Novell responds that Novell and Microsoft previously agreed
23 on a protocol to electronically search, using agreed upon
24 terms, one day of the backup tapes for documents responsive
25 to Microsoft's first set of requests for production. The

1 agreed upon search terms included the terms IShellBrowser,
2 IShellFolder, IShellView, IPersistFolder and
3 ICommDlgBrowser. Novell has produced over 18 million pages
4 of documents from that one day of backup tapes, which may
5 include the information Microsoft now seeks if such
6 information existed. This request is inconsistent with the
7 parties' prior agreement, and is duplicative of prior
8 discovery requests.

9 Moreover, Microsoft waived any right it has to
10 seek source code now. Microsoft failed to seek source code
11 in its first set of requests for production and failed to
12 ask for source code in connection with the agreed upon
13 protocol concerning the backup tapes. In addition,
14 Microsoft's decision to make IShellBrowser, IShellView,
15 IPersistFolder, and ICommDlgBrowser private and IShellFolder
16 a read only public interface, effectively prevented Novell
17 from using the namespace extension mechanism and/or
18 implementing the mechanism in a customized fashion.
19 Therefore, as a practical matter, no software that Novell
20 developed could rely upon or invoke those APIs.

21 Thank you, Your Honor.

22 MR. HOLLEY: Your Honor, may I be heard at the
23 bench about what Mr. Johnson just did?

24 (Bench conference held.)

25 THE COURT: Nobody ever raised, nobody asked me to

1 rule on the validity of the objections. Microsoft takes the
2 position it never agreed with what Novell says and what was
3 just read. Really it's a lot about nothing. It was for the
4 context in which the last statement was made, and consider
5 that. Everything else never has been ruled upon. There is
6 no -- the parties may disagree about what the agreements
7 were, but nobody ever asked me, nobody ever filed any kind
8 of motion, thank God, to make me rule upon it.

9 So the important thing is just consider that.
10 It's nothing about nothing, something about nothing, or
11 nothing about nothing. But the important thing was I
12 thought it should be read because there was some dispute
13 because it was cross-examination of the last couple of
14 sentences, and I just wanted you to know the context.

15 MR. JOHNSON: Thank you, Your Honor, very much.

16 At this time we would like to return to the
17 deposition of Mr. Silverberg, which I guess we started last
18 week but we didn't get to finish.

19 THE COURT: We have two open ends. Mr. Johnson
20 will respond to when he finds the time, and we also have to
21 finish this videotape.

22 MR. JOHNSON: Thank you.

23 THE COURT: I'm sorry. Breaking it out this way
24 is confusing to you all. I'm trying to convenience the
25 people who are here live, that's why we're doing this.

1 The Court reporter does not have to re-record
2 this?

3 MR. JOHNSON: Yes, Your Honor, we agree.

4 Mr. Goldberg has never let me down before, Your
5 Honor.

6 THE COURT: High tech kind of stuff.

7 MR. TULCHIN: For context, could we say again when
8 this deposition was taken?

9 THE COURT: The deposition was taken when?

10 MR. TULCHIN: 2001, I believe.

11 MR. JOHNSON: No. This was 2009. I will get you
12 the exact date, if you would like.

13 MR. TULCHIN: 2009. I'm sorry.

14 MR. TULCHIN: I don't know if we can help, Your
15 Honor. We may not have this on our system.

16 MR. JOHNSON: The exact date, Your Honor, was
17 January 22, 2009.

18 THE COURT: Thank you.

19 MR. WHEELER: Mr. Goldberg, is this supposed to be
20 plugged in?

21 MR. GOLDBERG: No, it's not.

22 (Videotaped deposition played)

23 MR. JOHNSON: Rather timely, if I say so myself,
24 Your Honor.

25 THE COURT: Six minutes short.

1 MR. JOHNSON: We could run six minutes of another
2 tape, but I don't think that would be very useful.

3 THE COURT: Why don't you?

4 MR. JOHNSON: To break it up that much, Your
5 Honor -- you remember we broke at a convenient point?

6 THE COURT: I am a task master. I don't want to
7 be an unreasonable task master.

8 Have a nice evening. See you at eight o'clock and
9 I'll stay with counsel to discuss matters.

10 (Jury excused)

11 THE COURT: The question I had is Microsoft has
12 now filed its response, which I have. Thank you for the
13 hard copy. I haven't read it yet. I can go read it now and
14 have you all stay. It seems to be a waste of your time. I
15 can read it and we can take it up at quarter of eight
16 tomorrow, or else we can take it up at the close of business
17 tomorrow, which means there wouldn't be -- whatever decision
18 I make wouldn't be implemented before the jury until Monday
19 morning.

20 MR. JOHNSON: Your Honor, if I may, since we're
21 only having movie day tomorrow, it won't matter in the
22 least. So I think we could take it up tomorrow. I didn't
23 receive a copy myself. I would like to read it.

24 THE COURT: Do you want to take it up tomorrow
25 morning?

1 MR. JOHNSON: Tomorrow afternoon would be fine,
2 Your Honor.

3 Mr. HOLLEY: That's fine, Your Honor.

4 THE COURT: Anything else?

5 MR. JOHNSON: No from plaintiff, Your Honor.

6 THE COURT: Back in my office they are getting
7 together for me all the expert reports together. If it's
8 not -- I probably won't be able to read it until I get back
9 to Baltimore. If any of you have Dr. Noll's report in hard
10 copy, just give Teresa a copy sometime.

11 MR. JOHNSON: There is an initial report and the
12 rebuttal report.

13 THE COURT: The more I know, the more I understand
14 it. In fact, I'm re-reading Mr. Gates's deposition right
15 now. Actually don't bother. I'm not going to read it until
16 I get back to Baltimore.

17 MR. SCHMIDTLEIN: We can send one back to
18 Baltimore overnight.

19 THE COURT: If they can't find it in the drawers,
20 you guys can do it. I asked them this morning to get all
21 the expert reports. I told them where they were. I'm sure
22 they found them. I was just trying to make good use of my
23 time. Thank you all.

24 (Whereupon, the trial was continued to Thursday,
25 October 27, 2011 at 8:00 a.m.)