

1 THE COURT: We'll get the jury.

2 (Whereupon, the jury returned to the court
3 proceedings.)

4 THE COURT: Mr. Johnson?

5 MR. JOHNSON: Thank you, Your Honor.

6 Now for something a little different, we're going
7 to have a very short reading. This was from the deposition of
8 Mr. Silverberg. As you remember, Mr. Silverberg, we saw his
9 deposition, the remainder portions of his deposition
10 yesterday. This deposition we're about to read from, which we
11 don't have video of, was taken in 1994. And Mr. David
12 Witebsky, who's on the stand, is going to play Mr. Silverberg.
13 And I'm going to ask the two questions involved.

14 THE COURT: You need a beard and a sweater.

15 THE WITNESS: And less hair, sir.

16 (Whereupon, the following testimony was
17 read into the record:)

18 Q. What is your understanding of AppWare?

19 A. AppWare is an upgrading system. AppWare contains
20 all of the functions of an operating system and is a wonderful
21 attempt by Novell to again reduce Windows or anything
22 underneath it to a commodity so it could then get applications
23 completely dependent on AppWare, have no dependence on
24 Microsoft or other pieces underneath it, so they can then
25 supply their own pieces underneath it and thus eliminate -- as

1 Mr. Noorda has stated, his goal is a Windows-free world.

2 Q. What about OpenDoc, do you regard that as an
3 operating system?

4 A. I regard OpenDoc as an essential operating system
5 component. At the recent Apple worldwide developer conference
6 Apple got up on stage in front of thousands of developers and
7 indicated that OpenDoc was its essential operating system
8 strategy for competing with Microsoft and ridding the world of
9 Windows.

10 Q. How do you understand that OpenDoc would achieve
11 that, based upon what you had heard from Apple or learned?

12 A. By my understanding -- I have not seen the
13 specification for OpenDoc. As you may be aware Apple refused
14 for over a year to send us the specification for OpenDoc. And
15 so the details about OpenDoc are relatively sketchy. But
16 based on my understanding of what was presented at the Apple
17 worldwide developers conference, Apple saw and was presenting,
18 positioning OpenDoc as their key operating systems strategy to
19 get developers to write to their interfaces, and thus not be
20 dependent upon any interfaces from other suppliers, and thus
21 rid the world of Windows.

22 MR. JOHNSON: Thank you.

23 THE COURT: Thank you, Mr. Johnson.

24 What's next?

25 MR. JOHNSON: Next, Your Honor, we are going to

1 play the portions of the deposition of Mr. Jeff Raikes. You
2 may remember Mr. Raikes was the one that sent the e-mail to
3 Mr. Buffett, and that would be the subject of examination.
4 This deposition was taken January 27th, 2009. It runs one
5 hour and eight minutes.

6 THE COURT: Thank you.

7 (Whereupon, portions from the video deposition
8 of Mr. Jeff Raikes were played.)

9 (Whereupon, the video deposition was stopped.)

10 MR. JOHNSON: Sorry, Your Honor.

11 (Time lapse.)

12 MR. JOHNSON: Perhaps a short break, and we can try
13 to get this fixed, or we could certainly go to another one, if
14 you prefer to do that.

15 (Whereupon, the video deposition resumed.)

16 (Whereupon, the video deposition was stopped.)

17 THE COURT: Do you want to take a recess?

18 MR. JOHNSON: Let's take a recess. Thank you.

19 THE COURT: I'll stay here with counsel for a
20 second. You all take a recess.

21 (Whereupon, the jury left the court proceedings.)

22 THE COURT: Mr. Tulchin, you haven't been fooling
23 around with their equipment?

24 MR. JARDINE: Speechless.

25 MR. TULCHIN: We'll have something to say in due

1 course, Your Honor.

2 (Recess.)

3 THE COURT: Okay. All worked out?

4 MR. JOHNSON: We think so, Your Honor.

5 THE COURT: Okay. Let's get the jury.

6 MR. JOHNSON: And our apologies.

7 THE COURT: No problem.

8 MR. JOHNSON: It was one of those nasty bugs.

9 THE COURT: Exactly. You need 60A or whatever it
10 is.

11 MR. JOHNSON: Yes.

12 (Whereupon, the jury returned to the court
13 proceedings.)

14 THE COURT: Okay. Let's continue. I think the bug
15 has been fixed.

16 MR. JOHNSON: Thank you, Your Honor. We're going
17 to try again.

18 (Whereupon, the video deposition resumed.)

19 THE COURT: Can we go another 15 minutes? Do you
20 have anything else to do? It's just been so truncated today.
21 It's up to you.

22 MR. JOHNSON: Right. Your Honor, we have more
23 tapes to play.

24 THE COURT: Why don't we begin. I think the jury
25 will probably like to stay a little bit longer, I know how

1 conscientious they are, and hear a little bit more.

2 MR. JOHNSON: Okay. Yeah.

3 THE COURT: And then we'll stop around 20 or
4 quarter of, something like that. Tell me when you reach a
5 spot.

6 MR. JOHNSON: Right. About 20 of we'll try to
7 reach a breaking spot.

8 THE COURT: Yeah. 20 of. And then try to have an
9 hour and a half after lunch.

10 MR. JOHNSON: Okay.

11 THE COURT: More or less.

12 MR. JOHNSON: So we're now going to see the
13 deposition of Mr. Scott Raedeke of Microsoft. This was taken
14 February 3rd, 2009. It is 57 minutes long. Portions of his
15 testimony, not it all.

16 (Whereupon, portions of the video deposition
17 of Scott Raedeke were played.)

18 (Whereupon, the video deposition stopped.)

19 MR. JOHNSON: Maybe we'll take our lunch break
20 sooner.

21 THE COURT: We may. But --

22 (Whereupon, the video deposition resumed.)

23 THE COURT: Why don't we break for lunch. If you
24 think the lunch is here?

25 We'll break for lunch. And I'll stay with counsel

1 here for just a second. See you in about 20 minutes.

2 (Whereupon, the jury left the court proceedings.)

3 THE COURT: I'm making -- please be seated. I'm
4 making these comments, not that I've reached any final review,
5 but things I'm going to have to understand. And the way my
6 mind works, I understand it better if I express it as I go
7 along. And sometimes I change my own mind, but I'm happy to
8 have argument at the appropriate time, which may -- I may find
9 enlightening.

10 I certainly understand Novell's position as
11 recently stated by Mr. Schmidtlein, that you can't blame
12 Novell that it had to be dealing with a monopolist. But
13 somehow, and I still have a hard time perhaps articulating
14 this. Particularly based upon Mr. Harral's testimony I did
15 not get the impression that he was looking at Windows 95
16 simply because Microsoft had a monopoly on it. He wanted his,
17 the best I can say, he didn't use these words, but he wanted a
18 marriage with Microsoft. It's also reflected in that, and I
19 forget the date of the e-mail or the memo, that people at
20 WordPerfect were excited about Windows 95 because it was a
21 better product. They wanted to work with it.

22 And I understand that during the relevant period
23 according to Novell Microsoft did things that prevented
24 Word -- excuse me -- prevented WordPerfect from being a
25 competitive and perhaps more importantly PerfectOffice from

1 being a competitive suite with Office. And as I say, in terms
2 of if -- in fact, what was happening back then, I still
3 haven't heard all the evidence, that Microsoft was allowing
4 Office to have access to APIs it was not allowing to
5 WordPerfect that, if that is the fact, then perhaps over time
6 theoretically, speculatively Microsoft was widening the moat
7 by making Office, by advantaging Office over WordPerfect.

8 But I still think, and this is where it becomes
9 conceptually confusing, I did not accept the fact that the
10 claims are the same with, attempting to monopolize in the
11 Office suite market is the same as the attempt to maintain the
12 monopoly in the operating system market. I understand they're
13 related, but I don't -- my view of the evidence so far that
14 isn't -- I'm understanding more why that's not the case,
15 particularly Mr. Harral's testimony, because what is lacking
16 so far, maybe who knows, you're going to present this
17 evidence, that there was some other operating system that was
18 rich enough, expansive enough within a longer period of time
19 that it would have gone to rather than Windows 95 to provide
20 the enhancements that it saw Windows 95 presented.

21 But there is no evidence of that so far. In fact,
22 what I have before me is Mr. Harral saying, we loved
23 Windows 95 because it was a technological breakthrough. It is
24 because it was a better operating system.

25 And if that is the case, I have a very hard time

1 seeing that somehow, although on a theoretical level maybe an
2 academic sees it that way or maybe one can construe looking at
3 the government's case, that somehow this is what, by
4 destroying Word in the marketplace, it was somehow was
5 enhancing its position in the operating system market.

6 In terms of the facts, that is not what I have
7 heard. In terms of the facts what I have heard is by
8 withdrawing support for the APIs or whatever, WordPerfect
9 couldn't marry Windows 95, and it wanted to marry Windows 95
10 to make Windows 95 the very best it could be, to make their
11 WordPerfect the very best that it could be, but there simply
12 is -- and maybe it's coming. That's why it's so -- but there
13 is no evidence that there was any alternative operating system
14 that was going to provide the enhancements and benefits that
15 Word -- excuse me -- that Windows 95 did.

16 And absent that proof, I think that may be where we
17 break down, and that is where Novell's apparent ideological
18 position is to claim that they were attempting to monopolize
19 the Office suite market translates into them trying -- you
20 know, that that makes it the same claim as trying to
21 monopolize, maintain a monopoly in the operating system
22 market. I don't see that. What I see right now is that
23 Microsoft -- and maybe other people could have done it, but
24 they hadn't done it, that Microsoft had made a better product
25 that came out in August of '95 or whatever, and WordPerfect

1 wanted to marry that product. And it wasn't -- and the fact
2 that it wasn't allowed to do so may have -- it may be an
3 antitrust violation if one user from -- attempted to
4 monopolize the Office suite market. But it does not
5 automatically mean to me that that means that from an
6 antitrust point of view, Microsoft absent evidence that there
7 was some alternative within a reasonable foreseeable future.
8 I didn't see that from Mr. Harral. I haven't heard at all
9 from Novell so far. Maybe it's coming.

10 But that somehow within the reasonable time frame,
11 whether it's '96 or reasonably foreseeable after '96 that
12 there was anything that Novell could have done other than to
13 marry itself to Windows 95, particularly because what happened
14 was was that Microsoft through the deliverance of R&D and the
15 superiority allegedly of others, programmers come up with a
16 better product. And if that's the case, I think that Novell
17 may have a problem.

18 And I'm not asking for responses. I'm just sharing
19 this with you because this is about -- you know, this is a
20 process that I have to understand it sometime, and to the
21 extent that you know where I am, the better.

22 MR. SCHMIDTLEIN: Your Honor, it is very helpful to
23 get your thoughts on these things, you know, and not wait
24 until the very end, and we don't know what you're thinking.

25 THE COURT: Sure.

1 MR. SCHMIDTLEIN: And it's very, very helpful. And
2 we know you're going to keep an open mind throughout the whole
3 thing.

4 THE COURT: I've got an open mind. I haven't heard
5 it all. That's not -- this is a complex issue for me.

6 MR. SCHMIDTLEIN: Yes.

7 THE COURT: And I've come back to it a thousand
8 different ways, and what you said you said it very clearly.
9 You can't blame Novell that it had to deal with a monopolist.
10 But they had to be using monopoly power to do something. And
11 if, in fact, they enhanced the product and that's what you
12 wanted to marry, that's an issue. I'll hear from you down the
13 line.

14 MR. SCHMIDTLEIN: We hear you loud and clear, Your
15 Honor. And it's very helpful. Thank you.

16 (Recess.)

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