

1 THE COURT: Let's get the jury.

2 (Jury present)

3 THE COURT: All right. We'll resume the
4 deposition.

5 (Videotaped deposition played)

6 MR. JOHNSON: That concludes Mr. Raedeke.

7 THE COURT: What's next?

8 MR. JOHNSON: We actually have one that will fit
9 in nicely, very close to 39 minutes long, Mr. Doug Henrich,
10 a Microsoft employee, dated January 8th, 2009.

11 THE COURT: You all can stay five minutes late,
12 can't you?

13 Shall we take a break?

14 MR. JOHNSON: I think that would be a good idea,
15 Your Honor. My apologies.

16 THE COURT: No reason to apologize. I'm ready as
17 soon as the machine is.

18 (Jury excused)

19 (Recess)

20 THE COURT: How long for this person?

21 MR. JOHNSON: Twenty minutes.

22 THE COURT: If I were, Mr. Johnson, please don't
23 be mad at anybody, don't be upset at anybody on your team
24 about this.

25 MR. JOHNSON: It's technology.

1 THE COURT: Technology is technology, unless it's
2 Novell or Microsoft technology.

3 MR. JOHNSON: We were talking about the days when
4 you just used paper.

5 (Jury present)

6 THE COURT: We're going on to somebody else who is
7 only 20 minutes long. I told Mr. Johnson if I were, I
8 wouldn't be upset. We all agree it's technology. Nobody is
9 going to be angry. It is somewhat ironic we are having
10 technology failures in this trial.

11 MR. JOHNSON: The good part about it is that we
12 have deposition excerpts of all different lengths. We went
13 down to one that was 20 minutes. Actually, we're going to
14 see Mr. Paul Maritz again as a younger man. This time his
15 deposition was taken on 5-24, 1994. It's about 20 minutes.

16 (Videotaped deposition of Paul Maritz was played)

17 THE COURT: Next week we have off, you all have,
18 so we'll see you all at eight o'clock on Monday -- what day?

19 MR. TULCHIN: The 7th of November, Your Honor.

20 THE COURT: See you in November. I'll stay here
21 with counsel. There is one issue we've got to talk about.
22 Have a good Halloween, everybody. You all look great.
23 Don't talk about the case with anybody, please.

24 (Jury excused)

25 THE COURT: Okay. You all be seated.

1 We, of course, have at least one issue, which
2 was -- I read your papers in connection with whether or not
3 Microsoft opened the door to production to the jury --
4 presentation to the jury to documents that were given to the
5 DOJ at some point.

6 Mr. Johnson.

7 MR. JOHNSON: Thank you, Your Honor. I thought it
8 might be important for Your Honor to actually see in context
9 what was stated at the opening of Microsoft.

10 We have highlighted the portions of the opening in
11 which Microsoft stated to the jury, without limitation, at
12 the time Novell never complained about Mr. Gates' decision
13 to withdraw the namespace extension APIs. That's October of
14 1994. Novell didn't even file this lawsuit until November
15 of 2004, more than ten years later. So when you hear that
16 there was a deception and hypocrisy and spin, when the
17 lawyer says it was all a facade, this conduct that allegedly
18 is so bad -- and it's easy to toss around those words.
19 That's what the courtroom is for, for the evidence. This
20 conduct that was supposedly so bad, Novell said nothing
21 about it at the time and waited more than ten years before
22 it even brought this case and filed the lawsuit.

23 And then on the next page, he returned to the same
24 theme. As I told you when I started this opening statement
25 way back when, though the decision was made in '94 and

1 Novell made no complaint in 1994, the lawsuit was filed ten
2 years later. If this decision had been such a killer for
3 Novell and made life so impossible, if there was no way for
4 Novell to compete in the market, I ask you, because as a
5 juror you don't have to leave your common sense home, would
6 Novell had remained silent at the time?

7 So that was the theme that was repeated several
8 times in the opening of Microsoft.

9 Now Your Honor did try to address the harm caused
10 by the ten year reference, which obviously we thought was
11 very out of line. Your Honor told the jury that the ten
12 years, they shouldn't worry about it, we were within our
13 rights. But you did say that it was fair comment to ask why
14 was there no complaint. And even in your own comment to the
15 jury you didn't say, Your Honor, that there was no complaint
16 to Microsoft. You said that it was fair to look at whether
17 there had been complaints with respect to Mr. Gates'
18 conduct. So we have, then, both the Court and the opening.

19 THE COURT: I don't know what the evidence is
20 about. I know what Microsoft's evidence is about whether
21 complaints to Microsoft were made. I don't want to
22 oversimplify this. Maybe having had the high school students
23 here, isn't there something unseemly to tattle to the
24 teacher but not say something to the person who stuck their
25 finger in your eye?

1 MR. JOHNSON: The evidence will actually reflect
2 when we get there, Your Honor, that the student did complain
3 to -- well, to Mr. Gates about their conduct with respect to
4 undocumented APIs and keeping the interfaces to themselves
5 during this period. But the evidence is going to reflect
6 that Mr. Gates refused to talk about that.

7 And you are going to have to understand that
8 Mr. Gates has a great deal of power over ISVs, not only with
9 respect to Windows but with respect to many aspects of their
10 business. So that if you press a point with Mr. Gates on
11 one front, he attacks you on another.

12 And so the evidence will reflect that in order to
13 get some cooperation from Mr. Gates in other areas of their
14 business, part of the quid pro quo, if you will, is stop
15 talking about that antitrust stuff, Mr. Frankenberg, for
16 instance.

17 So when you have that kind of situation where
18 Mr. Gates won't talk about it and the government comes to
19 you and says, what kind of things is Microsoft doing that is
20 interfering with your business, and we have these multiple
21 e-mails which say first order -- first thing they did, which
22 we find very destructive, is that they pulled these APIs
23 that they had sold us on, and they have left us in a real
24 bind here -- this is in 1995 -- in trying to develop our
25 product. And they go on in great detail about we're having

1 to rewrite our file open dialog from scratch, et cetera, et
2 cetera, in these e-mails.

3 It isn't so much whether that's true or not. I
4 think the evidence that we have already seen confirms that
5 it is true. Mr. Harral and Mr. Richardson talked about that
6 in great deal.

7 But the fact of the matter is we didn't remain
8 silent, Your Honor. We were -- it's not like -- see, the
9 implication given to the jury, I think that's what's
10 important here and that's why the door was opened. The
11 implication given to the jury was they never complained
12 about it at the time, and then they cooked up this lawsuit
13 ten years later, some clever lawyer sitting in the back
14 room.

15 And, in fact, as Your Honor may recall yesterday
16 during Mr. Gibb's --

17 THE COURT: They should have kept their documents,
18 which is a whole other issue. It frankly upsets me the more
19 I hear about it. I still don't think the spoliation
20 instruction should be given. Why keep all the documents
21 that help you and destroy the ones that are contemporaneous,
22 relevant or not, is not so relevant?

23 MR. JOHNSON: Well, Your Honor, in that regard, I
24 don't we think destroyed any documents.

25 THE COURT: You didn't keep them.

1 MR. JOHNSON: I'm not willing to concede that,
2 Your Honor. The fact of the matter is we heard testimony
3 that, in fact, there would have been records kept by
4 Microsoft with respect to Premier Support.

5 THE COURT: That was the most trivial as opposed
6 to contemporaneous code and all kinds of things. That's
7 something wouldn't they have written down context with the
8 group? It was not, in my mind, compelling. I heard the
9 testimony. I wasn't impressed by it.

10 MR. JOHNSON: The other thing that happened during
11 Mr. Gibb's testimony, Your Honor, is that they referred to
12 internal Microsoft communication in which someone at
13 Microsoft stated -- I think it was Brad Struss, which I
14 guess we're going to hear from, which is very interesting
15 because he says so far Stac, Lotus, WordPerfect, Oracle, SCC
16 appeared to be okay with this. So there was, again, a
17 reference like we're okay with it, it wasn't really a
18 problem directly from their documents.

19 There was cross-examination on this point, of
20 course, that ignores mounds of evidence that it really was a
21 problem. We're going to get to some of that later. But the
22 point is, again, we have the implication that this was not a
23 problem with us, we never complained about it. So the door
24 was opened and the jury has this inference that this wasn't
25 a big deal for us. It's been stressed and it's going to

1 continue to be stressed during the course of the trial.

2 Now if they didn't want to open that door, they
3 didn't have to say that to this jury. The lawyers at
4 Microsoft are very smart. They don't make mistakes with
5 what they say in opening statements.

6 THE COURT: You worry about the lack of brains on
7 the other side.

8 MR. JOHNSON: Exactly, Your Honor.

9 So having said that, that was a conscious decision
10 to tell this jury that we never complained, not only not to
11 Microsoft, they didn't phrase it that way, they said
12 repeatedly we never complained, period. And further, that
13 we then waited ten years to file this case.

14 You can't say that and not open the door to the
15 fact of the matter that we did complain. And we complained
16 not only in a timely manner but with specific reference to
17 the conduct that we're angry about in this case.

18 So I think --

19 THE COURT: I understand.

20 Mr. Paris, what's your position on this?

21 MR. JOHNSON: Thank you, Your Honor.

22 MR. PARIS: Thank you, Your Honor.

23 I don't think Novell gets to introduce
24 inadmissible hearsay evidence that was created in
25 anticipation of litigation against Microsoft, from the

1 government against Microsoft because of some supposed
2 implication in Microsoft's opening statement that we think
3 their claim lacks merit for a lot of different reasons. I
4 think it's very important here, when what they are saying is
5 you opened the door somehow, to read what was actually
6 stated by Mr. Tulchin in his opening statement. And there
7 are two points which they say opened the door, one of which
8 Mr. Johnson didn't just read to you. So I think it's
9 important that we do it.

10 Here we've given -- I think both sides have, Your
11 Honor, we have given it to you as part of the Holley
12 declaration, pages 140 to 141.

13 THE COURT: Is he back in New York or is he sick?

14 MR. PARIS: So starting at 140, line 2, you need
15 to hear it all.

16 THE COURT: Having those two big books in front of
17 him.

18 MR. SCHMIDTLEIN: He's talking to Mr. Richardson.

19 MR. PARIS: The books are compelling reading.

20 THE COURT: I'm sure they are.

21 MR. PARIS: So let me take you first through the
22 first area that they say opened the door to this hearsay
23 litigation evidence. It starts at line 2, page 140. We
24 don't think there will be any evidence that Mr. Gates
25 withdrew support for the namespace extensions to hurt

1 Novell. In fact, Brad Struss, S-T-R-U-S-S, will come
2 testify, he worked for Microsoft then, still does today.
3 Mr. Struss had a relationship with WordPerfect and Novell.
4 He spoke frequently to someone at Novell named Norm
5 Creighton. Mr. Struss was told before Mr. Gates made the
6 decision that Novell was not working on the namespace
7 extension APIs. And Mr. Struss wrote an e-mail after
8 Mr. Gates made the decision ten days or two weeks later in
9 October of '94 saying that WordPerfect appears to be okay
10 with the decision to withdraw support for the namespace
11 extensions. WordPerfect appears to be okay. No one at
12 WordPerfect said to Microsoft at the time, boy, if you
13 withdraw support for the namespace extensions, this is a
14 huge problem for us, for WordPerfect or Novell. Microsoft
15 thought the contrary. And Mr. Struss will come tell you,
16 and you'll see his e-mail.

17 Incidentally, that e-mail is now in evidence as
18 DX-3. It came in, I think, through Mr. Richardson.

19 THE COURT: I think I allowed examination through
20 the witness of that e-mail because he didn't know anything
21 else about the e-mail, if my memory is right about the
22 document.

23 MR. JOHNSON: It is, Your Honor.

24 MR. PARIS: Fair enough, Your Honor.

25 THE COURT: He denied knowing about the document,

1 but the document is going to come in.

2 MR. PARIS: Thank you, Your Honor.

3 This actually goes right to the point that you
4 said before about whatever it was, tattling to the teacher
5 instead of telling the person. I would ask Your Honor -- I
6 don't know, but I would ask you to think long and hard of
7 all the cases you've heard, if there's ever been a case
8 where you have two businesses, you know, working together in
9 a contractual relationship. We provided them with the
10 MX beta pursuant to the beta license agreement. The parties
11 are working together with WordPerfect to develop, you know,
12 these products for Windows 95. And at some point party A
13 does something that party B believes is contrary either to
14 the letter of their agreement or the spirit of their
15 agreement, or something, and at the time that happens says
16 nothing about it, says nothing about it to the other side,
17 A, you can't do this or doing this will really hurt me, or
18 whatever. That's a pretty extraordinary circumstance.

19 So, anyway, continuing with Mr. Tulchin's
20 statement, we don't think there will be any --

21 THE COURT: Jobs position is you don't tell the
22 bully.

23 MR. PARIS: Okay, but other people told the bully.
24 There is evidence to that fact that came in today through
25 Mr. Maritz.

1 THE COURT: The alleged bully.

2 MR. PARIS: Anyway, the point simply is, Your
3 Honor, a number of the people were using namespace
4 extensions without an issue. That's in the documents as
5 well.

6 We don't think there will be any evidence, no
7 document from Novell, contemporaneous document written in
8 1994 and 1995 that will indicate that anyone complained to
9 Microsoft about the decision. That's the statement as it
10 begins. This is the part that I think Mr. Johnson did read
11 to you, 141, beginning at line 3, as I told you when I
12 started this opening statement way back when -- like a walk
13 down memory lane -- though the decision was made in '94 and
14 Novell made no complaint in 1994, the lawsuit was filed ten
15 years later. If this decision had been such a killer for
16 Novell, had made life so impossible, if there was no way for
17 Novell to compete in the market, I ask you, because as a
18 juror you don't have to leave your common sense at home,
19 would Novell have remained silent at the time?

20 Passing the issue about the ten years on the
21 complaint for which Your Honor as already issued a jury
22 instruction, these statements are all very clear that what
23 we were talking about were statements made by Novell to
24 Microsoft -- the absence of any statements made by Novell to
25 Microsoft at the time in October '94 when this decision was

1 made.

2 And I think the only other --

3 THE COURT: I think the position also is what they
4 want to put in is inadmissible anyway?

5 MR. PARIS: Absolutely. I can move -- I already
6 had, Your Honor, because I think I can read from pages 90 to
7 91 of the transcript where the issue first came up,
8 essentially talking about the same -- of the same spirit.

9 Furthermore, you know, even if there was somehow
10 some contention that it opened the door, the Federal Rules
11 of Evidence don't go out the window when you open the door.
12 The fact of the matter is these documents are inadmissible
13 hearsay statements made to the federal government in the
14 interest of Novell's anticipating litigation against one of
15 its principal competitors.

16 THE COURT: Of course, it wouldn't be introduced
17 for the purpose of the truth of the fact they were made,
18 that they spoke.

19 MR. PARIS: I think it's virtually -- will be
20 virtually impossible for this jury to distinguish between
21 those two items, Your Honor. These things are so unduly
22 prejudicial under Rule 403 that the jury is supposed to take
23 away from them, these documents, again, that were compiled
24 specifically to obtain prosecution of Microsoft. So there
25 is no pretense here that they were trying to be fair or that

1 they were doing it -- Novell was doing it in the ordinary
2 course of business, or any of that. These were designed to
3 build a case.

4 And under a couple of cases that I think we've
5 cited to you several times now when this issue first came up
6 a couple weeks ago back in Baltimore, and then again in a
7 brief that we filed the other night, one is the Gwathney
8 case at 465 F.3d 1133, page 1140, Tenth Circuit case, 2006,
9 the other is the Timberlake Construction case, 71 F.3d, page
10 335, the discussion at page 341, again Tenth Circuit.
11 That's 1995. Both of those cases speak to the problems that
12 are associated with introducing these sorts of documents in
13 a trial that are hearsay and that clearly were designed
14 simply to -- basically in anticipation of litigation.

15 But just kind of coming back home, when you read
16 the actual statements that were made for the jury, none of
17 them opened the door to any of these points that Mr. Johnson
18 has made. You can't get this other evidence in, you know,
19 Ryan Richard's documents in because of some implication that
20 the jury may infer from what is, in fact, the actual
21 statement in evidence, which is they didn't complain to
22 Microsoft.

23 Thank you.

24 THE COURT: Mr. Johnson.

25 MR. JOHNSON: Yes. Your Honor, I will first

1 address that they come in because they are not being offered
2 for the truth of the statements made but, rather, to
3 confront directly the statement that we did not complain.
4 So clearly the evidence is really to one side.

5 I noticed that Adam didn't address the other
6 paragraph that I read to you, he never even mentioned it,
7 where Mr. Tulchin stated, at the time, Novell never
8 complained about Mr. Gates' decision to withdraw the
9 namespace extension APIs. He goes on in great detail in
10 that same paragraph I just handed to you on page 90 and 91.
11 He just kind of skipped over that, because in that whole
12 entire paragraph there is no mention of complaining to
13 Microsoft. It's only about didn't complain at all.

14 Now I don't quite understand this prejudicial
15 stuff that they are talking about. What's prejudicial about
16 a factual report?

17 THE COURT: In the government case. I mean you
18 are trying -- the very reason you want to get it in is you
19 want to ride on the coattails of the DOJ.

20 MR. JOHNSON: Those e-mails don't mention the
21 government case. All those e-mails do is say that there was
22 an inquiry from the DOJ. They have asked us what kind of
23 problems you have been having, and we were gathering
24 information to report to them.

25 So in fairness, Your Honor, it wasn't even us

1 running to the principal. It was the principal coming down
2 to the classroom and saying, is that guy bullying you over
3 there. Tell me about that. Is that bully over there
4 hitting you over the top of the head with a brick? And so
5 we gathered the information to provide to the principal
6 about what was going on. So we weren't running to the
7 principal, Your Honor. The principal came to us.

8 And another thing, Your Honor, is that -- I want
9 this to be very clear here. Not only did we complain, but
10 there is this sense that we knew back then what was really
11 going on behind the curtain at Microsoft. Remember, they
12 came to the developers and said, oh, we're going to
13 de-document this stuff. We don't want you to use it. It's
14 not compatible with future strategy.

15 Now what is a developer to do with that when
16 Microsoft says it's not compatible with future strategy?
17 They didn't know sitting there --

18 THE COURT: This is absolutely irrelevant, but I
19 mean it's got nothing to do with the present argument. The
20 documentation, didn't it come in '96? Was it different
21 documentation? For some reason, I thought I heard
22 re-document in '96.

23 MR. JOHNSON: Virtually after it was too late,
24 after Windows 95.

25 THE COURT: Very cleverly documented after.

1 MR. JOHNSON: In '96, it's suddenly re-documented.
2 And the evidence shows they were using them all along. And
3 the evidence shows --

4 THE COURT: That's what I'm not sure about. I
5 haven't heard the evidence.

6 MR. JOHNSON: The evidence shows that Mr. Gates --
7 his plan was exactly that, let us wait until we have the way
8 to do a high level of integration that WordPerfect won't be
9 able to achieve, and that will give Office a real advantage.

10 THE COURT: I understand.

11 MR. JOHNSON: The exact plan --

12 THE COURT: Was it re-documented exactly the same
13 way it was written?

14 MR. JOHNSON: Exactly. In fact, Mr. Nakajima, who
15 was deposed in this case, we asked him, was there any change
16 in these APIs. His answer, no change.

17 Now I've heard some noises over here about some
18 things they are maybe going to try to say now.

19 THE COURT: For example, the documentation, your
20 position is, they can put in the 28 confusing -- I think one
21 of the complaints about the way it was was that WordPerfect,
22 or somebody else, could confuse what came up on one of the
23 screens by having 28?

24 MR. JOHNSON: It wasn't that silly. They went and
25 re-documented the exact same thing.

1 THE COURT: That's my question, when they
2 re-documented.

3 MR. JOHNSON: Of course. There could have been
4 50, there could have been a hundred. They re-documented
5 them --

6 THE COURT: And there was no change?

7 MR. JOHNSON: There was no change. There was
8 still the ability to do exactly what we wanted to do, and
9 they re-documented it.

10 THE COURT: Excuse me. I've gone on a very long
11 detour.

12 MR. JOHNSON: I'm sorry.

13 THE COURT: No. No.

14 MR. JOHNSON: It's important for you to realize in
15 this context about we didn't know what was going on behind
16 the curtain, the documents that revealed what was going on
17 behind the curtain did not surface until years later in
18 these state cases brought against Microsoft, where Microsoft
19 was forced to produce these documents. And suddenly years
20 down the road, we said, oh, my goodness.

21 Mr. Frankenberg, who thought he had a good
22 relationship with Mr. Gates, and had testified in prior
23 depositions that he thought he had a good relationship with
24 Mr. Gates, he saw these e-mails, and this is years down the
25 road, and said, you know, if I had known this, I would have

1 never testified that way. They were gaming us behind my
2 back.

3 So the developers at Novell, when Microsoft comes
4 forward and says, we're not going that direction, that's,
5 you know, a bad way to go, we're going in a different
6 direction for our operating systems, they complained -- they
7 complained to Premier Support. They complained about the
8 de-documentation. There is going to be a document where Tom
9 Creighton, the guy who allegedly dealt with Mr. Struss,
10 said, and it's in a Microsoft document, Tom Creighton said,
11 there's going to be hell to pay if you de-document those
12 namespace extensions. It's right in their document.

13 For these people to stand up here and say it was
14 not a problem and that it wasn't a serious concern, but the
15 fact of it is we didn't know what was going on behind the
16 curtain. So when they tell the jury that we never
17 complained and we waited ten years, the jury is entitled to
18 know that this was a very serious matter with us, and these
19 documents go directly to that, and they opened the door to
20 their admissibility.

21 Thank you, Your Honor.

22 THE COURT: Okay. At this stage I'm not going to
23 let them in. If I really thought that the jury -- I think
24 the jury thinks what I think, which is what I thought was
25 that the opening statements talked about complaints to

1 Microsoft. I don't think the door was opened. Certainly the
2 second one confirmed the first. I came away with the
3 impression I think for me to let in what I wouldn't
4 otherwise let in, I just don't think it's necessary. I
5 think the jury -- and certainly if Microsoft says something
6 about not complaining from now on, they better be careful.

7 It's possible at some point if there really is a
8 dispute in the evidence as to whether or not there were
9 complaints to Microsoft, the fact that there were complaints
10 to somebody else may come in as corroborating evidence. If
11 it becomes a factual issue the fact there was a complaint
12 made, we might be able to do a stipulation. It might come
13 in when it's clear to me what the state of the evidence is,
14 whether there's a conflict between whether or not anybody
15 told Mr. Gates. I can see that coming in not because the
16 door was opened at the opening statement. But if there is a
17 dispute as to whether the complaint made to Microsoft or a
18 complaint made to somebody else, that's in a different
19 context and I will reconsider the issue then. Frankly, I
20 don't think the opening statement opened the door.

21 I came away with the impression, and I frankly
22 think the jury did too, that there were complaints to
23 Microsoft. So I'm going to deny the motion, but I do think
24 there is a -- even talking about complaints to the DOJ, I do
25 think there is a 403 issue. But that's not the primary

1 reason. I don't think the door was opened.

2 I will revisit the issue if there is real conflict
3 that occurs to me that there were complaints made to
4 somebody else simultaneously that would confirm testimony
5 that there was a complaint made to Mr. Gates. In that
6 context, I will reconsider it, but not now.

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

8 THE COURT: Now you also have a week. It's just
9 timing. Do you think it's likely you are going to think up
10 in a week something you need to address for me before the
11 testimony on Monday? If so, we ought to plan on getting
12 together at 7:45 on Monday morning so I can resolve it
13 before the jury comes in. Or if you know what Monday is
14 going to be, then we'll just start at 8:00.

15 MR. JOHNSON: We'll let you know, Your Honor. I
16 don't presently anticipate anything.

17 THE COURT: If you think you need it, let me know
18 and I will let Teresa know, and I will be here at 7:45.

19 MR. JOHNSON: Can I ask, Your Honor, where you're
20 headed?

21 THE COURT: There's an MDL judges conference in
22 Florida every year.

23 MR. JARDINE: You will have a lot to share.

24 THE COURT: All right.

25 MR. JOHNSON: All right, Your Honor.

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THE COURT: Talk to one another.

(Whereupon, the trial was continued to Monday,
November 7, 2011 at 7:45 a.m.)