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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

NOVELL, INC.,)
Plaintiff,)
vs.) CASE NO. 2:04-CV-1045 JFM
MICROSOFT CORPORATION,)
Defendant.)
_____)

BEFORE THE HONORABLE J. FREDERICK MOTZ

November 8, 2011

Jury Trial

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I N D E X

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1 November 8, 2011

8:00 a.m.

2 P R O C E E D I N G S

3
4 THE COURT: Good morning.

5 Mr. Wheeler, I confirmed and I will sit next
6 Friday, so you can make your schedule --

7 MR. WHEELER: Thank you. I will take care of
8 that.

9 THE COURT: Okay. I understand there is an
10 exhibit issue.

11 MR. JOHNSON: Yes, Your Honor. Good morning.

12 THE COURT: Good morning.

13 MR. JOHNSON: Counsel approached me this morning
14 and indicated that he intends to use what has been marked
15 Defendant's Exhibit 614-A. I guess I should hand it up to
16 you --

17 THE COURT: Sure.

18 MR. JOHNSON: -- so you can see what we're talking
19 about. This is one of those DOJ inquiry documents that Your
20 Honor has heretofore not allowed people to use.

21 Two things --

22 THE COURT: Let me read it.

23 MR. JOHNSON: Sure.

24 THE COURT: Okay. Go ahead.

25 MR. JOHNSON: Two things. One, of course,

1 apparently, despite the arguments the other day, Microsoft
2 intends to get into the issue of bugs, which I think is
3 unfortunate. There is going to be a frolicking detour with
4 respect to the issues in this case. Obviously I understand
5 why they want to use this doc, because Mr. Bradford states
6 that the bugs have something to do with the new products,
7 which they didn't, but I understand why they want to use it.

8 The other thing is, however, they have taken this
9 doc and redacted out of the bottom the Department of Justice
10 in the paragraph down there, which, as you will note,
11 indicates that Novell was approached by the Department of
12 Justice. We had that conversation awhile ago. We didn't
13 run to the principal, the principal came to us and asked for
14 our concerns about Microsoft's conduct during that period of
15 time. So I don't think that if they are allowed to use this
16 at all they get to redact who is making the inquiry here,
17 the Department of Justice.

18 I also think, Your Honor, that out of fairness if
19 they are allowed to get into our reports to the Department
20 of Justice, we certainly should be permitted to make the
21 jury aware that we complained about the issues that are in
22 suit here, because that is not fair for them to place a
23 document in front of the jury that said we complained about
24 bugs, and for there to be a suggestion that we didn't
25 complain about the manner that is in dispute here.

1 So that is all I have, Your Honor.

2 THE COURT: Okay.

3 MS. NELLES: Good morning, Your Honor.

4 First of all, I just want to note that this
5 document directly contradicts the DX-6 arguments we heard
6 yesterday about whether or not these bugs related to the
7 prior version or the current version.

8 I would also note that Mr. Frankenberg, who is
9 here, will be well prepared to address both of these
10 documents today. But we really just want to use, and I
11 think Mr. Johnson understands why, and that he understands
12 that it is relevant in this case, the top paragraph or top
13 two paragraphs. If it is going to make things easier we
14 don't need to use the bottom half. I redacted out the
15 Department of Justice to be consistent with what we have
16 done in this case, but what we would like to do and what I
17 think is fair to do, given the testimony to date, is to talk
18 to Mr. Frankenberg about the first two paragraphs in this
19 document.

20 THE COURT: Certainly as I read this document,
21 unless it is early in the morning -- the time of day has
22 nothing to do with it. My mind always does not work well.
23 I think this answers the debate from yesterday, because this
24 clearly says that the bug is related to the new product.
25 Rightly or wrongly, I guess, that is what it says.

1 Is there some way you can get into this without
2 using the document?

3 MS. NELLES: I think if that is what Your Honor
4 would like us to do --

5 THE COURT: I think the best thing to do is don't
6 use the document and don't get into the redactions. I'll
7 wait and see how the evidence develops, but the fact of the
8 matter is that what this really does for me is to solidify
9 that you should be able to get into Exhibit 6.

10 MS. NELLES: Okay. Thank you, Your Honor. We'll
11 do it that way.

12 MR. JOHNSON: Your Honor, may I have that? That
13 is my copy.

14 THE COURT: Absolutely. I didn't say good morning
15 and I didn't give your document back.

16 Let's get the jury.

17 Mr. Frankenberg, this is probably a safe time to
18 have you come on up.

19 MR. FRANKENBERG: Yes, Your Honor.

20 (WHEREUPON, the jury enters the proceedings.)

21 THE COURT: Good morning, everyone. Thank you for
22 your usual promptness.

23 Mr. Tulchin.

24 MR. TULCHIN: Thank you, Your Honor.

25 CROSS-EXAMINATION (Cont.)

1 BY MR. TULCHIN

2 Q. Mr. Frankenberg, good morning, sir.

3 A. Good morning.

4 Q. Yesterday I showed you Exhibit 636. I know you have a
5 lot of materials there, but you may remember that this was
6 the document concerning the notes that were taken about the
7 meeting between you and Mr. Gates and lots of other people
8 on January 10th, 1995. I asked you yesterday -- the notes
9 go on for something like eight pages, and they apparently
10 are notes taken by Dave Miller.

11 I asked you yesterday is there anything in here that
12 indicates that the subject of the namespace extension APIs
13 or undocumented calls was ever raised at the meeting. And
14 you said you had not had a chance to look at the entire
15 document.

16 Do you recall that?

17 A. I do, yes.

18 Q. Did you have a chance to look at it overnight?

19 A. I looked at it after you asked me about it.

20 Q. Is there anything in the document that you have been
21 able to spot that pertains in any way to undocumented calls
22 or to the namespace extension APIs?

23 A. I didn't see anything in the document, no.

24 Q. Can we agree then that at least insofar as this
25 document indicates, Novell didn't raise those subjects

1 during the meeting with Microsoft, including Mr. Gates, on
2 January 10, 1995?

3 A. I think we could assume that that didn't happen when
4 Dave Miller was present. It may have been well at another
5 session with Mr. Gates.

6 Q. But it is not your testimony that you recall that
7 occurring?

8 A. No.

9 Q. Correct?

10 A. But I think this covers what Mr. Miller intended.
11 There may have been other sessions.

12 Q. There may have been other sessions, but if there were
13 you don't have any memory sitting here today of raising
14 those subjects?

15 A. No, I don't.

16 Q. Thank you, sir.

17 Now, yesterday on direct you spoke a little bit about
18 certain applications being cross-platformed.

19 Do you recall that?

20 A. I do, yes.

21 Q. PerfectOffice 3.0 was released in December of 1994,
22 correct?

23 A. Correct.

24 Q. And that was written for the Windows 3.1 platform,
25 right?

1 A. Yes, it was.

2 Q. There was no version of PerfectOffice that was released
3 by Novell that was written for any other platform; is that
4 right?

5 A. No, not at that time. The intent was to start with
6 that. It was not released at that time.

7 Q. Okay. I think I have you, but let me ask you more
8 generally. From the time that Novell acquired WordPerfect
9 in June of 1994, until the time Novell sold WordPerfect to
10 Corel in 1996, Novell never released a version of
11 PerfectOffice that was written for any other platform except
12 Windows 3.1?

13 A. That is true.

14 Q. And is it also your understanding that when Corel
15 acquired WordPerfect, Corel released a version of
16 PerfectOffice for Windows 95?

17 A. They did release that, yes.

18 Q. And is it true, Mr. Frankenberg, that as far as you
19 know Corel never released any version of PerfectOffice for
20 any other platform except Windows?

21 A. I don't know what they did, sir, beyond releasing it
22 for Windows.

23 Q. Mr. Frankenberg, I'm going to hand you Defendant's
24 Exhibit 22.

25 The first page of Exhibit 22 is an e-mail dated April

1 3rd, 1995 from Brad C, and I think there is evidence in the
2 case that that is Brad Chase at Microsoft, to, among others,
3 Mark Calkins.

4 Do you see that, sir?

5 A. I do, yes.

6 Q. And on the c.c. line it indicates that the e-mail was
7 also sent to B Frank.

8 Do you see that, sir?

9 A. I do, yes.

10 Q. And that was you as you said yesterday?

11 A. Correct.

12 Q. Do you recall having received this e-mail on or about
13 April 3rd, 1995?

14 A. Yes, I do.

15 Q. And this is an e-mail about the Windows logo program,
16 correct?

17 A. Correct.

18 Q. The logo program for Windows 95.

19 Mr. Chase's e-mail goes on for about two and a half
20 pages, but he is responding to an e-mail that Mr. Calkins
21 sent to him on March 6 of 1995. I refer you, sir, to page 3
22 of Exhibit 22.

23 A. I see that, yes.

24 Q. Right. Mr. Calkins' e-mail of March 6 went to Brad C,
25 Brad Chase, and also Brad Silverberg, Brad S.I. at

1 Microsoft, and you were one of the people who got a copy of
2 that, correct?

3 A. Yes, I did.

4 Q. And you remember that e-mail as well?

5 A. Yes, I do.

6 Q. Mr. Frankenberg, am I correct that the e-mail that
7 begins on the third page from Mark Calkins was a request by
8 Novell to Microsoft that Microsoft change, for Novell's
9 benefit, the requirements of the Windows 95 logo program; is
10 that right?

11 A. I believe it asked for an exception to the program --

12 Q. Yes.

13 A. -- not necessarily, generally change the program.

14 Q. And Microsoft responded, and that is the e-mail that
15 starts on the first page from Mr. Chase, writing back to Mr.
16 Calkins, and with a copy to you and other people, and
17 Microsoft responded, and to cut through this three pages a
18 little bit the response was that we cannot make an exception
19 for Novell.

20 Is that fair?

21 A. That is what it says, yes.

22 Q. On the third page of Mr. Chase' e-mail there are two
23 paragraphs. One begins I would be glad to have a conference
24 call. Do you see that? And then there is one just below
25 that.

1 A. Yes.

2 Q. And Mr. Chase of Microsoft is writing to Mr. Calkins
3 with a copy to you, and in effect saying that if you went to
4 talk about this further let us know and Brad Struss will be
5 glad to set up a call.

6 Do you see that, sir?

7 A. Yes. Yes, I do.

8 Q. Mr. Frankenberg, it is correct, it is not, that Novell
9 never responded to that invitation for a call?

10 A. I don't honestly know whether we responded or not.

11 Q. Well, is it fair to say, Mr. Frankenberg, that sitting
12 here today you have no recollection of Novell ever
13 responding?

14 A. I do not have a recollection of that.

15 Q. And as we said before this took place in April of 1995,
16 the e-mail at the top, responding to an e-mail in March of
17 '95, right?

18 A. Yes.

19 Q. And during that period, in March and April of '95,
20 Novell was well aware that if you wanted to speak to someone
21 at Microsoft about some issue or concern, or if Novell
22 wanted an exception from some requirement that you could
23 easily send an e-mail to Mr. Chase or Mr. Silverberg at
24 Microsoft?

25 A. Yes.

1 Q. And both Mr. Chase and Mr. Silverberg were reasonably
2 high up in the organization, correct?

3 A. Correct.

4 Q. You had their e-mail addresses and you were getting
5 e-mails from -- at least this e-mail from Mr. Chase, right?

6 A. Yes.

7 Q. I think you testified yesterday that Mark Calkins was
8 one of the executives who was responsible for the business
9 applications group at Novell.

10 A. He was responsible for the business applications
11 division, yes, the business unit.

12 Q. Division. Thank you. Sorry, sir.

13 You also testified that had Novell been confronted with
14 a choice in 1994 or 1995 about which option to take, whether
15 to get out a product very fast by writing new versions of
16 your products to the Windows common file open dialogue, or
17 taking a much more difficult path and trying to write an
18 advanced file open dialogue, that a decision of that sort
19 would probably go to a group that included Mark Calkins?

20 A. Yes, that is correct.

21 Q. You also testified yesterday that you have no
22 recollection of ever being asked to make a decision or
23 provide your recommendation about which path to take?

24 A. I don't even recall ever being asked that, no.

25 Q. Right.

1 And it is correct, is it not, sir, that as far as you
2 know there are no e-mails to Brad Chase or Brad Silverberg
3 or anyone else at Microsoft concerning the namespace
4 extension APIs?

5 A. I don't know of any.

6 Q. Could I ask you, sir, to look in Exhibit 22, the same
7 document in front of you, to the second to last page. And
8 right towards the bottom there is a heading that says
9 conclusion, if I could direct you to that. This is still
10 part of the e-mail that Mark Calkins of Novell wrote to
11 Mr. Chase and Mr. Silverberg on March 6, 1995.

12 Do you see that, sir?

13 A. Yes, I do.

14 Q. At the bottom do you see the conclusion, the second to
15 the last page?

16 A. Yes, sir.

17 Q. And right at the bottom it says we would like to
18 propose that we set up a conference call to discuss this
19 issue. This is before the e-mail that came back from
20 Mr. Chase, and then it says we will work through our Windows
21 95 contact, Brad Struss, to find a time, et cetera.

22 A. Yes.

23 Q. So you knew and Mr. Calkins knew in March and April of
24 1995 that Novell's Windows 95 contact was someone named Brad
25 Struss at Microsoft, correct?

1 A. Well, certainly Mark Calkins knew that, yes.

2 Q. Right. But this e-mail went to you and you say you
3 remember getting it?

4 A. Yes, but --

5 THE COURT: That was a fair answer.

6 Do you remember everything you have ever read?

7 MR. TULCHIN: No, certainly not, Your Honor. I
8 don't remember some things I read yesterday.

9 BY MR. TULCHIN

10 Q. But --

11 THE COURT: I doubt that.

12 MR. TULCHIN: I have been reading a lot.

13 BY MR. TULCHIN

14 Q. Mr. Frankenberg, fair enough. You don't recall seeing
15 that, but certainly Mr. Calkins wrote it in his e-mail to
16 Chase and Silverberg?

17 A. Yes, he did. Certainly he knew and, as I said
18 yesterday, the name sounded familiar, but I don't recall
19 what Mr. Struss did.

20 Q. Yes, you did say that.

21 Now, Mr. Frankenberg, there was testimony earlier in
22 this case from Adam Harrall that he made some phone calls to
23 people at Premiere Support at Microsoft.

24 Do you know what Premiere Support is?

25 A. I assume it would be people who supported developers,

1 but I don't know that to be true.

2 Q. Did you know at the time that it was a telephone help
3 line that Microsoft set up so that ISVs, if they chose to
4 pay a fee to get access to this, could seek help from
5 developers at Microsoft in building their products?

6 A. That makes sense, yes.

7 Q. Did you understand at the time that if Novell had some
8 significant issue about APIs in Windows 95, that the logical
9 thing to do would be to contact the Windows 95 contact, Brad
10 Struss, and raise those issues?

11 MR. JOHNSON: Objection to what was logical, Your
12 Honor.

13 THE COURT: Overruled.

14 THE WITNESS: I think that would be a good thing
15 to do, yes.

16 BY MR. TULCHIN

17 Q. Do you have any information at all that anyone at
18 Microsoft ever from October 3rd, 1994, when Mr. Gates made
19 the decision to withdraw support for the namespace extension
20 APIs, until the time that Novell sold WordPerfect to Corel,
21 do you have any information at all that anyone at Novell
22 ever talked to Brad Struss about this question?

23 A. I do not personally have that knowledge, no.

24 Q. Would you agree with me, Mr. Frankenberg, that it
25 wasn't Microsoft's obligation in '94 or '95 to help Novell

1 build a product, a software product that would be better
2 than Microsoft's applications, that it was not Microsoft's
3 obligation to help Novell do better than Microsoft could do?

4 MR. JOHNSON: Objection to the legal question.

5 THE COURT: Sustained.

6 BY MR. TULCHIN

7 Q. Would you agree with me, Mr. Frankenberg, that the
8 people at Premiere Support, as far as you understood it,
9 were there to answer questions about how an ISV could plug
10 into the APIs in Windows that Microsoft was supporting?

11 A. Yes.

12 Q. It wasn't their function at Premiere Support to help an
13 ISV figure out how to use an API that Microsoft was no
14 longer supporting.

15 Do you agree?

16 A. I am sure that is true. However, we had been using
17 those APIs and they were removed from our ability to use
18 them.

19 Q. Well, is there any information that you have that
20 indicates that any particular specific person at Microsoft
21 knew that you were using those APIs?

22 A. I am sure they did.

23 Q. Well, is there any document that you have ever seen,
24 ever, from Novell to Microsoft, which indicates in any way
25 that Novell had informed Microsoft that it was using those

1 APIs or intended to use them in the future?

2 A. I have not seen documents. I have heard conversations,
3 but I have not seen documents.

4 Q. Are these conversations that you have heard in the
5 last, let's say, few months?

6 A. As well as conversations with, as I said -- as I
7 testified yesterday, with Mr. Calkins and Mr. Reitveld and
8 Mr. Waxman, that they had discussed this with Microsoft.
9 But I don't have any document, no.

10 Q. Mr. Frankenberg, let me show you Exhibit 155. I should
11 say Defendant's 155. When you have had a minute to take a
12 look at it, let me know.

13 A. Okay.

14 Q. Thank you, sir.

15 Now, this is a memorandum and at the top it says Novell
16 legal department memorandum from Ryan Richards. He was then
17 a lawyer at Novell, correct?

18 A. Yes, he was.

19 Q. And it is written to Mark Calkins, whose name we have
20 been talking about this morning.

21 Do you see that, sir?

22 A. I do, yes.

23 Q. It is written in January of 1995, and there are a
24 number of people who get copies of this, Mr. Mella,
25 Mr. Brereton, Mr. Moon, Mr. Bradford, Mr. Rietveld, you,

1 David Owen and Todd Titensor.

2 Do you remember this memo? Do you remember receiving
3 it in 1995?

4 A. Yes, I do.

5 Q. And this is also on the subject of the Windows 95 logo
6 program, correct?

7 A. Correct.

8 Q. Now, the people who received copies of this are Mark
9 Calkins, to whom it was directed, and a number of people who
10 got c.c.s, those include the executives in the business
11 applications group that you referred to yesterday in an
12 answer you gave me at I think about 1:25. It was close to
13 the time that we were breaking.

14 Do you recall that?

15 A. Yes, I do.

16 Q. I think you said that you would have expected that had
17 there been a choice presented about how to respond to the
18 withdrawal of support for the namespace extension APIs,
19 whether to just use the Windows common file open dialogue or
20 to build this much more difficult road, if you will, to
21 develop a special Novell advanced file open dialogue, you
22 would have expected that the people involved in that
23 decision were Mr. Calkins, and I think you said Mr. Moon,
24 and Mr. Rietveld and maybe Mr. Mella, correct?

25 A. Yes, most likely Mr. Mella, having marketing

1 implications.

2 Q. Right. And all four of those people received this
3 memorandum from Ryan Richards on January 12 of 1995, right?

4 A. Correct.

5 Q. Now, would it be fair to say, Mr. Frankenberg, that the
6 decision on how to respond to the namespace extension APIs
7 turned out to be a decision that had some real important
8 consequences for Novell?

9 A. Yes, it did.

10 Q. And is it also fair to say, Mr. Frankenberg, that as
11 far as you know no memorandum of this sort exists, that you
12 have never seen any memorandum of this sort which addresses
13 that decision about what choice to make?

14 A. I don't recall seeing one. That does not mean there
15 wasn't one, but I don't recall seeing one.

16 Q. I understand. That was just my question.

17 And you don't recall seeing one at the time in 1994 or
18 1995, right?

19 A. I do not.

20 Q. And you don't recall seeing any such memorandum in
21 preparation for your testimony here?

22 A. I do not.

23 Q. Now, if it is correct that no such memorandum was ever
24 written to Mr. Calkins or Mr. Moon or Mr. Rietveld or Mr.
25 Mella, or maybe to all four of them, if it is true that none

1 was ever written, would that surprise you?

2 A. If it were true it would surprise me, yes.

3 Q. In any business organization faced with an important
4 decision, it would normally be the case that a memorandum
5 such as this would be written laying out the concerns and
6 the issues and the considerations facing that business in
7 making some strategetic or tactical choice, true?

8 A. That would normally happen but, as I have said, I don't
9 know of any such memorandum.

10 Q. Do you know of any evidence whatsoever that either Mr.
11 Calkins or Mr. Mella or Mr. Moon or Mr. Rietveld or any
12 combination of the four of them ever were asked to make a
13 decision about what choice to make in responding to
14 Microsoft's decision to withdraw support for the namespace
15 extension APIs?

16 A. Could you repeat your question, please. It was rather
17 long.

18 Q. It was long. I will try to make it quicker.

19 A. Thank you.

20 Q. A little shorter.

21 Mr. Frankenberg, do you know of any evidence whatsoever
22 that any of the four people we mentioned, Calkins, Mella,
23 Moon or Rietveld ever were presented with a decision about
24 how to respond to Mr. Gates' decision to withdraw support
25 for the namespace extension APIs?

1 A. I know of no documents that do that.

2 Q. My question was a little broader. Other than
3 documents, is there any evidence that you know of that any
4 of these four people got involved in any such decision?

5 A. None, other than that I was told by either Todd
6 Rietveld or Jeff Waxman or Mark Calkins, as I testified
7 yesterday, that those extensions were removed from our use
8 and that that was the cause of delays. I assumed from that
9 that they knew about it and were responding to it, but I do
10 not have any other evidence other than that.

11 Q. And I think you said that you don't know when that
12 conversation took place, correct?

13 A. I said that it was probably the first part of 1995, but
14 I don't know an exact date, no.

15 Q. And you don't know who of those three you had the
16 conversation with? It could be any one of them?

17 A. Yes. Yes, I do not know which of the three --

18 Q. You're agreeing with me?

19 A. I do not know which of the three told me that, correct.

20 Q. Right. And looking at Exhibit 155 about the logo
21 program, you'll see that in the first paragraph Mr. Richards
22 writes I want to give you and those copied on this memo an
23 update of our discussions of the Microsoft Windows 95 logo
24 program.

25 I hope this is not repetitive, Mr. Frankenberg, but you

1 don't know of any document or memorandum or e-mail which
2 reflects the same sort of effort to provide an update of
3 discussions that executives at Novell had had about the
4 namespace extension issue?

5 A. I think I have already answered that. No, I do not.

6 Q. Right. And then it goes on in the second sentence to
7 say Glen Mella, Todd Titensor, Greg Jones, David Owen and I
8 met this morning to try to reach a decision on a recommended
9 response to the logo program.

10 Now, do you recall, Mr. Frankenberg, that Microsoft at
11 least at one point was saying, and we looked at this in
12 Exhibit 22, that it was not willing to make an exception for
13 Novell to the requirement in the logo program that the ISVs
14 product degrade gracefully on Windows NT?

15 Do you recall that?

16 A. It must have been -- I didn't read all of that in
17 detail. Can you point out to me where that was, sir?

18 Q. I don't want to spend too much time, because if you
19 don't recall, that is fine.

20 A. Well, if it is in here -- I will take your word for it,
21 but I don't recall degrading gracefully.

22 Q. Well, there was a compatibility requirement with
23 Windows NT.

24 Do you recall that?

25 A. Yes. That is a bit different than degrading

1 gracefully, but --

2 Q. Fair enough. We'll move on.

3 In the second paragraph of Exhibit 155, and this is a
4 two page memo, but we are still on the first page, the
5 author of this memorandum says two responses that we have
6 considered thus far are, one, to make a high profile
7 challenge to Microsoft's program requirements and, two, to
8 ignore the program and when asked state that we simply do
9 not intend to support it.

10 Do you see that, sir?

11 A. Yes, I do.

12 Q. Is it your recollection that you as the C.E.O. of
13 Novell ultimately made the decision to go with option two
14 when it comes to the logo program, that is, to ignore
15 Microsoft's logo program and simply decide not to
16 participate in it?

17 A. I may well have participated in that decision or made
18 it.

19 Q. Let me show you Exhibit 157.

20 I always forget to say Defendant's 157. Sorry.

21 THE COURT: We'll assume that is the case.

22 MR. TULCHIN: Thank you, Your Honor.

23 BY MR. TULCHIN

24 Q. Have you had a chance to take a glance at this, sir?

25 A. Yes. This confirms what I just said.

1 Q. Right. This is an e-mail from Todd Titensor. He was
2 one of the people who got the memo, Exhibit 155, and it is
3 to a number of people. It has e-mail aliases. February
4 2nd, 1995. The subject is Win 95 logo requirements, issues
5 with NT.

6 Then in the very first paragraph -- I should say that
7 the e-mail is addressed to Ryan and Greg. Right below it,
8 and directing your attention to that paragraph, it says
9 below is the beginning of a cover message to the attached
10 document that we are planning to send to Brad Silverberg,
11 V.P. of operating systems at Microsoft regarding the NT
12 requirement for Windows 95.

13 Do you see that, sir?

14 A. Yes, I do.

15 Q. And ultimately Mr. Calkins sent the message that we
16 looked at earlier, Defendant's Exhibit 22, correct?

17 A. Yes.

18 Q. You'll see at the bottom of Exhibit 157, the document
19 we are looking at, that there is a draft of the first part
20 of what Mr. Calkins eventually sent to Mr. Silverberg at
21 Microsoft, right?

22 A. Yes. That is what it says.

23 Q. That was the message that was sent in March.

24 Going back to the top of the document, Mr. Silverberg
25 is identified as vice president of operating systems at

1 Microsoft, right?

2 A. Yes.

3 Q. So Mr. Titensor certainly knew Mr. Silverberg's title,
4 and anyone reading this could have seen the same thing?

5 A. Yes.

6 Q. But as with Mr. Chase there is no document that was
7 ever sent to Mr. Silverberg as far as you know in which
8 Novell raised the subject of the namespace extension APIs?

9 A. There may have been such a document, but I don't know
10 of it.

11 Q. Then if you go to the third line of the first paragraph
12 there is a sentence that begins as you may be aware, and it
13 goes on to say Bob F has stated in a meeting with the QP
14 team, Mark, Glen, Bruce, that he does not accept the NT
15 requirement, and if it is not removed from the logo
16 requirements list we will simply not support the logo.

17 Do you see that?

18 A. Yes, I do.

19 Q. So to go back to my earlier question, is it fair to
20 say, looking at Exhibits 22 and 155 and 157, that you made
21 the decision that if Microsoft didn't grant Novell an
22 exception to the requirements of the logo program, that
23 Novell would simply not participate in it, correct?

24 A. That is correct.

25 Q. Thank you, sir.

1 Now, I want to direct your attention, if I could, to
2 Defendant's Exhibit 637.

3 And before we look at this document, Mr. Frankenberg,
4 we spoke yesterday about the decision in October of 1995 to
5 announce that Novell intended to sell WordPerfect.

6 Do you remember that?

7 A. Yes, I do.

8 Q. And that announcement was made even before Novell had a
9 buyer, right?

10 A. That is correct.

11 Q. In fact, you testified that one of the reasons for the
12 announcement was to get the word out widely to attract as
13 many potential buyers as possible?

14 A. That is correct.

15 Q. But your announcement in October that Novell intended
16 to sell WordPerfect, had some adverse consequences in the
17 marketplace, correct?

18 A. Yes, it did.

19 Q. And one of your competitors, Lotus, the company that
20 was making Lotus Smart Suite, decided to exploit that
21 announcement that you had made.

22 Is that fair?

23 A. Yes, they did. It was a very competitive environment,
24 as this ad shows.

25 Q. Do you recognize Defendant's Exhibit 637 as a copy of

1 an advertisement that Lotus placed in a number of
2 publications after your announcement in October where Lotus
3 was trying to exploit for its own advantages that
4 announcement?

5 A. Yes, I do.

6 MR. TULCHIN: We offer 637, Your Honor.

7 THE COURT: Okay. Any objection?

8 MR. JOHNSON: Yes, objection, Your Honor. I have
9 nobody from Lotus that I can cross-examine. This is
10 hearsay. I don't think --

11 THE COURT: It is not hearsay. It was what Lotus
12 did in reaction to the announcement.

13 Overruled.

14 (WHEREUPON, Defendant's Exhibit 637

15 was received into evidence.)

16 BY MR. TULCHIN

17 Q. Mr. Frankenberg, the advertisement that Lotus placed in
18 a number of papers, and this included The Wall Street
19 Journal, is that right, as you remember?

20 A. I don't remember which publications, but I do remember
21 the ad, though.

22 Q. You certainly remember seeing it at the time?

23 A. Yes, I do.

24 Q. Would you say it was sort of galling to you to see
25 this?

1 A. To say the least, yes, but I thought it was a good shot
2 on their part.

3 Q. And what Lotus is doing -- the ad says in very large
4 type, now may be the time to give up on WordPerfect.
5 Obviously Novell thinks so. Then it goes on below to the
6 left, try Lotus Smart Suite featuring WordPro risk free for
7 90 days, only \$199.

8 Do you see that?

9 A. Yes, I do.

10 Q. Is it correct, Mr. Frankenberg, that the announcement
11 that you made in October that Novell intended to sell
12 WordPerfect wound up hurting sales of WordPerfect and
13 PerfectOffice?

14 A. Yes, it would, and did.

15 Q. And because you made that announcement in October, and
16 because the announcement hurt sales, the price that you were
17 able to get from the buyer, Corel, was lower than it
18 otherwise would have been?

19 Is that fair?

20 A. I don't know that that is necessarily true.

21 Q. Well, certainly when Corel came in in 1996 and
22 expressed an interest in buying the WordPerfect business, it
23 asked for permission to look at the books and records of
24 Novell, correct?

25 A. Of course they did due diligence on the opportunity.

1 Q. And in doing their due diligence they looked at the
2 sales figures for WordPerfect and PerfectOffice in November
3 and December of 1995 and into the first part of '96, true?

4 A. I would assume that they did that as well as earlier
5 sales.

6 Q. And if a buyer looks at sales figures and sees that the
7 sales are declining, that would normally lead to a lower bid
8 than you would otherwise get, true?

9 A. Perhaps, but if it is explainable, and it certainly was
10 explainable, since we made the announcement and people
11 didn't know what the future was going to be, that would have
12 an impact on sales. Once people knew what the future would
13 be, presumably those sales would recover somewhat. It may
14 have had an impact, it may not. I can't say for certain.

15 Q. Mr. Frankenberg, I want to take you back, if I could,
16 to the time when you first joined Novell, around April 1st
17 of 1994. I think you said on direct examination that when
18 you joined Novell you were enthusiastic about Novell's
19 pending purchase of WordPerfect Corporation.

20 Do you recall that?

21 A. Yes, I do.

22 Q. Now, am I correct, in fact, Mr. Frankenberg, that the
23 truth is you did not agree entirely with the strategy that
24 Mr. Noorda had had, your predecessor at Novell, of buying
25 WordPerfect Corporation?

1 A. I think I also said that I had some significant
2 concerns about taking Microsoft on at the head in the
3 markets that they dominated. Sometimes we use the D word.

4 THE COURT: The distinction is understandable.

5 BY MR. TULCHIN

6 Q. Mr. Frankenberg, is it correct that at around the time
7 you were coming to Novell, that you did not think that
8 Mr. Noorda's business plan would work?

9 A. I thought that it was very difficult to take on an
10 entrenched competitor in every market that they were in, and
11 especially one approximately five times your size, that is
12 correct.

13 Q. My question, and I appreciate your answer and maybe
14 we're actually pretty close, but my question is around the
15 time that you were coming to Novell, was it your view that
16 Mr. Noorda's business strategy would not work?

17 A. It wasn't my view that it would not work, it was my
18 view that I had significant concerns about it, and that it
19 might well need to be modified and it was very risky. I did
20 have concerns, yes.

21 Q. Mr. Frankenberg, I'm going to hand you a transcript of
22 a deposition. This was a deposition taken in the Caldera
23 case.

24 Do you remember that, sir?

25 A. Yes, I do.

1 Q. I may have given you the wrong volume. I understand
2 there were two. I'm sorry.

3 A. Worse than that, I remember doing both of them.

4 Q. Maybe I gave you the right volume. I'm sorry that you
5 were subjected to two.

6 This is in 1998. Do you recall that?

7 A. Yes, I do.

8 Q. I mean, we are now 17 years later, this is only four
9 years after the events, correct?

10 A. Correct.

11 Q. And could I ask you, sir, to turn to page 159. I hope
12 you have the right volume.

13 THE COURT: Volume two?

14 MR. TULCHIN: Yes, sir.

15 MR. JOHNSON: I am sorry. I don't have the right
16 volume.

17 MR. TULCHIN: I'm sorry, Jeff.

18 THE COURT: You can have mine if you want.

19 The only good decision I made yesterday was not
20 taking you up on that deposition.

21 BY MR. TULCHIN

22 Q. You and I hadn't met yet, Mr. Frankenberg, so these are
23 not my questions. But if you look at page 159, line 6 --
24 are you with me, sir?

25 A. I am, yes.

1 Q. You were asked this: At the time before coming to
2 Novell, in these conversations and in your consideration,
3 did you think that Mr. Noorda's business plan for Novell
4 would work? Your answer was no, just a flat no.

5 Do you recall that?

6 A. Yes.

7 Q. And that was your answer to the question in 1998?

8 A. Yes.

9 Q. And then the questioner goes and says why? Your answer
10 was I should say strategy for Novell. You said business
11 plan and I was thinking strategy. So is strategy okay? And
12 the questioner says strategy works. And then you go on to
13 say, okay. No, because Novell was significantly smaller
14 than Microsoft in revenue, and even though a very successful
15 company -- its success was largely based on networking and
16 on integrating operating systems with networking and making
17 the two work very well together. And going toe to toe with
18 somebody three times your size on every front is generally
19 not a good strategy.

20 That was your answer at the time?

21 A. Well, so it was three times not five times, but I did
22 remember my answer.

23 Q. Yes. We won't quibble with the comparison in size.

24 A. Eventually it did get more than five times.

25 Q. I don't doubt that, sir.

1 But my question is this, Mr. Frankenberg. Your
2 testimony in 1998, which was four years after the event, was
3 that you didn't agree with Mr. Noorda's strategy of buying
4 WordPerfect Corporation, right?

5 A. That is not accurate. What this says is that -- the
6 question was did I agree with the business plan, and then
7 later modified to strategy because --

8 Q. Right.

9 A. -- that is what I had in mind was Strategy for Novell.
10 So it wasn't just WordPerfect, it was asking about the
11 entire company, not just buying WordPerfect. So my answer
12 there was that it is not a good idea to take on somebody a
13 lot bigger than you are and everything that they are doing
14 toe to toe. In selected areas you can do that, but it is
15 harder to do that and succeed if you're fighting on all of
16 those fronts. That was my answer then and now.

17 Q. I follow you, sir.

18 Am I correct that one of the reasons that you gave that
19 answer in '98 about your disagreement with the strategy, was
20 that you didn't think it was a good idea to take on
21 Microsoft in the suite market, correct?

22 MR. JOHNSON: Objection, asked and answered.

23 THE COURT: Overruled.

24 THE WITNESS: What I was concerned about was
25 taking on Microsoft and all of the businesses that they were

1 in. I said earlier -- I testified earlier that I was
2 enthused about the suite opportunity, that I was enthused
3 about network applications and that we had a good
4 opportunity. I believe it was 74 percent of the people that
5 hadn't made the decision yet, and that the network could
6 play a big role in the success of that. So I had concerns,
7 and I stated them in 1998 and I stated them in 2009, and I
8 stated yesterday that I had those concerns.

9 BY MR. TULCHIN

10 Q. Could I ask you, sir, to look at page 171. This is the
11 same transcript, your deposition in the Caldera case in
12 1998. Starting at line 11 --

13 A. What page, again, sir?

14 Q. 171.

15 A. This is very hard to read. There it is. Okay.

16 Q. Are you with me, sir?

17 A. Yes.

18 Q. You were asked the time period when you came on board,
19 you indicated previously that you did not think that
20 Mr. Noorda's strategy may have been the right strategy.

21 Your answer there was yes, correct?

22 A. Yes.

23 Q. And then the next question is was it known to the board
24 that you had that view at the time that you came on?

25 Answer, I think some of the board members knew that. I

1 can't say that everyone did. I made it clear in the
2 interviewing process that while I was enthused, for example,
3 about the acquisition of WordPerfect, largely because of the
4 product that became known as GroupWise and, I'm sorry, I
5 can't remember the name it had before that, that I had some
6 concerns about going after Microsoft toe to toe in every
7 arena, especially in the operating system and suite areas
8 that they dominated, personal productivity suite areas that
9 they dominated.

10 Do you see that, sir?

11 A. Yes, I do.

12 Q. That was a correct answer at the time in '98?

13 A. Yes.

14 Q. So is it correct then to say that, Mr. Frankenberg, one
15 of your concerns just at the time that you were joining
16 Novell, around the first of April of 1994, is that it might
17 not be a great idea to take on Microsoft in the suite area?

18 A. Amongst other areas, yes.

19 Q. And in the suite area I think you told me yesterday
20 that Microsoft had this huge head start. They were years
21 and years ahead of WordPerfect?

22 A. Actually I think you told me that.

23 Q. Well, you agreed with me?

24 A. Okay.

25 Q. Isn't that right?

1 A. Yes.

2 Q. Okay. And you also told me yesterday that in the suite
3 area Microsoft had the strongest one two punch, the
4 strongest one two combination of Word and Excel, correct?

5 A. What I said, actually, was that WordPerfect was a
6 better word processor than Word, and that Lotus One Two
7 Three was a better spreadsheet than Excel, but that they
8 were both strong products.

9 Q. But nobody had a one two punch, a combination of the
10 word processor and a spreadsheet that was as strong as
11 Microsoft's Word and Excel put together?

12 A. True. I guess two Bs versus an A and a C and a C and
13 an A is kind of what you're talking about.

14 Q. All right. But you agree?

15 A. All right.

16 Q. Thank you, sir.

17 Now, I want to show you just briefly Exhibit 377.

18 Mr. Frankenberg, you recognize this document as a
19 contract that Novell entered into in 1996 with a company
20 called Caldera, correct?

21 A. Yes, I do recognize it.

22 Q. And if you turn to the very last page, page 21, at the
23 bottom the contract was signed for Novell by Mr. Bentley,
24 correct?

25 A. Yes, it was.

1 Q. This was around the time that you were leaving Novell;
2 is that right?

3 A. It was approximately a month or maybe a little more
4 than a month before I left.

5 Q. Right. And Mr. Bentley was authorized by the board of
6 directors and by you to sign this contract for Novell,
7 correct?

8 A. That is correct.

9 Q. Could you look just briefly at the bottom of page 4 of
10 Defendant's Exhibit 377.

11 MR. JOHNSON: Your Honor, may we approach, please.

12 THE COURT: Sure.

13 (WHEREUPON, a bench conference was begun.)

14 MR. JOHNSON: Your Honor, turn the mike away.

15 THE COURT: Thank you.

16 MR. TULCHIN: I just want to preserve this for the
17 Tenth Circuit, Your Honor. This is the sale of claim issue,
18 and --

19 THE COURT: Okay. Let's preserve it here at the
20 bench.

21 MR. TULCHIN: Not in front of the jury.

22 THE COURT: You can preserve it here.

23 MR. TULCHIN: This is not in evidence.

24 MR. JOHNSON: Thank you, Your Honor.

25 MR. TULCHIN: Thank you.

1 (WHEREUPON, the bench conference was concluded.)

2 THE COURT: For that legal issue it was right to
3 approach the bench.

4 Thank you, Mr. Johnson.

5 MR. TULCHIN: Thank you.

6 BY MR. TULCHIN

7 Q. Mr. Frankenberg, you can put that document aside.

8 A. Are you okay? Did you hurt yourself?

9 MR. TULCHIN: No. I am afraid I may have hurt one
10 the computers by pulling out the plug, but I hope the APIs
11 survived.

12 THE WITNESS: We'll find some way to access them.

13 THE COURT: It might take a year.

14 THE WITNESS: That is right. You asked me
15 questions last night in my sleep. You are everywhere.
16 Actually I should say the same question over and over.

17 BY MR. TULCHIN

18 Q. Well, when I play bridge I see cards falling in my
19 sleep.

20 A. I understand that, yes.

21 Q. I sympathize.

22 Mr. Frankenberg, a different subject. Novell had its
23 own operating system, correct, the NetWare product which was
24 an operating system for servers, right?

25 A. It was a network operating system, yes.

1 Q. Thank you, sir.

2 NetWare, the NetWare operating system had APIs,
3 application program interfaces, correct?

4 A. Yes, it did.

5 Q. In any given version of NetWare there were many, many
6 APIs?

7 A. That is correct.

8 Q. At the time that you were C.E.O., the head of Novell,
9 did you consider those APIs to be Novell's intellectual
10 property?

11 A. Yes.

12 Q. And, in fact, Novell claimed a copyright on the APIs,
13 correct?

14 A. That is correct.

15 Q. And that was the subject of a certain amount of
16 contention in the industry, whether Novell was entitled to
17 protect APIs through a copyright?

18 A. The tension was largely with Microsoft, but, yes.

19 Q. All right. But it was your position throughout the
20 time that you were C.E.O. that the application programming
21 interfaces in your operating system, NetWare, were Novell's
22 intellectual property, correct?

23 A. That is correct.

24 Q. And you never wavered from that position?

25 A. No.

1 Q. Am I correct, Mr. Frankenberg, that when Novell
2 received a beta version of a Microsoft operating system, at
3 least during the time that you were at Novell, it was
4 understood by people at Novell that a beta version is
5 nothing more than a prerelease version of the product?

6 A. Yes.

7 Q. And it was also --

8 A. It is actually a fairly advanced prerelease of the
9 product, because it had already gone through what was
10 normally called the alpha stage or the pre-alpha stage and
11 had been tested and used in a number of ways qualifying it
12 to be labeled beta.

13 Q. Novell sent out beta versions of NetWare to various
14 other software companies from time to time, correct?

15 A. Yes, we did.

16 Q. And when Novell sent out beta versions of its operating
17 system, Novell made sure that the people who were intending
18 to use the beta understood that the beta could change, that
19 the product could change, right?

20 A. Yes.

21 Q. And you understood when Microsoft sent a beta version
22 of Windows 95 to Novell, that that prerelease version could
23 change.

24 Am I right?

25 A. Yes, it could change.

1 Q. You also understood that there was no obligation on
2 anyone's part, either Novell when it sent out a beta, or
3 Microsoft when it sent out a beta, to make a product that
4 conformed exactly to what the beta contained?

5 MR. JOHNSON: Objection, calls for a legal
6 conclusion.

7 THE COURT: I think so too. I will sustain it.

8 BY MR. TULCHIN

9 Q. Mr. Frankenberg, let me show you a copy of
10 defendant's --

11 THE COURT: Just so you all understand, clearly it
12 is not an industry practice, the answer to that question,
13 but the antitrust issues that you all need to --

14 MR. TULCHIN: I'm handing the witness, Your Honor,
15 Defendant's Exhibit 618.

16 BY MR. TULCHIN

17 Q. Mr. Frankenberg, do you have this, sir?

18 A. Yes, I do.

19 Q. Do you recognize this as a contract that Novell
20 provided to developers that were receiving copies of
21 Novell's beta versions of NetWare?

22 A. I see that it is a license agreement. I guess that is
23 a contract. I don't know. I'm not a lawyer.

24 Q. All right. Let's call it a license agreement. You'll
25 see at the bottom of the first page to the left it says

1 copyright 1994 and 1959 Novell, Inc.

2 Do you see that?

3 A. Yes, I do.

4 Q. So will you agree with me that this was an agreement
5 that Novell used in those years, '94 and '95?

6 A. It appears to be the case, yes.

7 Q. Will you look on the first page under the title
8 disclaimer. There is a paragraph there.

9 Are you with me?

10 A. I am with you, yes. I am reading it.

11 Q. Sure. Take your time.

12 A. Okay.

13 Q. About five lines down in that paragraph it says Novell
14 does not warrant that the software or associated
15 documentation will satisfy your requirements, or that the
16 software and documentation are without defect or error, or
17 that the operation of the software will be uninterrupted.

18 Do you see that, sir?

19 A. Yes, I do.

20 Q. And that is because a beta version is nothing more than
21 a prerelease version, true?

22 A. I'm a little bit confused. This is for a software
23 developers kit that would have been released as opposed to a
24 beta version of a product. This is not a beta license, it
25 is a --

1 Q. Could I ask you --

2 A. It is an agreement for a released product.

3 Q. Could I ask you to look at the second page of this
4 agreement, Exhibit 618. In the first column on the left
5 under the heading license there is a long paragraph.

6 Maybe we can bring that up.

7 A. Okay.

8 Q. I know this is sort of dense language, but about --

9 A. Yes, it is.

10 Q. About three --

11 A. Obviously designed for people younger than me.

12 Q. Younger or more versed to these sorts of agreements,
13 one of the other.

14 A. Okay.

15 Q. Maybe both.

16 About three quarters of the way down there is a
17 sentence that begins beta products.

18 Do you see that?

19 A. Yes.

20 Q. Beta products are prerelease quality and have not been
21 fully tested and may contain errors and omissions.

22 Do you see that, sir?

23 A. Yes, I do.

24 Q. That was something that Novell in this agreement was
25 telling people who received the software developer kit,

1 correct?

2 A. Yes.

3 Q. Would you agree with me that that was something that
4 was widely understood in the software industry?

5 A. Yes, it was.

6 Q. And then the next two sentences say Novell does not
7 guarantee that beta products will become generally available
8 to the public or that associated products will be released.
9 The entire risk arising out of your use of beta product
10 remains with you.

11 Do you see that?

12 A. Yes, I do.

13 Q. And, again, that was something that when you were
14 C.E.O. Novell put in its agreement, Exhibit 618, covering
15 the software developer's kit, correct?

16 A. Correct.

17 Q. Would you agree with me that that was something as well
18 that was commonly understood in the industry at the time?

19 A. I think so, yes.

20 THE COURT: I do this at the risk of you all
21 telling me that I say something wrong, and I know this must
22 be confusing for you all, but here the allegation is that it
23 is not a -- the withdrawal of the APIs, the basic extensions
24 is not a question of industry practice, and that it is
25 understood that that is what happened, that that is the way

1 the industry worked, it is not a violation of a licensing
2 agreement or anything of that nature.

3 What is alleged here, and the reason all along,
4 and I am just telling you all so that you are not confused,
5 here the allegation made by Novell is that the withdrawal of
6 the namespace extensions, even though it was understood in
7 the industry that that could occur, constituted a violation
8 of the antitrust laws. I hope that clarifies it a little
9 bit. This is not a case about licensing agreements or
10 anything else, but it is about whether or not Novell's claim
11 that the violation of the namespace extensions are an
12 antitrust violation constituting anticompetitive conduct.
13 So that is where we are. Okay.

14 I hope I got that right.

15 MR. JOHNSON: You did, Your Honor. Actually --

16 THE COURT: Do you want to approach?

17 MR. JOHNSON: Maybe at a break --

18 THE COURT: I don't want to misstate anything, but
19 I don't want you all to be confused about this, and I might
20 have misstated it, and so I will talk with you at a break.

21 BY MR. TULCHIN

22 Q. Mr. Frankenberg, I'm handing you Defendant's Exhibit
23 19. Take a look at it, but I think I can say to you this is
24 a license agreement. It is entitled nondisclosure agreement
25 between Microsoft and Novell.

1 A. Yes.

2 MR. JOHNSON: Again, Your Honor, I think at this
3 point I do need to approach.

4 THE COURT: Approach the bench.

5 (WHEREUPON, a bench conference was begun.)

6 MR. JOHNSON: Of course, Your Honor, remember that
7 we had this discussion sometime ago about these documents
8 and their significance or lack thereof. We actually
9 formulated from what you had said at the hearing a proposed
10 instruction that we would ask that the Court give about this
11 document --

12 MR. TULCHIN: I have not seen this, Your Honor.

13 MR. JOHNSON: -- which is exactly what you said at
14 the hearing.

15 MR. TULCHIN: I don't think any such instruction
16 should be given now. If it is appropriate at the end in the
17 Court's instructions to the jury, then --

18 THE COURT: I think I can give it now. I will
19 give it.

20 MR. JOHNSON: Thank, you Your Honor.

21 (WHEREUPON, the bench conference was concluded.)

22 THE COURT: I am going to let the document in. We
23 obviously had previously discussions about this outside your
24 presence and I am going to let the document in. I just want
25 to let you know that if you find that Microsoft committed

1 antitrust violations in this case, that the contract which I
2 am letting in does not excuse Microsoft's conduct or protect
3 it from damages for antitrust violations. That is sort of
4 saying what I have said before.

5 MR. JOHNSON: Thank you, Your Honor.

6 THE COURT: But now we are -- it is actually the
7 license agreement between Microsoft and Novell.

8 MR. TULCHIN: Yes, sir.

9 BY MR. TULCHIN

10 Q. Mr. Frankenberg, looking at the first page, about one
11 third of the way down, you'll see that it is about the
12 product named Chicago, correct?

13 A. Yes.

14 Q. And this is the beta licensing agreement between
15 Microsoft and Novell for Chicago, what became Windows 95.
16 Is that fair?

17 A. Yes.

18 Q. Now, would you look, sir, still on the first page of
19 Defendant's Exhibit 19, and there is a paragraph numbered
20 two, capital letters prerelease code. You'll see there that
21 it says this product consists of prerelease code,
22 documentation and specifications, and it is not at the level
23 of performance and compatibility of the final generally
24 available product offered. The product may not operate
25 correctly and may be substantially modified prior to first

1 commercial shipping. Company assumes the entire risk with
2 respect to the use of the product.

3 Now, that is sort of consistent with what Novell put in
4 its license agreement that we looked at a moment ago,
5 correct?

6 A. It is consistent with it, yes.

7 Q. They are certainly pretty much similar, right?

8 A. Yes.

9 Q. And it was your understanding at the time in 1994, when
10 you were C.E.O. of Novell, that when Novell got a beta
11 version from Microsoft of what eventually became Windows 95,
12 that the beta version might change, correct?

13 A. Yes.

14 Q. Do you recall, Mr. Frankenberg, around the middle of
15 1995 --

16 A. Mr. Tulchin, could we go back to this document for a
17 minute?

18 Q. Yes, of course.

19 A. This actually is between Novell, the systems part of
20 Novell and not Novell WordPerfect.

21 Q. You're correct, and I have the one with WordPerfect if
22 you want to see it.

23 A. I was only pointing that out so that we were clear.

24 Q. I'm sorry. Defendant's Exhibit 18 is -- we're looking
25 for it -- it is the document that is the same contract but

1 between Microsoft and WordPerfect.

2 Let me just give you a chance to take a look at that.

3 THE COURT: To pick it up, Mr. Frankenberg, what I
4 said before obviously applies to this document as well.

5 BY MR. TULCHIN

6 Q. You're welcome to look at the last page, Mr.
7 Frankenberg, and you'll see that Exhibit 18 is the same
8 contract, but this one with WordPerfect instead of Novell,
9 right?

10 A. It is actually -- yes, it is WordPerfect just prior --
11 about a month prior to the completion of the acquisition.

12 Q. Right. And the contract would continue on with
13 WordPerfect?

14 MR. JOHNSON: Objection to the legal conclusion.

15 THE COURT: It probably is a legal conclusion, but
16 I think it probably will help the jury to know.

17 Overruled.

18 THE WITNESS: Yes. You were a little quick for
19 me.

20 BY MR. TULCHIN

21 Q. This Exhibit 18, I think you have now said is a
22 contract between Microsoft and WordPerfect Corporation just
23 before WordPerfect was acquired by Novell, correct?

24 A. Roughly a month before it was completed, yes.

25 Q. Right. And the same contract would continue in

1 existence after --

2 THE COURT: Generally that is a legal conclusion,
3 but I think subject to proof of the contract that is true.

4 BY MR. TULCHIN

5 Q. Is that your understanding?

6 A. I would assume so, yes.

7 Q. Now, we won't spend a lot of time on this, but it is
8 exactly the same contract with the same provisions, is it
9 not? The product name is Chicago at the top, et cetera, and
10 the paragraph number two, prerelease code --

11 A. Just a second.

12 Q. Take a look at it, but this is the one with WordPerfect
13 and --

14 THE COURT: He has already looked at that.

15 THE WITNESS: I looked at it and I agree it is the
16 same.

17 BY MR. TULCHIN

18 Q. It is the same. All right. I was just responding to
19 your point that there was a second contract.

20 A. Thank you.

21 Q. Thank you.

22 Do you recall, Mr. Frankenberg, and now directing your
23 attention to the middle of '95, do you recall in the middle
24 of 1995 telling Mr. Bradford, the top lawyer at Novell, the
25 general counsel, that one of the reasons that PerfectOffice

1 for Windows 95 was going to be delayed was because of five
2 bugs in Windows?

3 A. No, I did not tell him that.

4 Q. Do you recall expressing that view to Mr. Gates at
5 Microsoft, that there were bugs in Windows that caused
6 PerfectOffice to be late?

7 A. Yes.

8 Q. And --

9 A. Those are two different things, though.

10 Q. I understand. I understand. I am just asking a second
11 question. But --

12 MR. JOHNSON: Can we allow the witness to explain,
13 Your Honor?

14 THE COURT: He can, but not right now.

15 Go ahead.

16 BY MR. TULCHIN

17 Q. Mr. Frankenberg, around the middle of 1995, let's say
18 around July, August, did you tell Mr. Gates that one of the
19 problems you were having in getting PerfectOffice for
20 Windows 95 out to the market was because of bugs in Windows?

21 A. I recall telling Mr. Gates that we were having troubles
22 running our current version of PerfectOffice, PerfectOffice
23 3.0, the one that had been released the previous December on
24 Windows 95, and the issue was bugs in Windows 95.

25 Q. And that had nothing to do with this namespace

1 extension API issue, correct?

2 A. No.

3 Q. You are agreeing with me?

4 A. Yes, I am agreeing with you.

5 Q. Let me hand you, sir, what we have marked as
6 Defendant's Exhibit 6.

7 THE COURT: If there is an objection to this
8 exhibit, it is overruled.

9 BY MR. TULCHIN

10 Q. Mr. Frankenberg, have you seen this document before?

11 A. Yes, I have.

12 Q. This is a one page memorandum that is dated October
13 16th, '95.

14 It says David Miller at the top, and we saw
15 Mr. Miller's name on an exhibit earlier today, and I think
16 it was 22.

17 Do you remember that?

18 A. I don't remember whether it was 22 or not, but I do
19 remember seeing his name.

20 Q. He was director of strategic relations, I think, or
21 something like that.

22 A. He very often interfaced with Microsoft, yes.

23 Q. Right. And Exhibit 6 at the top says Dave thinks the
24 August 21 letter went out from DRB.

25 That would be Mr. Bradford, correct?

1 A. Correct.

2 Q. The general counsel. DRB and others believe that this
3 bug deal is a big deal but the apps people do not.

4 Do you see that?

5 A. Yes.

6 Q. The apps people would refer to people like Mr. Calkins
7 and Mr. Moon and Mr. Rietveld and Mr. Mella?

8 A. It would have been people in that area. I don't know
9 specifically who Dave Miller was referring to.

10 Q. All right.

11 A. But, yes, in that team.

12 Q. The next sentence says Dave thinks it is mostly our
13 fault. When we found the bugs we didn't press Microsoft to
14 fix them.

15 Do you see that?

16 A. Yes.

17 Q. And then it goes on to say when Dave was in Mac
18 development and they found a bug in the Mac OX they called
19 Apple daily until they were fixed. Our apps people don't do
20 that enough. Dave said that Bruce Brereton didn't think the
21 letter should have been sent at all. He felt that the bugs
22 were ordinary bugs not malicious. He and Dave -- it says
23 though, and it maybe should be thought -- our guys should
24 just call the Q and A people at Microsoft and get them
25 fixed, not write the letter.

1 Now, this is an example, is it not, Mr. Frankenberg, of
2 a case where some people at Novell were blaming Microsoft
3 for certain bugs, right?

4 A. Yes.

5 Q. And by your recollection they were bugs that effected
6 the old versions of WordPerfect and PerfectOffice?

7 A. The old versions of WordPerfect and PerfectOffice
8 running on what became Windows 95, yes.

9 Q. All right. And this memorandum, Defendant's Exhibit 6,
10 indicates that the apps people don't think that it was
11 Microsoft's fault at all, and Dave, it looks like referring
12 to Dave Miller, thinks it is mostly Novell's fault, correct?

13 A. Well, I don't know why Dave Miller would refer to
14 himself with his name, so I don't think it refers to Dave
15 Miller.

16 THE COURT: I think it is very confusing. I don't
17 think he wrote the memo.

18 BY MR. TULCHIN

19 Q. Mr. Frankenberg, if you look towards the bottom left of
20 the document there are the initials RR written in hand.

21 A. Yes.

22 Q. Do you see that?

23 A. I do.

24 Q. Do you recognize those initials as Ryan Richards?

25 A. It may be, but I am not sure. I don't recall what his

1 handwriting looked like.

2 Q. Thank you, sir.

3 In any event, am I right that this is an example of
4 some people at Novell blaming Microsoft for a problem with
5 Windows when, according to this memo, the apps people don't
6 think it was Microsoft's fault and Dave thinks it is mostly
7 Novell's fault?

8 MR. JOHNSON: Objection, asked and answered.

9 THE COURT: Overruled.

10 Go ahead.

11 THE WITNESS: Could we try that one more time, Mr.
12 Tulchin?

13 MR. TULCHIN: Sure.

14 THE COURT: And you have the same objection.

15 MR. JOHNSON: Thank you, Your Honor.

16 BY MR. TULCHIN

17 Q. I am just asking, Mr. Frankenberg, if this is an
18 example of a case where some people at Novell blamed
19 Microsoft for a problem, and other people at Novell didn't
20 think it was Microsoft's fault at all, they thought it was
21 Novell's fault?

22 A. Well, I think what this actually says is that there
23 were bugs, and they should have been more diligent in asking
24 Microsoft to fix them. I don't think it says that there
25 were not bugs.

1 Q. Right. But certainly it says what it says, Dave thinks
2 it is mostly our fault?

3 A. Yes, for not being aggressive enough in asking them to
4 fix them. I agree.

5 Q. And it goes on to say that he felt -- it looks like it
6 was either Dave or Bruce Brereton -- he felt that the bugs
7 were ordinary bugs not malicious, right?

8 A. Yes.

9 Q. So there was nothing malicious, according to this, in
10 what Microsoft was doing.

11 Do you agree?

12 A. As far as the bugs are concerned, yes.

13 Q. All right.

14 A. Not in other areas.

15 Q. Am I right, Mr. Frankenberg, that software engineers at
16 Novell worked with people in the systems group, the
17 operating systems group at Microsoft on a regular basis?

18 A. Yes, they did.

19 Q. And as far as you know, and you may have said this
20 yesterday, and if I am repeating something forgive me, but
21 as far as you know the people in the systems group at
22 Microsoft endeavored to be helpful to Novell, correct?

23 A. Generally, yes, that is true.

24 Q. All right. Now, am I also right, Mr. Frankenberg, that
25 in 1995, even if it had been true that the shared code group

1 was ready to go, that they had written an advanced file open
2 dialogue that was ready, the QuatroPro people were not ready
3 with their product that would have gone into PerfectOffice?

4 A. I don't know that personally, no. It may well have
5 been, but I don't know that personally.

6 Q. Mr. Frankenberg, I'm handing you Exhibit 221. This was
7 written on March 1st, 1995. It is from Bruce Brereton,
8 whose name we have seen before, and it is addressed to BU
9 staff and BU managers.

10 Who would that include?

11 A. BU would be short for business units, so that would
12 have been the applications, business applications, business
13 unit.

14 Q. That would include people like Mr. Calkins, correct?

15 A. Yes.

16 Q. And maybe Rietveld and Moon as well?

17 A. Perhaps, yes. Although technically they would have
18 been group staff as opposed to business unit staff, but it
19 may well have included them.

20 Q. But certainly Mr. Calkins would have gotten this?

21 A. Yes.

22 Q. At the top under the word confidential the first
23 paragraph says in an effort to make sure that we are all in
24 sync, et cetera, I'm sending this to group leaders. As you
25 know our current plan of record is that we would ship or Win

1 95 products as follows. WP -- and that means WordPerfect,
2 right?

3 A. Yes.

4 Q. -- September 15th and Storm November 30th.

5 Do you see that?

6 A. Yes.

7 Q. Now, this is March 1st of 1995. Storm referred to the
8 suite; isn't that right? That was the code name for the
9 suite?

10 A. That was the code name for the suite, yes. The one
11 that was designed for and ran on Windows 95.

12 Q. Right. So even on March 1st, 1995, according to the
13 first paragraph of Exhibit 221, the plan -- the plan of
14 record, and let me just stop there. That plan of record,
15 was that something that you would have approved?

16 A. I probably would have been aware of it. The approval
17 would have been done by the business unit.

18 Q. Mr. Calkins?

19 A. Mr. Calkins, perhaps Mr. Rietveld --

20 Q. Right.

21 A. -- and the others we have talked about, Dave Moon and
22 so on.

23 Q. I didn't mean to interrupt.

24 The plan of record on March 1st this says was to ship
25 Storm, that is the PerfectOffice suite, on November 30th,

1 correct?

2 A. Yes.

3 THE COURT: I am not sure. I am sorry. I am
4 confused. I am sorry. Read the next -- maybe we're going
5 to get there.

6 MR. TULCHIN: We are, Your Honor.

7 THE COURT: Okay. Go ahead.

8 MR. TULCHIN: We are.

9 BY MR. TULCHIN

10 Q. The very next paragraph in Mr. Brereton's memorandum or
11 e-mail says after further discussion and an analysis of
12 several options, we feel it would be much better to have
13 WordPerfect, which then implies PerfectFit, WPDRAW and many
14 other components on the same schedule as Storm.

15 Just above with Storm they talked about November 30th,
16 right?

17 A. Yes.

18 Q. And then it says, also, the QuatroPro team have
19 examined their product deliver time frame and feel December
20 30th is a more realistic date. Therefore, after reviewing
21 this with Mark, Glen and others, we have moved the Storm RTM
22 date -- and RTM means release to market, right?

23 A. Release to manufacturer.

24 Q. Thank you. Release to manufacturing, back by one month
25 to December 30th, and have put WP on the same timeline as

1 Storm.

2 So Exhibit 221 tells us, does it not, Mr. Frankenberg,
3 that on March 1st of '95 the plan became to get
4 PerfectOffice out, released to manufacturing, not even to
5 the market, just to manufacturing, at the very end of the
6 year, December 30th, correct?

7 A. Yes.

8 Q. There is nothing in here about the namespace extension
9 APIs causing any delay, is there?

10 A. Well, I have not read the whole document.

11 Q. Well, feel free. So far in the stuff we have looked at
12 there is nothing in there?

13 A. So far, yes.

14 Q. What it says is the QuatroPro team does not think they
15 can get it done by November 30th. They feel that December
16 30th is more realistic and, therefore, the Storm date has
17 been pushed back to December 30th, the very end of the year,
18 correct?

19 A. What we don't know from what we have read so far is
20 whether the QuatroPro team was delayed by the shared code
21 team not having completed their task. So it is hard for me
22 to say that they couldn't do what they needed to do until
23 shared code was in shape to work with. It is a little bit
24 hard for me to agree with your conclusion --

25 Q. Well, I'm happy to --

1 A. -- without knowing the answer to that question.

2 Q. Well, I'm happy to have you look at the whole thing.

3 THE COURT: He does not know.

4 MR. TULCHIN: I understand, Your Honor.

5 THE COURT: Again, there is no magic to me asking
6 the question. Well, is there a delay between, ordinarily
7 between release to manufacturing and manufacturing to get it
8 out to market?

9 THE WITNESS: In Novell's case it was a matter of
10 usually 24 hours or --

11 THE COURT: So --

12 THE WITNESS: It was essentially the same. That
13 is why we used the term release to manufacturer.

14 THE COURT: That is fine.

15 MR. TULCHIN: Thank you, sir.

16 THE WITNESS: Although, your honor, you're right,
17 it could be significantly different.

18 THE COURT: But in this case it is really not?

19 THE WITNESS: Yes.

20 BY MR. TULCHIN

21 Q. Mr. Frankenberg, the second page shows that copies of
22 this memo went to Mr. Calkins and Mr. Mella and to Dave, and
23 do you know who Dave would have been?

24 A. Dave probably would have been Dave Moon.

25 Q. Dave Moon. To Todd Titensor, correct?

1 A. That looks right, yes.

2 Q. And to others?

3 A. Yes.

4 Q. Going back to the first page we looked at the paragraph
5 saying that we have moved the RTM date back by one month,
6 and then right under that there is a paragraph that starts
7 some additional comments. One, we still have several
8 assignments that are not yet covered. We are short by about
9 ten people so we are looking at doing some relocations of
10 our staff. A few assignments will be temporary and some
11 will be permanent. I'll be working with the various
12 development directors to come up with the best proposals,
13 and will be surveying our teams to see if there is any
14 interest in the specific open positions.

15 Also, we are committed to help out the QP team,
16 Quatropro, in any way we can. Most likely PerfectFit and
17 Win 95 kinds of things. So please be aware that some of you
18 will be asked to travel to Scotts Valley for short trips and
19 may work on QP for some amount of time while here in Orem.
20 For what it is worth, their location is beautiful.

21 Now, this tells you, Mr. Frankenberg, does it not --

22 A. It was beautiful.

23 Q. I know it is. This tells you, does it not, that there
24 were problems getting the job done with QuatroPro in Scotts
25 Valley, correct?

1 MR. JOHNSON: Your Honor, we went through this.
2 Mr. Gibb covered all this, and this is not the man to be
3 talking about these subjects.

4 MR. TULCHIN: I am surprised to hear counsel say
5 that.

6 THE COURT: Well, okay.

7 I raised the issue and, Mr. Tulchin, you can
8 continue. I am sure you took into account what I said, but
9 I am sure you will streamline your examination.

10 MR. TULCHIN: I will, Your Honor.

11 BY MR. TULCHIN

12 Q. The point here is that the author here, Mr. Brereton,
13 says we are short by about ten people, and some people are
14 going to have to relocate to Scotts Valley at least
15 temporarily, correct?

16 A. That is what this document says, yes.

17 Q. And Scotts Valley --

18 A. I have never met a development team that didn't feel it
19 was short by some number of people.

20 Q. Right. Building software is complex and complicated
21 and time consuming and you can always use more help.

22 A. Yes.

23 THE COURT: Usually.

24 MR. TULCHIN: Okay.

25 BY MR. TULCHIN

1 Q. Mr. Frankenberg, were you aware around March of 1995
2 that the QuatroPro team in Scotts Valley wanted to push back
3 the date for the release of PerfectOffice?

4 A. No, I was not aware.

5 Q. I don't know if you have had a chance to look at any of
6 the rest of Exhibit 221, but is there anything in here that
7 you have been able to spot that has anything to do with some
8 delay that Mr. Harrall or Mr. Richardson were having in
9 trying to build the advanced file open dialogue?

10 A. I don't see anything in here along that line.

11 Can we go back to my answer to the previous question --

12 THE COURT: I don't think that is -- we understood
13 what you said. I think we ought to just move on.

14 THE WITNESS: Well, I wouldn't have --

15 THE COURT: Your concern is that somehow what they
16 were doing was delaying QuatroPro.

17 THE WITNESS: Yes.

18 THE COURT: We all understand that. There has
19 been other evidence of that.

20 BY MR. TULCHIN

21 Q. Mr. Frankenberg, would you say that Windows 95 was a
22 significant step forward?

23 A. Yes, it was.

24 Q. And would you say as well that Novell was very excited
25 about Microsoft's impending release of Windows 95?

1 A. We were very excited and very interested, yes.

2 Q. And there were many features in Windows 59 that Novell
3 was eager to take advantage of?

4 A. Yes.

5 Q. What Novell wanted to do with PerfectOffice was to
6 build the PerfectOffice suite in a way that would take
7 advantage of all of those features and do even more,
8 correct?

9 A. I don't know that it could advantage of all of the
10 features of Windows 95, but it would certainly have taken
11 advantage of the capabilities in Windows 95 that would give
12 it an advantage in the marketplace, if that is your
13 question.

14 Q. Was it true that Novell wanted to do even more by
15 building the advanced file open dialogue?

16 A. I believe the advance file open dialogue was written in
17 response to the APIs being withdrawn, so I don't know that
18 it would have been as you stated.

19 Q. Was it your view at the time, in 1994 and 1995, that if
20 PerfectOffice, the new version of PerfectOffice for Windows
21 95 had been released by Novell, that that would have made
22 Windows 95 even more desirable in the marketplace than it
23 otherwise would have been?

24 A. Definitely. It would have made Windows 95 more
25 desirable in the marketplace.

1 Q. It was your view at the time that if PerfectOffice for
2 Windows 95 had been released by Novell, that would have been
3 a benefit to Microsoft for exactly the reason that you just
4 said, it would have made Windows 95 even more desirable for
5 consumers?

6 A. That is true.

7 Q. If --

8 A. Especially for those who used WordPerfect products.
9 They would be able to use Windows 95, and they wouldn't
10 otherwise have been able to do that if they wanted to
11 continue using WordPerfect.

12 Q. If anything, that would increase the sales of Windows
13 95, correct?

14 A. Yes.

15 Q. Having a good PerfectOffice product out there would
16 make Windows 95 even more popular than it turned out to be,
17 true?

18 A. True.

19 Q. If PerfectOffice had been released in 1995 by Novell
20 and had been successful, and had gained a reasonably good
21 share of the market how, if at all, would that have effected
22 sales of Windows?

23 A. Presumably it would have increased sales of Windows 95.

24 Q. And would have made Windows 95's market share even
25 higher than what it turned out to be, correct?

1 A. Yes.

2 MR. TULCHIN: Nothing else, Your Honor.

3 THE COURT: Mr. Johnson.

4 MR. JOHNSON: Thank you, Your Honor.

5 Give me a moment, please.

6 THE COURT: Of course. We will go about 15
7 minutes, and depending on where you are we'll break.

8 MR. JOHNSON: Sure. Unfortunately, I have more
9 than 15 minutes.

10 THE COURT: I just wanted you to know our
11 schedule. We will break at 15.

12 REDIRECT EXAMINATION

13 BY MR. JOHNSON

14 Q. Mr. Frankenberg --

15 A. Yes, sir.

16 Q. -- good to be talking to you again.

17 A. It is for me, too.

18 Q. Unfortunately we have a lot of ground to cover, because
19 that was a rather lengthy cross-examination, so we're going
20 to have to go back and talk about some of the things that
21 were discussed yesterday, and then we will eventually get to
22 the things that were talked about today.

23 Right now I would like to --

24 MR. TULCHIN: Your Honor, I object to these
25 gratuitous comments. I think we should just proceed.

1 THE COURT: Well, that will add to the next
2 cross-examination.

3 MR. TULCHIN: Appreciate that, Your Honor.

4 BY MR. JOHNSON

5 Q. There were questions from Mr. Tulchin yesterday about
6 the fact that you never told Mr. Gates personally that
7 WordPerfect was using the namespace extensions.

8 Let me show you what has been marked Plaintiff's
9 Exhibit 220.

10 MR. JOHNSON: Your Honor, would you like one or is
11 the screen okay?

12 Thank you.

13 BY MR. JOHNSON

14 Q. This is an e-mail from Brad Silverberg to Russel
15 Segelman with a carbon copy to both Bill Gates and Paul
16 Maritz dated October 5th of 1994.

17 Just for context, that is two days after Mr. Gates'
18 decision not to publish the namespace extension.

19 Mr. Silverberg states, quote, I am afraid that when we tell
20 ISVs, there will be a firestorm of protest.

21 Mr. Frankenberg, you mentioned that you knew Tom
22 Creighton, a manager of the shared code team at WordPerfect;
23 is that correct?

24 A. Yes, I knew Tom.

25 Q. Was Tom Creighton involved in the development of the

1 PerfectOffice suite and shared code during this time period?

2 A. Yes, he was.

3 Q. Were you aware that when Mr. Creighton found out about
4 Mr. Gates' decision to take away the namespace extensions,
5 that he told Microsoft personally that there would be hell
6 to pay if they made such a decision?

7 A. I am sure he used words something to that effect, yes.

8 Q. We'll get back to that in a minute. Let's go back to
9 this Plaintiff's Exhibit 220.

10 Mr. Silverberg also stated, and I want to remind you
11 again that Bill Gates is copied on this e-mail, that, quote,
12 other ISVs using the extensions are WordPerfect, Lotus,
13 Semantic and Oracle.

14 Were you aware, Mr. Frankenberg, that Mr. Gates was
15 advised within two days of his decision to take away the
16 interfaces that WordPerfect was using the namespace
17 extensions?

18 A. Clearly that is the case and I have reviewed this
19 document before.

20 Q. Did Mr. Gates ever call you up or speak with you about
21 whether that was a problem for WordPerfect?

22 A. No, he did not.

23 Q. Mr. Silverberg goes on to state that these companies
24 will not be bashful about expressing their displeasure. It
25 will play out, I predict, on page 1 of the weeklies, lead to

1 calls for the DOJ to investigate, et cetera.

2 D.O.J. refers to the Department of Justice.

3 I would like to go now to --

4 MR. TULCHIN: Your Honor, I object to Mr.
5 Johnson's testimony. I think --

6 THE COURT: I think generally -- the general
7 position is that that is true, but I think we all know --
8 that is fine.

9 Go ahead.

10 MR. JOHNSON: Thank you, Your Honor.

11 THE COURT: Don't testify.

12 BY MR. JOHNSON

13 Q. Let's now turn to the topic of companies not being
14 bashful about expressing their displeasure and take a look
15 at Plaintiff's Exhibit 215.

16 Mr. Frankenberg, this is an e-mail chain within
17 Microsoft detailing a survey that was done by Microsoft's
18 development relations group in September of 1994, that
19 indicates the status of independent software vendors that
20 were using the namespace extension mechanism. Let's turn
21 our attention to the survey results for WordPerfect, which
22 is located in the bottom of what is marked page 48 and goes
23 on to the next page, 49, but for now let's just turn to the
24 page marked 48. The survey results ask have they started
25 work? The survey answer says very likely based on Tom

1 Creighton's feedback below.

2 Would it have been, Mr. Frankenberg, Mr. Creighton's
3 job to interface with Microsoft with respect to issues such
4 as the namespace extensions?

5 A. Clearly that was the case, yes.

6 Q. So we turn to the next page, page 49, and under the
7 section comments, and it states a detailed survey was sent
8 to WordPerfect but the results are likely to be very
9 informative. Tom made the comment that there would be hell
10 to pay in the press if we changed the interfaces from the
11 initial release of Chicago to the next release. They will
12 try to get feedback to us, but they don't want to tip their
13 hand.

14 Mr. Frankenberg, does that sound to you look Tom
15 Creighton was okay with Microsoft's decision to take away
16 the namespace extensions?

17 A. It sounds to me like he was mad as hell and wasn't
18 going to take it anymore.

19 MR. TULCHIN: It is just speculation, Your Honor.
20 The witness is being asked to look at a Microsoft document
21 and somehow interpret it.

22 MR. JOHNSON: Your Honor --

23 THE COURT: I think that the e-mail speaks for
24 itself, so the objection is --

25 MR. TULCHIN: So do I.

1 THE COURT: -- sustained. This is all for
2 argument.

3 MR. JOHNSON: Your Honor, there was lengthy
4 cross-examination with respect to what WordPerfect told
5 these people.

6 THE COURT: I understand, and that is exactly why
7 it is appropriate for you to argue it.

8 MR. JOHNSON: Thank you, Your Honor.

9 BY MR. JOHNSON

10 Q. If we look at the bottom of the first page of this
11 exhibit it states that the following companies have voiced
12 an interest in the namespace extensions and show
13 extensibility and it indicates whether they have started
14 work. On this page it appears that the survey found that
15 Oracle, Semantic, Stac Electronics and DCA had started work
16 with the namespace extensions.

17 Mr. Frankenberg, were you aware that other companies
18 were also interested in using the namespace extensions?

19 A. I am not surprised that they were. I am not sure that
20 I was aware of which particular companies.

21 Q. On the next page it gives a whole bunch of other
22 companies, and at the top there is a reference to
23 WordPerfect, and it says very likely, and actually the next
24 one is Lotus which says very likely, and both of those add
25 the parenthesis but detailed information will be difficult

1 to get.

2 Mr. Frankenberg, can you think of any reason from a
3 WordPerfect Novell perspective why detailed information
4 would be difficult to get from Microsoft about Novell's
5 plans for what they intended to do with the namespace
6 extensions?

7 A. Well, by telling Microsoft what our plans were we would
8 be telling our competitor in the suite business what we were
9 going to do, and so they would have foreknowledge of what we
10 were going to develop and take to market. It would be
11 foolish of us to be really forthcoming and telling them what
12 we were doing.

13 Q. Mr. Tulchin also asked you a number of questions of
14 whether you had any personal knowledge about whether people
15 within Microsoft were using the namespace extensions, and he
16 particularly talked about, I believe, Microsoft Office.

17 Mr. Hanson in this e-mail on the first page also evaluated
18 what groups within Microsoft were using the namespace
19 extensions under the heading there Microsoft, if we could
20 highlight that.

21 You can see there that it states that the Chicago shell
22 team will make use of everything. It says the Chicago
23 networking team, including remote access, will use the
24 namespace browser and explorer extensions. It also states
25 that the Elsewhere Company will provide the font folder in

1 Chicago and will use the namespace browser and explorer
2 extensions. And then it goes on to indicate that the office
3 team is using IShell folder and IShell link and maybe more
4 to do file open and save dialogues.

5 Mr. Frankenberg, I take it is fair to say you were not
6 aware of these facts when you answered Mr. Tulchin's
7 questions?

8 A. I was not aware of these facts, but clearly I was
9 right.

10 Q. The next listing says that Capone and the Info Center
11 will do everything, and they were able to do their work on
12 other platforms, the Mac, NT and Windows 3.1 by taking the
13 shell source code and modifying it to their needs.

14 Were you aware, Mr. Frankenberg, that Capone, which was
15 later called Info Center had access to the shell source code
16 and were modifying it to their needs?

17 A. I was not aware of that, no.

18 Q. In your entire history at Novell, do you recall ever
19 getting shell source code from Microsoft to use with your
20 applications?

21 A. No, I do not. It certainly would have been helpful at
22 a point in time or two.

23 Q. The next line indicates that Marvel, the online service
24 will extend the namespace in the explorer.

25 Were you aware, Mr. Frankenberg, that Marvel, the

1 online services application, was using the namespace
2 extensions at this time?

3 A. I was not.

4 Q. The next line says that Microsoft Access, which I will
5 represent to you is a Microsoft database product, would be
6 doing a file system view with namespace browsers, shell
7 extensibility, the works.

8 Were you aware of the product Microsoft Access, Mr.
9 Frankenberg?

10 A. I was. In fact, I still use it today.

11 Q. Were you aware at this time that they were using the
12 namespace extensions?

13 A. I was not aware of that, no.

14 Q. The next line shows that Ren, which prior testimony has
15 indicated was Microsoft Outlook, was originally implemented
16 totally as a shell extension, and that the hot debate right
17 now is namespace and explorer extensibility.

18 Were you aware that Ren was looking into using the
19 namespace extensions as well?

20 A. I was not aware.

21 Q. So it is fair to say, Mr. Frankenberg, that you never
22 had any personal knowledge regarding what was going on
23 within Microsoft with these namespace extensions?

24 A. I did not have personal knowledge, but it does not
25 surprise me, and it clearly shows that my belief of them

1 using one documented call was true.

2 Q. Let's turn now to plaintiff's --

3 THE COURT: Let's turn now to a break.

4 MR. TULCHIN: Thank you, Your Honor.

5 (Recess)

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