

1 THE COURT: Let's get the jury.

2 MR. TULCHIN: Your Honor?

3 THE COURT: Yes.

4 MR. TULCHIN: Maybe just a moment.

5 THE COURT: I'm sorry.

6 MR. TULCHIN: We need a witness.

7 THE COURT: Now, talk about leading questions, I  
8 didn't think it was that bad, that you didn't need a witness.

9 MR. HOLLEY: Your Honor, if Mr. Schmidtlein is  
10 finished with his cross, which I don't know if he is, I'd  
11 like to say something outside of the hearing of the jury. If  
12 he's got other questions, then I don't want to do it.

13 THE COURT: Are you finished?

14 MR. SCHMIDTLEIN: I'm finished.

15 THE COURT: What do you want to say?

16 MR. HOLLEY: Your Honor, Microsoft moves to strike  
17 the entire testimony of Ronald Alepin. He is not an expert  
18 in anything. None of the testimony he offered was based on  
19 technical or other specialized evidence that would be helpful  
20 to the jury, and as another Court in this district found,  
21 specifically in the Lantek case, all he was doing was  
22 adopting or vouching for Novell's view of this case.

23 He was relying on selective documents from  
24 Microsoft's files, and that reliance resulted in what the  
25 Court in called anecdotal evidence that is haphazard. And

1 it's too unreliable. And this is exactly what the Court in  
2 Lantek found, too unreliable for the jury to consider in  
3 determining liability in an antitrust case.

4 I did not hear a single instance of Mr. Alepin  
5 expressing a technical opinion. He said over and over and  
6 over again what he thought the evidence in the case showed or  
7 what broadly we -- and the royal "we" he used repeatedly --  
8 in the software industry think. But I didn't hear a single  
9 instance in which he said that he had conducted a technical  
10 analysis or reached any technical conclusions based on  
11 anything other than reading what other people wrote or  
12 testified about.

13 That is not expert testimony. Now, I'll take an  
14 example. He said that nothing was done do change the syntax  
15 of the NameSpace extension API's after they were  
16 de-documented, if you want to use that term. Well, actually,  
17 that's not true. And he gave a second opinion a few minutes  
18 later in which he contradicted himself.

19 His first opinion was based on our email that  
20 Satoshi Nakajima, the developer who wrote the NameSpace  
21 extension API's wrote or testimony that Nakajima gave. But  
22 that is not what technical experts do. He should have torn  
23 apart the code. He should have run tests on it. He should  
24 have made his own determinations about whether any change was  
25 made.

1           But the jury can look at Nakajima's testimony, they  
2 can look at the emails in the case and reach its own  
3 conclusions about these issues. There's nothing technical  
4 about what Mr. Alepin said. Thank you, Your Honor.

5           THE COURT: I deny the motion. I rely upon your  
6 excellent skills in cross examination to establish all those  
7 things.

8           MR. HOLLEY: Thank you, Your Honor.

9           MR. JOHNSON: One -- actually. One second. Let me  
10 talk about this. He's struggling a little with his shoulder  
11 from being up -- sitting here for four hours. We want to get  
12 started and get into the cross and sort of move this along as  
13 best he can, we probably have an hour of work.

14          THE COURT: Try to make it for another hour and five  
15 minutes.

16          MR. JOHNSON: Yeah, but if he --

17          THE COURT: If you can't, you can't

18          MR. JOHNSON: Yeah. If he reaches a point --

19          THE COURT: That's fine.

20          MR. JOHNSON: -- we're prepared to sort of take a  
21 break and read findings of whatever.

22          THE COURT: Sure.

23          MR. JOHNSON: Thank you.

24          THE COURT: Just let us know.

25          THE CLERK: Please rise for the jury.

1 (Jury brought into the courtroom.)

2 Please be seated.

3 THE COURT: We're ready for cross. Mr. Alepin is  
4 are not feeling so well, so at some point we may have him  
5 leave and reads some findings.

6 Mr. Holley

7 MR. HOLLEY: Thank you, Your Honor.

8 CROSS EXAMINATION

9 BY MR. HOLLEY:

10 Q. Mr. Alepin, I'd like to start where you stopped in  
11 talking to with Mr. Schmidtlein, and, with the indulgence of  
12 Novell's folks, I'd like to see slide 26 which is entitled  
13 Middleware and has all these purple and green boxes.

14 Now in this particular instance, sir, you referred  
15 to MAPI as middleware; is that right?

16 A. Yes.

17 Q. Now, MAPI, that middleware layer, exposes how many  
18 API's?

19 A. Fourteen. Fourteen, thereabouts. Somewhere in that  
20 vicinity.

21 Q. Okay. Fourteen Windows 95 exposed in excess of 2,5000  
22 API's; is that right?

23 A. A lot. Yes. Thousands, yes.

24 Q. Thousands. Way more than 14 you'll agree with me,  
25 right?

1 A. Certainly.

2 Q. Okay. So this green box called MAPI middleware, is not  
3 even a vague substitute for a PC operating system in terms of  
4 providing support for applications, is it?

5 A. It's not -- are you asking to compare it to an  
6 operating system?

7 Q. Yes, because I thought you said, on direct examination,  
8 that the purpose of middleware was to provide a substitute  
9 development platform for an operating system, right?

10 A. I did not intend that middleware to be interpreted as  
11 that. No, I don't believe I said that.

12 THE COURT: I think you better get a little closer  
13 to the mike.

14 THE WITNESS: No. I don't believe that that was my  
15 intention. Some middleware has that potential of extending  
16 to cover an increasingly large portion of the needs of  
17 application programmers, but other middleware, performs  
18 functions which, as I said in my definition, which was that  
19 it performs -- performs meaningful abstractions for software  
20 developers.

21 And mail, MAPI takes hundreds of API's from the  
22 operating system that would be necessary for each program to  
23 write to, to send an email out and reduces them to a single  
24 function call. And that's a meaningful -- that's a  
25 meaningful abstraction, and it makes that portion of the

1 operating system -- I'm sorry -- makes that portion of the  
2 application that depends on that middleware portable to  
3 another operating system, without change.

4 Because the developers have used a portable -- a  
5 middleware that is cross platform to perform mail, their mail  
6 functionality can be migrated to different platform's  
7 unchanged.

8 Q. But you were not intending for the jury to conclude  
9 from your testimony, were you, sir, that merely calling  
10 something middleware means that it is a potential substitute  
11 for a PC operating system?

12 A. No. No. Not at all.

13 Q. Okay. In fact, there are literally thousands and  
14 thousands of software products that expose some API's that  
15 can be called by other software products. Isn't that right,  
16 sir?

17 A. Absolutely. And, in part, that was the purpose of the  
18 refinement in the definition of middleware, that they have --  
19 there has to be some other thing that they do other than just  
20 expose API's, otherwise it's just -- it's a program with  
21 API's.

22 Q. Right. So, it's not enough to say that something is  
23 middleware, and it isn't even enough to say that something is  
24 middleware that exposes some API's or that software product  
25 that we're referring to, to constitute any sort of threat to

1 Windows; isn't that right?

2 A. There's got to be more, yes. There's got to be more  
3 than just the exposure of API's or the encapsulation of  
4 meaningful abstraction of API's. You need more.

5 Q. Okay. Now, you testified on direct examination, but I  
6 would like to see the Novell slide that you used that had a  
7 list of all the things called middleware. So, I don't think  
8 these are numbered, but by my count it is --

9 A. They are numbered, but you have to look very  
10 carefully.

11 Q. Yes. There you are. Thank you very much. Let's talk  
12 about these middleware examples. Now, when you used the word  
13 middleware in this --

14 THE WITNESS: Could somebody fix the screen? It's  
15 truncated.

16 THE COURT: Here you go.

17 THE WITNESS: Actually, you're right. I have that.  
18 I was trying to look at that. Okay.

19 MR. HOLLEY: Don't stretch.

20 THE WITNESS: Here we go.

21 Q. BY MR. HOLLEY: Now we're all on the same page. Now,  
22 this was a slide that Mr. Schmidlein showed you during your  
23 direct examination, and it's headed Middleware Examples.

24 A. Yes.

25 Q. Now, in this instance, did you mean that all of the

1 things that are on this slide are middleware in the sense  
2 that they are potential substitutes for a PC operating system  
3 as a platform for developing general purpose applications?

4 A. I think there are a couple of points of  
5 clarification.

6 THE COURT: And you can clarify. That's a fair  
7 question.

8 MR. HOLLEY: Absolutely, Your Honor. And I'm not  
9 asking -- if he can't answer yes or no, then I'm happy  
10 to hear the clarification.

11 THE WITNESS: As to time, we're talking about when  
12 the products were first released is a point that I'm asking  
13 you to clarify. When Netscape Navigator came out, it had  
14 very little functionality, relatively speaking. It did not  
15 have Java Script. It did not have JVM. Java did not have  
16 AWT. There's a bunch of things that make it important for  
17 you to tell me.

18 Q. That's a good clarification. Let's assume, for  
19 purposes of my question, that these -- we're talking about  
20 these products at their most able state, as good as they ever  
21 got. And then my question is, in that most able state --

22 THE COURT: He's saying most able, a-b-l-e.

23 MR. JOHNSON: I thought he said "evil."

24 THE COURT: Didn't you say able, able.

25 MR. HOLLEY: Absolutely, Your Honor.



1 MR. JOHNSON: Are you calling Novell's technology  
2 evil?

3 MR. HOLLEY: I might, but that wasn't my  
4 intention.

5 THE WITNESS: So, at their most capable -- and are  
6 you also -- what the second clarification is, what the intent  
7 was on the part of the owner/developer of the product. Are  
8 you taking that into consideration or not?

9 Q. BY MR. HOLLEY: I'm happy to take the intent of the  
10 developer into account as long as it's plausible. Right? I  
11 mean, I don't want you to testify about somebody who had  
12 grand aspirations if, in your opinion, those aspirations were  
13 ridiculous, but -- so, I don't know quite how to answer your  
14 question.

15 A. Excuse me. If Netscape says we want to make you BIOS,  
16 we want to make Windows BIOS, was that grandiose?

17 THE COURT: Can you get a little closer?

18 THE WITNESS: Sorry.

19 Q. BY MR. HOLLEY: Well, I think what Mr. Andreason  
20 actually said was, "I hope to reduce Windows to a slightly  
21 debugged set of device drivers."

22 And that's interesting, but my question is, did he  
23 ever come vaguely close to doing that? So, I don't want to  
24 listen to what Mr. Andreason said, I want your opinion about  
25 what he actually did.

1 A. Well, I think the answer for each of these is that they  
2 provided for their -- for the area in which they were  
3 intended, a -- a set of capabilities which would or could  
4 eliminate the need for concerns about the operating system or  
5 the need to run applications -- other applications that  
6 depended on the operating system.

7 Q. Well, let's unpack that a little bit, please. Let's  
8 take Netscape Navigator, as an example.

9 A. Sure.

10 Q. What general purpose office productivity application  
11 ever ran on any version of Netscape Navigator?

12 A. Well, I mean I -- the question is on a -- I can only  
13 answer the question as a browser because the objective was to  
14 make the browser the operating system. And, to my mind's eye  
15 today, looking at Google Docs and all the capabilities that  
16 are available to you on browsers, that it's entirely possible  
17 for you to live inside the browser.

18 Q. Well, let's look at slide 6, while we're talking about  
19 this and see if we can relate what you just said to slide 6.  
20 Okay. Now, in slide 6, you told the jury that what happened  
21 was that application A, the big purple box --

22 A. Uh-huh.

23 Q. -- was going to call API's exposed by yellow layer,  
24 called middleware; in this case Netscape Navigator, and the  
25 application was going to run on Netscape Navigator. That's

1 what you said, right, in your direct testimony?

2 A. I think you are expanding or interpreting what I  
3 said.

4 Q. Well, can you tell me, sir, not in 2011, when we now  
5 have web-based applications that did not exist in 1994, but  
6 can you tell me a single word processing spreadsheet database  
7 or presentation graphics application that ran on Netscape  
8 Navigator in 1994 or 1995?

9 A. KONA.

10 Q. And was KONA running on a server or was it calling  
11 API's exposed by Netscape Navigator? And I'm not talking  
12 about the Sun Java Virtual Machine and its libraries. I'm  
13 talking only about Netscape Navigator.

14 A. That's not -- that's not a -- Netscape Navigator  
15 included a scripting language and it included a virtual  
16 machine for the purposes of permitting the development of  
17 applications.

18 Q. Not in its first iteration, right?

19 A. That's it, but the point was, at the peak of its  
20 capabilities was the framework in which I was supposed to  
21 consider this.

22 Q. Well, I was talking about -- I didn't know you were  
23 going to can join products together. The answer you gave me  
24 about KONA only applies if one takes both Netscape Navigator  
25 and Sun's Java technologies and puts them together, right?

1 A. That's the way they were put. You said at the peak of  
2 their abilities. And I was trying to answer that. And then  
3 you said, okay, well, now, we're talking about 1995, which  
4 was not the peak of their abilities. But the point about  
5 answering in '95 was that there was a word processing program  
6 and there was a spreadsheet program that had been made  
7 available to run on JVM and in a browser, and for the network  
8 computers in 1995, '96.

9 I was trying to answer that question, but my  
10 question -- my answer to the question about programs at the  
11 peak of their capability, Netscape Navigator included the --  
12 the scripting language and the Java Virtual Machine.

13 Q. If you exclude the technologies in a Netscape licensed  
14 in from Sun, things like Java script -- are you all right,  
15 Mr. Alepin?

16 A. I'm okay. Never better. Well -- let me take that  
17 back.

18 Q. I'm not sure -- you're under oath.

19 A. I am. That's what I thought.

20 Q. If you exclude the Java scripting --

21 THE COURT: Wait just a second. If you exclude  
22 the --

23 Q. BY MR. HOLLEY: The Java script scripting language in  
24 the Java Virtual Machine and the Java Class Libraries, you  
25 would agree with me, would you not, sir, that, at no time,

1 was Netscape Navigator, all by itself, just the code that  
2 Netscape wrote, able to run general purpose office  
3 productivity applications?

4 A. That is the case. That was never the intent of the  
5 product, but that's certainly the case when it first came  
6 out.

7 Q. Okay. You said, as I understood you, sir, that it  
8 wasn't Netscape's intention to do that, and, in fact, it  
9 never happened. Is that right?

10 A. No. They bundled the JVM, the Class Libraries and  
11 Lotus script to fill out the range of capabilities that would  
12 allow them to run general purpose applications.

13 Q. Well, just -- before we move on to Java, I just want to  
14 be sure that you and I are on the same page. If we exclude  
15 Java Script, the Java Virtual Machine, and the Java Class  
16 Libraries, Netscape Navigator, itself, what Netscape wrote,  
17 was neither intended to nor ever did run any general purpose  
18 office productivity applications?

19 A. I mean, you're referring to the product that existed  
20 for a few months in 1995. I mean, for three months -- it was  
21 three or four months in 1995. That's -- that's true. They  
22 didn't have a -- they didn't put in the things that they were  
23 going to put in.

24 Q. Okay. And after, as you say, they put in the things  
25 they were going to put in, which was the Java Virtual Machine

1 the JScript Scripting Language and the Java Class Libraries,  
2 the only example you can think of, of an office productivity  
3 suite that ran on that combined Javagator -- excuse me, Java  
4 navigator platform -- actually, there is something called the  
5 Javagator we are going to talk about in a minute. But the  
6 only things that ran on the combination of Netscape Navigator  
7 and Sun's Java technologies that you can remember as you are  
8 sitting here now is KONA; is that right?

9 A. In 1995, that's all I can remember. From 1995. That  
10 was the beginning of the platform availability in that  
11 form.

12 Q. Okay. And you testified on direct examination that, on  
13 behalf of Jujitsu, you looked at that KONA product. I don't  
14 think you named it in your direct examination, but did I  
15 understand you correctly to say that, sir?

16 A. You did. I looked at the network computer, which, of  
17 course, was going to include the KONA or potentially include  
18 the KONA to license that on the -- if you were going to be an  
19 LEM for network computers, yeah.

20 Q. I'm sorry.

21 A. That's taking the design from Intel and implementing  
22 it.

23 Q. Okay. Among the people who implemented office  
24 productivity applications on the Java platform, was IBM,  
25 correct?

1 A. That's a -- yes. They did, yes.

2 Q. And they abandoned the effort because the performance of  
3 the applications that IBM wrote on top of Netscape Navigator  
4 and Sun's Java technologies was appallingly bad. Is that not  
5 correct, sir?

6 A. I would say they were not commercially viable.

7 Q. Not commercially viable because they were terrible,  
8 right?

9 A. Their performance was very slow.

10 Q. Okay. Now, other people made the same mistake, right?  
11 Other people tried to write applications to run on top of the  
12 combination of Sun's Java technologies, and they gave up.  
13 You're aware of that, aren't you sir?

14 A. This is -- it was no different from early adopters of  
15 other technologies on other platforms. You find out that  
16 it's not quite mature or it needs more work, or whatever, but  
17 it's -- some people who tried to get it to work in the early  
18 days busted their pick trying to do it, just like early  
19 Windows developers had problems getting their applications to  
20 run satisfactorily on Windows. It's no different.

21 Q. Now, Mark Andreason is someone you're familiar with,  
22 right?

23 A. Yes.

24 Q. He was the founder of Netscape?

25 A. One of the founders, yes.

1 Q. One of the founders of Netscape. And you're aware that  
2 Mr. Andreason tried to rewrite Netscape Navigator to run on  
3 top of the Java Virtual Machine and Java Class Libraries,  
4 correct?

5 A. We're getting to Javagator.

6 Q. Correct.

7 A. I didn't want to spoil it for the jury.

8 Q. Okay. And you're aware of Mr. Andreason's famous  
9 quotation, "The Javagator is dead. My joke is that the Java  
10 version of Navigator will have a lot of good attributes.  
11 It's slower. It will crash more and have fewer features so  
12 you can do fewer things. It will simplify your life."

13 A. That was some of the reports from the early -- early  
14 adopter community. That is correct. Yeah. They had a tough  
15 time.

16 Q. Well, let's talk about late adopters. Can you tell the  
17 jury, as we're sitting here now, anybody who has implemented  
18 a competitor to Lotus SmartSuite or Corel WordPerfect Office  
19 and Microsoft Office that runs on Sun's Java technologies?

20 A. I haven't done a recent survey, but I don't know that  
21 they would consider that implementing that kind of an  
22 application on -- on Java is perhaps the best way to solve  
23 the problem, that a combination of different technologies, is  
24 perhaps a better way to arrive at these, these problems.

25 Q. Well, have you ever had the occasion to read the



1 testimony of a man named Derek Burney, who was the CEO of  
2 Corel at the time that Corel made the mistake of trying to  
3 move the WordPerfect Office from Windows to Java?

4 A. Yes. I recall that.

5 Q. Okay. And his testimony was that they abandoned that  
6 effort because the security sandbox technology of Java made  
7 it impossible for them to work with large spreadsheets or  
8 word processing documents or presentations. Isn't that  
9 right, sir?

10 A. I believe that there were additional factors that  
11 influenced him. You have hit a few, but there were others.  
12 You're picking one point. There were other reasons why Java  
13 was not well suited at that time for deployment of the  
14 application.

15 Q. And, as you sit here today, sir, I just want to be  
16 clear. You can't tell the jury any suite of office  
17 productivity applications that has ever been developed to run  
18 on Sun's Java technologies?

19 A. As I indicated, that may not be the best use of Java  
20 technology, to develop an office suite or word processing  
21 software. Java's applicability for developing general  
22 purpose applications may be in a different -- may be better  
23 optimized for different kinds of applications.

24 Q. Well, how could Java, either alone or in combination  
25 with Netscape Navigator, ever have been a threat to

1 Microsoft's monopoly in PC operating systems if applications  
2 as basic as word processors and spreadsheets could not run on  
3 that platform?

4 MR. JOHNSON: We have an objection. Can we be heard  
5 Your Honor?

6 THE COURT: Yes.

7 (Discussion outside the hearing of the jury.)

8 THE COURT: Go ahead.

9 MR. JOHNSON: We have findings of the fact,  
10 collateral estoppel and otherwise, that demonstrate that  
11 Microsoft went to extraordinary ends and conduct to kill off  
12 Sun's Java because they were fearful that it was a competing  
13 platform. They have filed motion after motion after motion  
14 to exclude all of that, and now they are going to try to  
15 establish that, somehow, in fact, this threat, which was the  
16 foundation for the government lawsuit and the finding of  
17 liability against them somehow was ephemeral. They are  
18 relitigating facts and issues that they have already lost.

19 MR. HOLLEY: He just testified --

20 THE COURT: No. You can examine an expert about --  
21 I don't see anything wrong with this. This is a case about  
22 WordPerfect. And you're suggesting that middleware is a  
23 threat and to your client Novell. This is not the  
24 government's case.

25 THE COURT: It's overruled.

1 MR. JOHNSON: The last line of questioning was about  
2 Java.

3 THE COURT: About office productivity.

4 MR. JOHNSON: But that's --

5 THE COURT: Yes, it was, wasn't it?

6 MR. HOLLEY: Yes, it was, Your Honor, whether they  
7 run on Java and Netscape.

8 THE COURT: And that's what -- this is not a general  
9 case by the government. This is a case brought by  
10 WordPerfect, which is an office productivity application.

11 (Proceedings continued in open court.)

12 THE COURT: Just rephrase the question. Just  
13 restate your question.

14 Q. BY MR. HOLLEY: My question to you, Mr. Alepin was,  
15 given your testimony that Java was not a suitable -- we're  
16 the Keystone Kops here. Given your testimony that Java was  
17 not a suitable platform for developing suites of office  
18 productivity applications, my question to you, sir, is, how  
19 would the combination of Java and Netscape ever pose a threat  
20 to Microsoft's PC operating system monopoly? If you couldn't  
21 even develop those sorts of basic applications to run on Java  
22 and Netscape?

23 THE COURT: The objection is overruled. You may  
24 answer.

25 THE WITNESS: It's a complicated question to answer.

1 The -- the first thing is that not everyone wants or needs a  
2 full featured desktop personal productivity application on  
3 their desktop. In fact, many users can be satisfied with a  
4 word processor or a spreadsheet program to the extent they  
5 even need them, that is nothing -- that is little more than  
6 an email editing program on steroids.

7 The second part of that is that the -- that the  
8 platform threat, in many ways, is -- manifests itself in two  
9 main areas. What platform are developers targeting new  
10 applications for? And the second one is, second leg of that  
11 is, where are users spending their time when they turn on  
12 their computer.

13 And the -- if a user spends all of his time or is  
14 able to spend all of his time or virtually all of his time  
15 in a browser or an email program or a groupware program like  
16 Lotus Notes and can find the -- a complimentary set of  
17 applications to fill in the needs beyond that, then he has  
18 no -- he has a limited need for a general purpose operating  
19 system like Windows. The value of Windows is diminished as  
20 long as he can get to his browser, as long as he can get to  
21 his email program, as long as he can run his groupware  
22 program.

23 And that's a threat that Microsoft executives see  
24 before them in the mid-1990's.

25 Q. Well, I appreciate your view about -- about putting

1 yourself in the head of Microsoft executives. But let's talk  
2 about the two things that you said matter. One was what  
3 API's or software developers are targeting, did I understand  
4 that correctly?

5 A. The platform.

6 Q. Okay. What platform are they targetting? For Lotus  
7 and Corel WordPerfect and Microsoft, it is not an option, if  
8 you want to create a full-featured suite of productivity  
9 applications, to target Java and Netscape, because they won't  
10 help you; isn't that right?

11 A. For those existing applications, that's correct.

12 Q. Okay. And then, in terms of the person that you said  
13 wants to live inside Lotus Notes --

14 A. Yeah.

15 Q. -- that person is not silly enough to believe that  
16 Lotus Notes runs directly on the Intel processor, correct?  
17 Lotus Notes runs on an operating system. Isn't that right?

18 A. Many people don't have -- or pay little attention to  
19 that, but Lotus Notes -- but is in true that Lotus notes does  
20 run on an operating system, several operating systems.

21 Q. Right. And if you installed Lotus Notes on a new  
22 computer that didn't have Windows or Linux or the Mac OS on  
23 it, Lotus Notes wouldn't do one thing, would it?

24 A. The way that it is designed, that's correct. It  
25 requires an operating system to function.

1 Q. Now, when you testified on direct examination that  
2 Lotus Notes was a middleware platform -- and I hope we can  
3 put slide number 7 back up, please, but when you testified  
4 that Lotus Notes was a middleware platform, you weren't  
5 trying to suggest to the jury --

6 THE COURT: Is that the one you want?

7 MR. HOLLEY: I'm sorry. That's number 6. Number 7  
8 is -- yes. Thank you very much.

9 THE WITNESS: Okay. Yes.

10 Q. BY MR. HOLLEY: So, I understood you correctly, did I  
11 not, that you told Mr. Schmidlein that Lotus Notes was a  
12 middleware platform?

13 A. That's correct. That's my view, and that's Lotus'  
14 view, and that's Microsoft's view.

15 Q. Well, actually, we'll find out with a Microsoft's view  
16 is eventually. But your understanding -- your testimony was  
17 that Lotus Notes is a middleware platform?

18 A. That's correct.

19 Q. Now, you were not suggesting, were you, sir, that  
20 someone could use Lotus Notes as an alternative to  
21 Microsoft's Windows, for writing word processors,  
22 spreadsheets, relational data bases or presentation graphic  
23 software products, were you, sir?

24 A. No, I was not.

25 Q. In fact, it would be a singularly worthless exercise,

1 would it not, to try to write Lotus SmartSuite or Corel  
2 WordPerfect Office or Microsoft Office to run on top of Lotus  
3 Notes. It wouldn't work?

4 A. Well, I don't -- I'm not sure I see the irresistibility  
5 of that statement. They might -- they might find that  
6 writing SmartSuite to use some of the functionality that was  
7 made available by -- by the Lotus Notes platform as being a  
8 strong or a valuable thing to do, just as Microsoft Office  
9 developers might find that making use of SharePoint  
10 technologies would be a good thing to do. It's -- the idea  
11 here is that they can combine and extend. The Notes people  
12 say you should make use of -- rather than using the operating  
13 system's file system to store documents, why don't you use  
14 Notes to store documents. Isn't that a good idea.

15 And maybe the SmartSuite people start doing that  
16 instead of depending on and writing to the API's of the  
17 Windows operating system for file storage, they use the API's  
18 provided by Lotus Notes. And that's the point there. And  
19 eventually it extends, and who knows where it goes, but  
20 that's the idea of middleware is making those things  
21 possible.

22 Q. Well, we do know where it goes, don't we, Mr. Alepin?  
23 IBM owns both Lotus SmartSuite and Lotus Notes, and as we sit  
24 here in 2011, Lotus SmartSuite runs on Windows, not on Lotus  
25 Notes. Isn't that right, sir?

1 A. It runs on Windows.

2 Q. Yes. It doesn't run on Lotus Notes, does it,

3 Mr. Alepin?

4 A. That's correct.

5 Q. Okay. so your supposition about what IBM might have  
6 done to make SmartSuite run on top of Lotus Notes is not what  
7 IBM decided to do and has not done for the last 17 years; is  
8 that right, sir?

9 A. That's correct.

10 Q. Now, let's turn to the Novell technologies on your  
11 list. WordPerfect was never a potential substitute for a PC  
12 operating system in terms of being a platform for general  
13 purpose applications; isn't that right?

14 A. It was a platform for the development of applications  
15 that were -- that worked with and were complimentary to the  
16 WordPerfect system.

17 Q. Right. So, if I wanted to write a thesaurus  
18 application or a spell checker application or an application  
19 that lawyers might use to generate a table of authorities  
20 in a legal brief, I'm the kind of person who might want to  
21 write on top of WordPerfect; is that right?

22 A. That's one use, and that's the general idea.

23 Q. But, if I'm somebody who wants to write a spreadsheet  
24 like Lotus 123 or Microsoft Excel, or if I am WordPerfect,  
25 trying to write it's own presentations graphic package, I am



1 going to write to Windows or the Mac OS. I am not going to  
2 write on top of WordPerfect, am I?

3 A. Well, I think the idea for those applications was  
4 PerfectFit and the shared code environment, not the  
5 WordPerfect environment.

6 Q. Okay, well, we'll get there soon enough. But can you  
7 answer my question about WordPerfect. Somebody writing a  
8 general purpose office productivity application, like a  
9 spreadsheet, a word processor or a relational database  
10 would not write an application to API's exposed by  
11 WordPerfect, would they?

12 A. It would not be the best use of your time.

13 Q. They couldn't do it, could they, sir?

14 A. I haven't tried to do it. I don't know. I don't  
15 suspect that it would be a worthwhile exercise.

16 Q. All right. Let's talk about PerfectFit shared code. I  
17 think you testified that the PerfectFit shared code was  
18 basically the glue that held the different applications in  
19 PerfectOffice together. Did I understand that correctly?

20 A. That was the -- the aim was to extract the services  
21 that they -- the various applications needed to use and make  
22 those available in a common, consistent platform, yeah, the  
23 common, consistent layer; common, consistent layer.

24 Q. A layer. Okay. And was it your testimony on direct  
25 examination that the technologies that are called PerfectFit

1 or were called PerfectFit, were a potential substitute for a  
2 Windows PC operating system in terms of acting as a platform  
3 for the development of general purpose applications?

4 A. I don't -- I did not intend for them to be taken  
5 separately and individually. I intended them -- I intended  
6 for them to be taken as a whole, not each individual  
7 technology standing alone as a potential alternative to a --  
8 or potential eventual alternative to a Windows operating  
9 system.

10 Q. Fair enough. So, why don't you tell the jury what  
11 you -- what technologies are on your list that fall within  
12 that category, PerfectFit/shared code?

13 A. There is the common services layer, the ability to make  
14 use of abstracted desktop productivity application  
15 functionality that are in PerfectFit, and in the shared code  
16 is the abstraction layer of the operating system.

17 Q. Now, you did, I assume, a fair amount of analysis of  
18 what Novell hoped to do with the NameSpace extension API's in  
19 Windows 95; is that right, sir?

20 A. I did, indeed.

21 Q. And I think that Mr. Schmidtlein showed you a picture  
22 which I'd like to put on the ELMO if it works.

23 A. ELMO?

24 Q. This is old technology, which means I don't know how it  
25 works.

1 THE COURT: Why don't you use Mr. Goldberg's new  
2 technology.

3 MR. HOLLEY: Well, I wrote on it, Your Honor, that's  
4 the problem.

5 THE WITNESS: There's a nob, isn't there?

6 Q. BY MR. HOLLEY: If there is one -- all right. All  
7 right. Okay. How many lawyers does it take to change a  
8 light bulb?

9 Now, if we think about the yellow layer called  
10 middleware, and we apply that to the PerfectFit shared code  
11 technologies, you can accept that, right, for purposes of  
12 discussion? One of the things you said.

13 A. I'm sorry. I wasn't -- I missed the first part of your  
14 question.

15 Q. Sure. That's fine. So I thought you just said to me  
16 on cross examination that one of the things that you said on  
17 direct constituted a middleware platform were the PerfectFit  
18 shared code technologies that Novell was developing?

19 A. The part of the middleware platform that they were  
20 developing included the PerfectFit for -- yes, the  
21 PerfectFit.

22 Q. And one of the things that Novell wanted to do was have  
23 that yellow PerfectFit shared code middleware layer call the  
24 NameSpace extension API's in Windows 95; is that right?

25 A. Yes.

1 Q. Those NameSpace extension API's were what you would  
2 think of as platform specific, correct? They are only on  
3 Windows. They are Microsoft's invention?

4 A. That is correct. Yes.

5 Q. So, by virtue of calling the NameSpace extension API's  
6 in Windows 95, Novell would have destroyed any potential  
7 cross platform opportunity for the PerfectFit shared code  
8 layer which you call middleware; is that correct?

9 A. The -- I don't know why you would say that that's true.  
10 The -- the NameSpace -- the PerfectFit job, as I described,  
11 for other middleware API's is there. With NameSpace  
12 extensions, it's not there. So they would have to develop --  
13 they would develop NameSpace extensions there to work with  
14 Windows, and then they would come over here and use Workplace  
15 shell extensible interfaces here. And over here, they would  
16 use Next, and then over here they would use whatever else was  
17 available.

18 The PerfectFit job is to be a common interface up  
19 and a variable interface to operating system below. So I  
20 don't know why you would say there's a destruction of -- of  
21 interoperability, interoperability.

22 Q. Cross platform is what you're trying to say. But have  
23 you done any study to look at the Mac OS, IBM's OS/2, Next,  
24 UNIX, any variant you want, to see whether there was anything  
25 vaguely like the NameSpace extension mechanism that was in

1 Windows 95?

2 A. The -- as I mentioned -- as I mentioned, in my direct  
3 testimony, the notion of extensible shells, beginning in the  
4 early 1990's, '92, '93, was something that had been adopted  
5 by at least two products that were to get to market before  
6 Microsoft's Windows product got to market, and it is -- it is  
7 entirely conceivable that other vendors would have followed  
8 Microsoft's lead, notwithstanding the at least -- the  
9 decision that the WordPerfect/Novell people had made to focus  
10 initially their development efforts on Windows 95.

11 So, Windows 95, was a -- was a big first commitment,  
12 as the target development platform for -- for their next  
13 product, including PerfectFit. Their ability to deliver  
14 those same functions that depended on the NameSpace  
15 functionality in Windows may have been -- may have relied on  
16 the -- their ability to persuade their operating system  
17 vendors to provide comparable technology in the future to  
18 NameSpace, or they may have had to do, as they did with  
19 Windows, and develop it themselves for OS2 or other  
20 platform's if they needed it.

21 But it did not do anything to destroy compatibility,  
22 as lease as near as I can understand that concept, given that  
23 they were developing the mate to the operating system, not  
24 the mate to the application.

25 Q. Well, Mr. Alepin you just said, did you not, that it

1 was conceivable that other operating systems might have  
2 implemented something like the NameSpace extension API's. Is  
3 that your testimony, sir?

4 A. That's -- yes. That's what I said.

5 Q. And when you gave that testimony, did you consider  
6 United States patent numbers 5831606 and 6008806 to the  
7 Microsoft Corporation?

8 A. I did, yes, in fact.

9 Q. Okay. And you have done an analysis to determine  
10 whether IBM or Apple could implement the NameSpace extensions  
11 without infringing these patents. Is that your testimony?

12 A. I have done enough work with software patents to  
13 understand that there are ways to work around the software  
14 patents and that the degree to which they -- I'm sorry.  
15 There is no -- there is not a considerable amount of  
16 identity that the -- that IBM, who has a software patent  
17 cross-licensed with Microsoft, would have to do to implement  
18 NameSpace extensions in a non-infringing way, on OS2.

19 Q. That testimony is based on nothing other than your  
20 general attitude toward software patents; isn't that right,  
21 sir? You have not done any analysis of these patents to  
22 determine whether or not someone else could implement the  
23 NameSpace extension API's without constituting a patent  
24 infringement. Isn't that right, sir?

25 MR. JOHNSON: I think we're getting a little far

1     afield of the direct.

2             THE COURT: I don't think so. Overruled.

3             THE WITNESS: The answer is, I have looked at the  
4     patents. I have studied them. I have tried to determine  
5     whether they disclose and enable. And I have found that, in  
6     my opinion, it would be possible to implement functionality,  
7     that it was part of an extensible shell that would allow an  
8     application program to put stuff, put information sources  
9     in a view panel without infringing that patent.

10    Q.     Did you fail to tell the jury during direct that you're  
11    a patent lawyer?

12             MR. JOHNSON: Objection, Your Honor. Come on.

13             THE COURT: Sustained.

14    Q.     BY MR. HOLLEY: Whatever you think, the truth of the  
15    matter is that nobody else ever implemented anything like the  
16    NameSpace extension API's in their operating system. Isn't  
17    that correct?

18    A.     I think those operating systems disappeared.

19    Q.     The Mac disappeared?

20    A.     Not the Mac but the BOS and the OS2 operating systems  
21    disappeared.

22    Q.     Can you name for me, sir, a single general purpose  
23    office productivity application that was ever written to run  
24    on the API's exposed by PerfectFit shared code as you have  
25    described that?

1 A. I'm sorry. Could I have your question back again?

2 Q. Sure. Excluding any product from Novell, can you tell  
3 me any general purpose office productivity application that  
4 was ever written to run on API's exposed by PerfectFit shared  
5 code?

6 A. I don't understand the import of the question. There  
7 were -- perfectFit was running in a product that already had  
8 desktop productivity applications in it. What would be  
9 the -- I'm losing the import of the question. They were  
10 already -- there were already word processors and  
11 spreadsheets and things inside it that were running on  
12 PerfectFit.

13 Q. Right. So you find my question utterly senseless;  
14 isn't that right? Why would somebody write --

15 A. I think --

16 Q. Just let me finish. Why would somebody write a general  
17 purpose word processing or spreadsheet application to run on  
18 top of one?

19 MR. JOHNSON: Your Honor, Mr. Holley may not like  
20 his answers, but I would like him to be a little more  
21 respectful of the witnesses.

22 THE COURT: I think that's a perfectly good  
23 question, one that has occurred to me, so no wonder I think  
24 it's a good question.

25 THE WITNESS: But the point of this is, it's like



1 Netscape Navigator and its -- and the related technologies.  
2 People aren't writing browsers to run on top of Netscape  
3 Navigator. People aren't writing email programs and  
4 calendaring programs to run on top of Lotus Notes. That's  
5 what they do. People don't write database programs to run on  
6 top of databases.

7           Yet, each one of those products is a middleware  
8 platform on which people develop applications. Just like --  
9 just like Oracle. Oracle's database program is a database  
10 program, and people write lots and lots of applications to  
11 work with Oracle's program, but they don't write a database  
12 program for it.

13 Q.       Well, let me ask you to assume with me the following  
14 definition of middleware. Middleware is a software product  
15 that exposes a sufficiently broad set of API's to enable the  
16 creation of general purpose office productivity applications.  
17 That's what middleware means for my question.

18           And you'll agree with me that none, not a single one  
19 of the things on this slide is middleware under my  
20 definition. Isn't that right, sir? I'm sorry, we have to  
21 shut the ELMO off and go back to number 7.

22           THE COURT: Yeah. It's number 7.

23           THE WITNESS: So, the requirement here for your  
24 definition of middleware is that I'm able --

25 Q.       BY MR. HOLLEY: It has to be a software product --

1 A. Right.

2 Q. -- that exposes a sufficiently broad set of API's to  
3 enable the creation of general purpose office productivity  
4 applications.

5 A. I don't -- it doesn't. I don't understand the  
6 requirement for that. I don't understand the requirement in  
7 the hypothetical. I'm lost.

8 Q. It's really -- I don't think it's necessary for you to  
9 understand why I'm asking you the question I'm asking you.  
10 Just assume there's a reason. And my question is, if you  
11 assume with me that middleware means a software product that  
12 exposes a sufficiently broad set of API's that enables the  
13 application of the -- the development, excuse me, of general  
14 purpose office productivity applications, you'll agree with  
15 me that none of the things listed on this slide meets that  
16 definition of middleware. Isn't that right, sir?

17 A. No. Is it -- when you are using whatever it is,  
18 general purpose office productivity application, is that a  
19 proxy for the complexity or the variety or the -- some  
20 other -- what is the attribute in the desktop productivity  
21 application?

22 Q. It's what the case is about, sir.

23 A. I'm sorry?

24 Q. Let's use as a proxy -- it's a fair question. Let's  
25 use as a proxy something as complex as Corel WordPerfect

1 Office 7, released in March or April, whenever it was, of  
2 1996. That's our proxy for what is a general purpose office  
3 productivity application. And my question to you, sir, is,  
4 can you tell the jury whether any of the things listed on  
5 this slide is a software product that exposes a sufficiently  
6 broad set of API's to enable the development of Corel  
7 WordPerfect Office 7?

8 A. At the -- at that time, at the time that they were  
9 around, I don't think that that is the case. However, I  
10 don't think that people would develop -- would use the same  
11 development model as was used for general -- for the  
12 development of general purpose desktop applications to  
13 develop comparable applications under the -- in these  
14 platforms.

15 They would take different approaches, given the  
16 environments in which they -- these platforms would operate.

17 Q. Well, assume with me, sir, that the allegation is --  
18 I'm not saying this is real. I'm just saying, assume with me  
19 that the allegation has been made that one or more of the  
20 things listed on this chart was a threat to Microsoft's  
21 Windows operating system because it exposed a sufficiently  
22 broad set of API's to enable the development of applications  
23 as complicated as Corel WordPerfect Office 7.

24 If that's the allegation, you would agree, would you  
25 not, sir, that that allegation is false?

1 THE COURT: Approach the bench a minute.

2 (Discussion outside the hearing of the jury.)

3 THE COURT: That is the allegation.

4 MR. HOLLEY: I think it is, Your Honor. I think the  
5 testimony of the witness on direct was that these things,  
6 either alone or in combination, isn't contrary or alternative  
7 to Windows as the development platform. If that isn't true,  
8 then they don't belong here because there isn't any  
9 conceivable impact on competition in the PC operating  
10 system.

11 THE COURT: Well, what confuses me, and I'll hear  
12 from Mr. Schmidtlein in a minute, you're limiting your  
13 question to office productivity applications.

14 MR. HOLLEY: Yes.

15 THE COURT: Why?

16 MR. HOLLEY: Because it's one thing to write a spell  
17 checker, some simple little thing that you plug into a word  
18 processor. And, in that sense, Your Honor, you might say  
19 that WordPerfect is a platform. But it's only if WordPerfect  
20 is sufficiently capable that it could actually serve as an  
21 alternative to Windows for writing all kinds of very complex  
22 applications that it could ever have any impact on  
23 competition in the market.

24 THE COURT: I'll hear from Mr. Schmidtlein because,  
25 it would seem to me that it would be for general purposes

1 applications other than what they are doing because they have  
2 the office productivity in WordPerfect, so it would seem to  
3 me that the concern was that, in addition to getting the  
4 office productivity --

5 MR. HOLLEY: Yeah.

6 THE COURT: -- you could use the middleware for  
7 entirely different applications.

8 MR. HOLLEY: It's a perfectly fair question. The  
9 reason I'm using them is because they were the most complex,  
10 sophisticated applications among them in existence  
11 at that time. And that's why I want them to use that as the  
12 proxy, because if you can't run something as complicated as  
13 Office, WordPerfect Office or Lotus SmartSuite, then you  
14 aren't really a threat, and nobody could be afraid of you  
15 because you could never --

16 THE COURT: But, as you said, it's almost a  
17 senseless question. Who would ever write to that?

18 MR. HOLLEY: That's the theory. The theory is that  
19 WordPerfect, in combination with AppWare and Open Dock, was a  
20 platform competitive to Windows. I must confess to you, I  
21 think it's silly, but that is their case.

22 MR. JOHNSON: He's asking about all these  
23 technologies. If this is what his theory is, he's  
24 relitigating the government case. You can't write general  
25 applications to Netscape. You can't write general

1 applications to Sun, therefore there can't be any harm to  
2 competition. There was harm to competition.

3 MR. HOLLEY: Your Honor, the government's case was  
4 based on a toothless causation standard because the  
5 government has the power to nip the competition threats in  
6 the bud. Judge Kollar-Kotelly said none of this ever came to  
7 be, so it's one thing to say that we lost the government case  
8 because somebody thought there was a threat. These folks are  
9 trying to collect a huge amount of damages in a private case  
10 after we see the way the world actually played out. I don't  
11 think it's fair to say that we are foreclosed from pointing  
12 out that nothing that the DOJ said would happen ever  
13 happened.

14 MR. JOHNSON: They killed the technology. Netscape  
15 Navigator and Sun were killed in the crib. That's the  
16 point.

17 MR. HOLLEY: Well, that is the point if you were  
18 here litigating on behalf of Netscape and Sun, but they have  
19 settled with us. You're here litigating on behalf of other  
20 people. And you have to prove that your clients' products  
21 were injured and that those injuries caused competition to be  
22 harmed in the PC operating system.

23 MR. JOHNSON: The same way that Sun and Navigator  
24 did. And he's saying they didn't form -- they couldn't have  
25 run a general purpose application, so they must not have had

1 a claim, too. They did have a claim.

2 MR. HOLLEY: Your Honor, it's a different standard.  
3 They have to show that, if they had gotten access to this  
4 technology, not only would they have been more popular,  
5 vis-a-vis our applications, the claims that were dismissed,  
6 but they would have changed the competitive dynamic in the PC  
7 operating system business.

8 Mr. Frankenberg testified yesterday that that was  
9 not going to happen. They were tying themselves to Windows.  
10 So, the whole nexus between the competition between Word and  
11 WordPerfect and the PC operating system market has never been  
12 established here, and I'm just trying to make that point.

13 THE COURT: I think it's fair cross examination.  
14 Forget the point about relitigating the case. You have  
15 suggested this was viable middleware for purposes of your  
16 client recovering damages, so it's fair, so the objection is  
17 overruled. But I still -- if I were you --

18 MR. JOHNSON: Your Honor, the test is not only if  
19 you can run a general purpose application. Could you be a  
20 threat? Could they -- they viewed lots of things as threats  
21 and killed lots of things that couldn't run a general purpose  
22 application. That's the point. And we're going to get  
23 into --

24 THE COURT: There's a lot of difference between this  
25 and the government's case. As of right now, I'm overruling

1 the objection.

2 MR. HOLLEY: Your Honor, we've talked to the end.

3 THE COURT: Okay.

4 MR. HOLLEY: Five minutes?

5 (Proceedings continued in open court.)

6 THE COURT: We could have sent you home five minutes  
7 earlier. Did you want to stop?

8 MR. HOLLEY: Your Honor, I must say, given the way  
9 Mr. Alepin obviously feels --

10 THE COURT: Let's stop and come back at 8:00 o'clock  
11 in the morning.

12 Mr. Alepin, I hope if you feel better.

13 (Jury leaves the courtroom.)

14 And I'll stay here. I'm actually going to leave and  
15 come right back. If you all want a break?

16 MR. HOLLEY: No. I'm fine, Your Honor.

17 MR. JOHNSON: I'm fine, Your Honor.

18 THE COURT: Mr. Alepin, go back and take some --  
19 whatever medication it is that you're on.

20 THE WITNESS: I was ordered not to.

21 THE COURT: At least Advil.

22 I know of three things we have to take up. One is  
23 the admissions -- two things to take up. The exhibits that I  
24 reserved ruling on, the exhibits referred to in Mr. Johnson's  
25 letter of this morning, and the third thing is -- I realize



1 this is not -- I just want to make sure my head is on  
2 straight. And I don't think this changes the legal analysis.  
3 Throughout the Microsoft --

4 MR. JOHNSON: Would you turn your mike on, Your  
5 Honor.

6 THE COURT: Excuse me. Throughout the Microsoft  
7 litigation -- and it's not disputed here, and I'm not  
8 suggesting that we revisit it, I'm just trying to make  
9 sure -- that actions were taken to preserve Microsoft's  
10 monopoly in the PC operating system. And that's the way it's  
11 always been phrased. And I -- as I now understand it, a  
12 different way, and maybe a better way to rephrase that from  
13 the outset was Microsoft took actions, and that is the  
14 classic -- what I just said is an easy way to do this, is the  
15 classic way to say it under established antitrust law.

16 But isn't the issue really that Microsoft took  
17 actions, allegedly took actions to acquire -- not to acquire  
18 and maintain its monopoly, but to assure that the monopoly  
19 that it had remained relevant? I mean, I don't think it  
20 changes the analysis, but the more I think about it, as I  
21 hear this case particularly, it is not that things were done  
22 to protect things in the PC operating system market, but that  
23 the PC operating system market itself remained relevant.

24 What I mean by that is, to the extent that things  
25 were going to be cross-platformed outside of the PC operating

1 market, the actions allegedly taken -- I'm not saying this  
2 for any -- I'm not changing the analysis at all. I just want  
3 to make sure my head's on straight. Really, the more I think  
4 about this and as I try to write things down, it is really to  
5 assure that the relevant market remains relevant.

6 MR. JOHNSON: I don't think -- I think that's the  
7 same way of saying, to maintain the monopoly.

8 THE COURT: But once we start talking about cross  
9 platform, it's really not maintaining the monopoly, it is  
10 making the monopoly -- I just want to make sure that I'm not  
11 misanalyzing.

12 MR. JOHNSON: But part of the cross platform goes to  
13 other competing operating systems.

14 MR. HOLLEY: But I think Your Honor's point is  
15 well-taken, which is, you might think, in a case involving  
16 the coal mining industry, you'd be talking about things that  
17 were done to monopolize that business, and you wouldn't be  
18 thinking about related businesses that might encroach upon  
19 the coal mining business, although, you know, maybe that's a  
20 bad analogy.

21 THE COURT: But here there are not allegations that  
22 acts were taken to keep other companies away from Intel, or  
23 something, but it really is different. As soon as you start  
24 talking about cross platform, you are almost, by definition,  
25 saying -- maybe I'm not making myself clear.

1 MR. HOLLEY: Your Honor --

2 THE COURT: But it seems to me that if something is  
3 cross platform, you are not taking actions to preserve a  
4 monopoly in the PC operating system market, what you're doing  
5 is taking actions to assure that your monopoly in the PC  
6 operating systems market itself remains relevant.

7 MR. TULCHIN: Your Honor, I think a good analogy  
8 might be this. I'm just thinking about it, but your point, I  
9 think, is a very interesting one. WordPerfect had a dominant  
10 position in word processors for the DOS platform. They had  
11 70, 75, 80 percent or more of the market for years and years.  
12 And after Windows came along, and the DOS market became  
13 irrelevant, to use the Court's word, WordPerfect continued to  
14 have a very, very high share of the DOS market for word  
15 processors. In fact, I think the share went up to over 90  
16 percent.

17 The market itself was irrelevant because, while  
18 WordPerfect continued to have its monopoly, no one was buying  
19 word processors that ran on the DOS market. The market had  
20 shrunk to a very small, almost minute shape, as compared to  
21 before.

22 And here, I think what the Court is saying is that  
23 PC operating systems could have become irrelevant as well.  
24 They might have been essentially wiped out by some other  
25 technology. And I don't know if that's the right way to

1 think about this or not, but I offer my analogy as one way  
2 of -- one way of thinking.

3 THE COURT: And I'm not suggesting -- I'm not  
4 suggesting that changes the analysis at all. I'm just  
5 trying -- it seems to me, the more I think about it, the more  
6 you talk about cross platform switching away from the -- it's  
7 not that Microsoft allegedly did things to preserve its  
8 monopoly, but to make sure that it's monopoly was still  
9 relevant.

10 MR. JOHNSON: Your Honor, I respectfully disagree.  
11 Whether you are -- whether you are taking action to prevent  
12 somebody else from displacing your technology as the relevant  
13 technology, whether you are doing that or you are taking  
14 action against a competitor in whatever your current market  
15 is, either of those is maintaining the monopoly. I think  
16 it's the exact -- it's the exact same thing. And whether MS  
17 DOS is part of the same market, if Windows is part of the  
18 same market with a server or something else, if you take  
19 action, unlawful action to block a competing technology,  
20 whether it's a different operating system in the Intel PC  
21 market or whether it's something else outside that could make  
22 you irrelevant and displace you, the conduct is still  
23 unlawful maintaining the monopoly.

24 THE COURT: I'm not suggesting that it's not  
25 unlawful. I'm trying to make it clear that I'm not saying --

1 all I'm doing is suggesting that, conceptually, when you  
2 phrase the issue -- it may actually have something to do with  
3 how competitive the industry is. I mean, what I'm saying it  
4 may reflect my greater understanding potential stress caused  
5 by paradigm shifts, but that's not to say that, if conduct is  
6 unlawful under the antitrust laws, it's just as unlawful to  
7 do what was allegedly done to continue to make your monopoly  
8 relevant, as it is to preserve the monopoly.

9 All I'm saying is, it's almost by definition, once  
10 you're talking about cross platform, actions taken aren't  
11 done to preserve the monopoly so much as to make sure that  
12 your monopoly is still effective.

13 MR. JOHNSON: I think, in the context of the  
14 evidence we've heard, though, I think most of the references  
15 to cross platform have been related to other operating  
16 systems.

17 THE COURT: Outside the PC operating system.

18 MR. JOHNSON: Some may be. Some, yes. I mean --

19 THE COURT: I thought all of them were. I mean, I  
20 thought that was the whole point. I thought all of these --  
21 everything we've heard -- maybe I'm wrong, but I would think  
22 the Mac, the IBM OS, the UNIX, all of them, the Sun Java  
23 technology.

24 MR. HOLLEY: Well, this depends on whether you're  
25 talking about the moat theory or you're talking about the

1 middleware theory, and let me address them one at a time.  
2 Under the moat theory we are talking about other operating  
3 systems because, under the moat theory, the concept is that  
4 if WordPerfect is available on other operating systems --

5 THE COURT: Yes. The more I think about it, it is  
6 counterfactual because it's been operating on other operating  
7 systems since time immemorial.

8 MR. HOLLEY: That's right, Your Honor. Not only is  
9 it counterfactual, but it's collaterally estopped because the  
10 findings of fact 37, 38 and 39 say that --

11 THE COURT: If it's a very, very good application,  
12 maybe you only need one or two.

13 MR. HOLLEY: Well, Your Honor, having been the  
14 person who made that argument until I was blue in the face  
15 and having lost and having those findings now held to be  
16 preclusive, I think that, you know, you have to be careful  
17 what you wish for. They wanted those findings.

18 On the middleware theory, Your Honor, though, it is  
19 a situation where the things that are alleged to be threats  
20 are not PC operating systems. They are things like Lotus  
21 Notes. They are things like WordPerfect plus AppWare plus  
22 Open Dock, and I think, for all the reasons that the Court  
23 has talked about in the past, you have to be very careful  
24 under the antitrust laws to say things that are done outside  
25 the market have an impact in the market.

1           That's why this causation point is so important to  
2 us, Your Honor, because you could say all sorts of things  
3 over here have some potential impact, and normally -- I mean,  
4 the Fourth Circuit disagreed -- but normally you have to be a  
5 consumer or competitor in the market in which trade was  
6 restrained for a very good reason, because, if you are, it's  
7 quite likely the things that happened to you in that market  
8 had a competitive impact.

9           If you're outside the market, the chances that  
10 things that happened to you affect the competition are much  
11 less clear. And that's why this -- it is so important for  
12 Novell to have to show that the things that happened to its  
13 word processor not only hurt the word processor but had a  
14 real impact on competition in the PC operating system.

15           THE COURT: I understand that, but, again, maybe  
16 factually I'm just wrong, but I thought under both the moat  
17 theory and the middleware theory, the issue was that -- and  
18 you could phrase this different ways -- but it really doesn't  
19 matter what the operating system is, and there's a concern,  
20 which is related maybe a little different, that you're going  
21 to commoditize the operating system, to basically become a  
22 parts supplier, or something, as opposed to being on the  
23 cutting edge of technology.

24           But it seems to me that the whole theory is, and  
25 maybe I'm -- this is why I'm raising it. Maybe I'm just

1 conceptually wrong -- you all had, and it's undisputed, a  
2 monopoly in the PC operating system market.

3 MR. HOLLEY: Yes, Your Honor.

4 THE COURT: It seems to me that the argument is,  
5 look, both on the moat theory and on the middleware theory,  
6 it doesn't -- you could have been on a PC operating system.  
7 You could have been on UNIX. You could have been on -- you  
8 could have been using Sun Java technologies. You could have  
9 been using Mac. The danger of middleware was that it could  
10 operate in between the applications and the operating system,  
11 whatever the operating system was, so that, therefore -- and,  
12 again, I'm not suggesting that's not unlawful.

13 I'm really just suggesting a change -- and I'm not  
14 really suggesting a change in terminology, I just want to  
15 make sure I'm understanding correctly -- that actions taken  
16 by -- let's assume that Microsoft violated the antitrust  
17 laws, which I'm not -- don't expect you to accept -- that it  
18 acted unlawfully, it acted unlawfully not so much for the  
19 purpose of preserving its monopoly in the PC operating  
20 market, because it still was going to happen, no matter -- it  
21 wasn't? Why wasn't it?

22 MR. JOHNSON: It was going to lessen. Don't you  
23 understand the threat of middleware was that it would make  
24 Windows irrelevant? You wouldn't need Windows anymore.

25 THE COURT: You would need an operating system.



1 MR. JOHNSON: Sure you would, but there's lots of  
2 other PC operating systems. There's Linux. There's OS/2  
3 There was lots of other places. And the problem is that  
4 Microsoft targeted every single middleware product because,  
5 as shown in the evidence, they feared that this middleware  
6 would rend them -- render them irrelevant, and they would  
7 lose their monopoly.

8 THE COURT: In the PC operating?

9 MR. JOHNSON: The monopoly they had, they would lose  
10 that monopoly because of the existence of this ever growing  
11 threat of middleware, which the D.C. Circuit said they viewed  
12 as a threat, as a category of software. And that's why --

13 THE COURT: I think that answers my question, but  
14 isn't it also true that operating systems, other than PC  
15 operating systems, could be used?

16 (Unintelligible exchange between counsel.)

17 THE COURT REPORTER: Counsel, I can only take one at  
18 a time.

19 MR. JOHNSON: Sorry.

20 Could there be operating systems that weren't  
21 Intel-based? Of course. And Mac is one, certainly, that was  
22 not Intel. It is now, but it wasn't then.

23 THE COURT: It wasn't then.

24 MR. JOHNSON: But the moat theory of the case is a  
25 bit different. The moat theory is based upon the proposition

1 expressed by both Mr. Gates and Mr. Raikes that if we own,  
2 we, Microsoft, own those key franchises on top of the  
3 operating system, we widen the moat, i.e., maintain the  
4 monopoly in the operating system.

5 In fact, if you read a little further in Mr. Raikes'  
6 email, he says that not only do we hope to make a lot of  
7 money off of these key franchises, i.e., Office --

8 THE COURT: Yeah. That's a claim you can't bring.

9 MR. JOHNSON: -- but it will protect -- exactly.  
10 The claim that is gone -- but it will protect our royalty per  
11 PC from the operating system. And that's the moat.

12 THE COURT: Absolutely. And you may have answered  
13 my question, but it's just that -- it seems to me that most  
14 of the platforms that have been talked about are not other  
15 Intel-compatible PC's.

16 MR. JOHNSON: That's not true. Linux was an  
17 Intel-compatible PC. DOS was Intel-compatible.

18 THE COURT: DOS is another thing.

19 MR. JOHNSON: OS/2. OS/2 was Intel-compatible  
20 There's lots of Intel-compatible --

21 THE COURT: Mac wasn't at the time?

22 MR. JOHNSON: Mac wasn't.

23 THE COURT: How about UNIX? Was that part of the  
24 line?

25 MR. JOHNSON: Yes. UNIX -- well, UNIX is -- there's

1 a whole lot of different UNIX's, but there were lots of  
2 UNIX's that ran on Intel processors.

3 THE COURT: So you have answered my question. It's  
4 still that most of the cross platforms we are talking about  
5 were still Intel-compatible?

6 MR. JOHNSON: Yes. Absolutely.

7 MR. HOLLEY: I think that's fair, Your Honor.

8 THE COURT: Then I was wrong.

9 MR. HOLLEY: But the one last thing I would like to  
10 say, Your Honor, the whole purpose of the cross that I'm  
11 doing right now is to point up -- and I don't think that  
12 Novell's expert has disagreed with me at all. The things  
13 that are alleged to be middleware -- that's a totally plastic  
14 term. It's meaningless -- the only middleware that matters  
15 is middleware that had a potential to displace Windows in the  
16 way that Mr. Johnson just said.

17 It can't be something like MAPI, that the expert  
18 witness just said exposes 14 API's. So, the thing that  
19 Novell has totally failed to prove thus far -- and we're not  
20 going to hear from Professor Noll anything different because  
21 he doesn't know -- the thing that Novell has totally failed  
22 to prove is that there was anything out there that exposed  
23 enough API's to make it a plausible alternative to Windows.

24 And, unless Novell can do that, which it has failed  
25 to do and we'll talk about this more next week, there is no

1 conceivable impact on competition in the PC operating system  
2 market, which is the only way that this claim escapes being  
3 time barred.

4 THE COURT: I understand.

5 MR. JOHNSON: If I may respond.

6 THE COURT: Sure.

7 MR. JOHNSON: That is completely contrary to the  
8 holding in U.S. v. Microsoft. It is completely contrary to  
9 the holding of the Fourth Circuit in this case. There is no  
10 requirement for us to show that you could build whatever he's  
11 defining there, these full-fledged applications, on top of a  
12 particular middleware. In fact, the entire U.S. v. Microsoft  
13 case was not -- in fact, they said, you can't do it yet. But  
14 what U.S. v. Microsoft said is, we will not permit the  
15 monopolist to squash the nascent threat --

16 THE COURT: I will decide that next week.

17 MR. JOHNSON: -- to build.

18 MR. SCHMIDTLEIN: And just as an aside --

19 THE COURT: Whatever was decided in U.S. v.  
20 Microsoft, I don't think Trial Courts, in treble damages  
21 actions, I hope don't live in the world of speculation.

22 MR. SCHMIDTLEIN: I understood you. But, Your  
23 Honor, they spent -- it's interesting to find now their  
24 position. They spent weeks, if not months, in the government  
25 case saying all of these things were competitors. They said,

1 "We're not a monopolist. We're not a monopolist. There's no  
2 such thing as a PC operating system. This middleware is a  
3 competitor. This (inaudible) is a competitor." They said  
4 all these things were competitors. And they lost it. And  
5 now they are back here doing a total 180.

6 MR. TULCHIN: Mr. Schmidelein wants to relive the  
7 government's case as if he is the Department of Justice.

8 THE COURT: My name is Fred Motz, not whatever  
9 Jackson.

10 MR. TULCHIN: He's not the Department of Justice,  
11 Your Honor. He's got a client and a private treble damages  
12 case. And, so far, there hasn't been any evidence  
13 whatsoever, and I don't think there will be, that this  
14 so-called middleware, which, with every witness the  
15 definition has changed. With Harral and Richardson it was  
16 just something in the middle, anything. It didn't even have  
17 to expose API's. And there is no evidence that any  
18 middleware posed a threat to Windows. On the contrary. More  
19 next week.

20 MR. SCHMIDTLEIN: When you watch the early '90's  
21 deposition of Mr. Ripley, and he's asked, "Is Netware a  
22 competing platform?" you know what he said back then when  
23 they were fighting the operating system?

24 THE COURT: He said yes.

25 MR. SCHMIDTLEIN: Absolutely it was. Now, when they

1 are deposited in this case, oh, no, none of those things can  
2 run anything. These things would have changed everything.

3 MR. TULCHIN: Your Honor, I was there at the time,  
4 and I can say with complete assurance that we never said that  
5 WordPerfect, either alone or in combination with AppWare and  
6 Open Dock was a competitor to Windows, and we never said  
7 that.

8 MR. SCHMIDTLEIN: They said AppWare alone was.

9 MR. JOHNSON: Maritz said it. We played it for the  
10 jury.

11 THE COURT: Yeah. I heard it. So what?

12 MR. JOHNSON: So what? You can't have it both ways.  
13 It's an admission. It's an admission that AppWare was a  
14 competitor. AppWare was a product that was going to deliver  
15 a full set of functionality that applications could use. And  
16 you know why he said that? Because, in the government case,  
17 they tried to -- tried to show that all these things were big  
18 competitors, and, therefore, they didn't have a monopoly.

19 MR. TULCHIN: Well, stay tuned, Your Honor. They  
20 can't talk to their witness overnight because he's on cross,  
21 but he told me in his deposition that AppWare was vaporware,  
22 that it was never released and that he could not think of one  
23 product ever written to run on it.

24 So Mr. Johnson can say whatever he wants about what  
25 Mr. Maritz feared, but they cannot collect damages based on

1 fear. They have to show causal connection.

2 THE COURT: Nor -- nor can they show damages based  
3 upon intent, as I understand the antitrust law.

4 MR. JOHNSON: We don't need intent.

5 THE COURT: No. I feel you need intent, and I feel  
6 you need effect.

7 MR. JOHNSON: I've got Mr. Maritz giving me that  
8 AppWare was middleware. I don't even need anybody else to  
9 say it. I have an admission from Microsoft

10 MR. TULCHIN: Well, it hurts when your expert --

11 THE COURT: Well -- well, excuse me. I got us far  
12 afield. I still, as I said before, in addition to all these  
13 issues -- and I still have no idea how I am going to rule. I  
14 am still concerned about the basic principle of antitrust  
15 law, cooperation, duty to cooperate. And, secondly -- and  
16 I'm having a very hard time articulating it -- but absent  
17 evidence that in fact, during the relevant period of time or  
18 within the foreseeable future thereafter -- excuse me --  
19 wordPerfect or PerfectOffice could have been -- there were  
20 plans to write it for an operating system other than Windows,  
21 there is, in my judgment, a problem. I've said that. Ten  
22 times now I've said it.

23 And I understand -- Mr. Johnson made a very good  
24 point that a hallmark manifestation of this -- this is a new  
25 thought -- of intent or reflection of bad intent is that you

1 take short-term loss for long-term gain. There is absolutely  
2 no evidence, and I think it's too late now to present it. I  
3 think there is absolutely no evidence of that because, as I  
4 understand Novell's theory, I don't know what profits it is  
5 that Microsoft thought it was going to get out of leveraging  
6 Windows 95 into Word. And, in fact, it could very well have  
7 been that Microsoft didn't think it was sacrificing  
8 short-term profits, that, in fact, it was going to maximize  
9 short-term profits by doing something which may not have been  
10 nice -- but which is not the claim here -- which is selling a  
11 lot of Word because Jay Leno was there on the big day,  
12 saying -- and I remember -- I can't remember his name, but  
13 the project manager saying, well, he was very upset because  
14 usually they were invited to the big tent, and here the tent  
15 was all about Word and Windows.

16 Thinking about this overnight or maybe two nights  
17 ago, the fact of the matter is, there's an absolute lack of  
18 evidence that, in fact, in the short-term, Microsoft thought  
19 it was sacrificing profits by even -- by not letting  
20 WordPerfect in the game because it could very well be -- it's  
21 speculative. I don't know. But there's certainly no  
22 evidence from plaintiff that it was not -- that it was going  
23 to maximize short-term profits by selling both Windows and  
24 Office together.

25 MR. TULCHIN: Well, Your Honor, I think there's a



1 much more fundamental, just gaping hole in Novell's case.  
2 And here it is. All of their people have testified that they  
3 loved Windows 95, that they thought it was a great product,  
4 that they were hitching their wagon to the Windows 95 star,  
5 and that they wanted to make it a better operating system.

6 No one has testified that Novell had either the  
7 intention or any realistic prospect of competing with Windows  
8 95 and thereby increasing the competition in the PC operating  
9 system market.

10 THE COURT: I agree. I agree. That's exactly -- I  
11 think they are two related issues, and I think that is a  
12 problem. But Mr. Johnson, very appropriately, when I asked,  
13 I think, Mr. Harral about this, the next day or two days  
14 later, Mr. Johnson said, for once, I was particularly -- he  
15 didn't say "for once," but I was particularly astute because,  
16 in fact, it is a classic -- it's a hallmark trait of a  
17 monopolist that they will sacrifice short-term profits; which  
18 Mr. Harral said, I don't understand why they were doing this  
19 because they could have sold more Windows because we had such  
20 a great WordPerfect program, and it was very baffling to us.

21 It is an answer to say, you know, the fact that  
22 Microsoft didn't want to do that shows it was a monopolist.  
23 It's occurred to me since that that is not the state of the  
24 evidence in light of the fact that, clearly, Novell's  
25 position is that Microsoft was trying to maximize its profits

1 through the sale of Word and Office, as well as through  
2 Windows.

3 MR. TULCHIN: But, Your Honor --

4 MR. JOHNSON: Now you're starting to mix markets,  
5 Your Honor.

6 THE COURT: No, I'm not. The point is, what was the  
7 intent? And that's the very point. If their intent -- it  
8 may not have been nice, but if their intent was to leverage  
9 Windows so it would sell more Office, at the expense of  
10 WordPerfect, they were arguably attempting to monopolize the  
11 applications market, which is a claim which isn't here.

12 MR. JOHNSON: And, Your Honor, under the moat quote,  
13 which the Fourth Circuit accepted, that intent leads to a  
14 widening of the moat protecting the operating system  
15 monopoly. And what we are talking about here is antitrust  
16 economics.

17 THE COURT: That's right. And that's why I'm going  
18 to reserve until I can hear it. I don't know. I still think  
19 that there is -- and I think there -- frankly, this is -- I  
20 absolutely understand your theory, but theory may collide  
21 with fact. I mean, that's -- and that -- I don't care.  
22 Antitrust lawyers can talk forever and forever, but we are  
23 here in a courtroom, and the fact of the matter is, in a  
24 courtroom, you don't -- you have to deal with facts. And I  
25 think, to prove anti-competitive effect, I'm going to hear

1 argument on whether there has been any indication that -- I  
2 understand the theory that, in the long-term, maybe this  
3 would have an anti-competitive effect because the moat  
4 would be widened or because middleware would -- you know  
5 would become rampant and a threat. I understand that, but  
6 still I'm not sure -- that's theoretical.

7 MR. JOHNSON: Your Honor, if it wasn't true, U.S.  
8 vs. Microsoft wouldn't have been decided the way it was.

9 THE COURT: An eventual standard in a wholly  
10 different context. But I'm not deciding, and I don't know  
11 what I'm going to do, but I'm just -- but I am saying what  
12 I'm saying, because I am -- I absolutely understand your  
13 theory, but the more I think about it, there is a disconnect,  
14 absent proof, which I still may hear -- I may hear it from  
15 Dr. Noll.

16 But, absent proof that, in fact, there was a  
17 realistic possibility there was going to be -- that, in fact,  
18 WordPerfect was going to be written to another operating  
19 system, which, as I say, is counterfactual, since I know it  
20 was written to DOS and had a huge part of the DOS market for  
21 a long time, or that, by being written to other operating  
22 systems, it -- perhaps, in combination with other potential  
23 products, that it presented a middleware threat, which would  
24 have threatened the monopoly. I understand. I absolutely  
25 understand the theory.

1 MR. JOHNSON: Your Honor, can we turn to something  
2 much more mundane?

3 THE COURT: Absolutely.

4 MR. JOHNSON: I want to get clear --

5 THE COURT: I want to hear from Microsoft what its  
6 problems are.

7 MR. JOHNSON: On the Kruger dep?

8 THE COURT: Yeah, on the Kruger dep.

9 MS. BRADLEY: Heidi Bradley of Sullivan & Cromwell  
10 on behalf of Microsoft.

11 There are three exhibits to the Kruger deposition  
12 that contain embedded hearsay to which Microsoft objects.  
13 Novell has -- Microsoft has offered to permit the exhibits to  
14 come in with the embedded hearsay redacted in each of the  
15 three. For two of the three, none of the embedded hearsay is  
16 referenced in the testimony, nor is it necessary to provide  
17 any context for the rest of the documents, not that providing  
18 context would provide an exception to the Hearsay Rule in any  
19 Event.

20 The first is PX 487. Does Your Honor have copies of  
21 these in front of you?

22 THE COURT: PX 487? Okay. I've got it.

23 MS. BRADLEY: Okay.

24 THE COURT: That's Exhibit C, I think.

25 MS. BRADLEY: I don't have --

1 THE COURT: That's all right. I've got it.

2 MS. BRADLEY: PX 487, which was Kruger Exhibit 2.  
3 And you'll see that there is about a page and a half of a  
4 Microsoft email exchange, followed by three pages of a press  
5 release issued by Gupta Corp. and Novell regarding AppWare.  
6 Novell seeks to admit the entirety of its own press release  
7 extolling the virtues of AppWare, presumably because it's  
8 attached to a Microsoft document.

9 If Your Honor reads the document that -- the email  
10 exchange itself --

11 THE COURT: Shall I start at bottom?

12 MS. BRADLEY: Start at the bottom, yes, the email  
13 from Cameron Myhrvold to Bob Kruger and others, on October --  
14 Tuesday, October 5, 1993. And he asks if there's anybody  
15 analyzing AppWare and asks that a team start to do that.  
16 There's nothing about --

17 THE COURT: I'm sorry. October -- what Bates page?

18 MS. BRADLEY: We are Bates page MS 5042321.

19 THE COURT: 2321. And it's October -- I see an  
20 October 4.

21 MS. BRADLEY: So that October 4 is the beginning of  
22 the rather lengthy press release.

23 THE COURT: Okay. And so I should first read the  
24 one beginning Gupta Corp. and Novell?

25 MS. BRADLEY: Yeah. So that's really where it

1 starts, so you can take a look at the press release itself.

2 THE COURT: Okay. Let me read it. Okay. And you  
3 don't -- okay. And what should I read next?

4 MS. BRADLEY: Your Honor can read anything you want  
5 from it, but that's the portion to which we object. It's  
6 hearsay, and there is simply no basis on which to admit it.  
7 I think in Novell's letter it claims that it is seeking to  
8 admit this hearsay because it somehow reflects Microsoft's  
9 state of mind.

10 THE COURT: Okay. Let me hear now from  
11 Mr. Johnson.

12 MR. JOHNSON: Thanks, Your Honor. I was surprised  
13 they fought this so hard. We're certainly not planning on  
14 using this material to prove our case with respect to  
15 AppWare, but rather to just provide context for why these  
16 people were saying the things they are saying. It's not to  
17 prove the truth of the matters asserted in the press release,  
18 but, rather, showing why they had the reactions they had and  
19 the state of mind of the Microsoft personell reading the  
20 trade, so -- or really the press release that they are  
21 reading.

22 So, we have here some reactions from Microsoft  
23 executives with respect to what AppWare is that we think is  
24 very telling in this case, and we don't want to leave to the  
25 jury to look at this exhibit and say, well, what is this

1 about? What does this mean?

2 You just have to -- you have to take it in context  
3 of what is shown in the email.

4 THE COURT: Is there -- again, I don't feel strongly  
5 about this, but I'll rule if I have to. Is there a way to  
6 accomplish what you want to do by having the rest of the  
7 email come in with a stipulation that the emails were in  
8 response to a press release which was issued by Gupta and  
9 Novell about the issuance of -- I'm just wondering --

10 MR. JOHNSON: You mean and just leave the exhibit  
11 alone?

12 THE COURT: No. Take out what -- the press release,  
13 itself, because I gather that's what the objection is, right?

14 MS. BRADLEY: Yes, Your Honor.

15 THE COURT: Leave in everything else but have them  
16 place the press release -- and I'm basing this on what you  
17 just told me -- to have the rest come in, and say this email  
18 exchange is against a background -- and this would be a  
19 stipulation -- of a press release that was issued by Gupta  
20 and Novell in which they announced blank. Without getting  
21 into the details of press release. I'm just -- I'm just  
22 wondering whether that gives you what you need.

23 MR. JOHNSON: Well, it's a little difficult because  
24 the jury is going to see this on video, right? So there's  
25 going to be really no opportunity to give any context.

1 THE COURT: I understand. I understand.

2 MR. JOHNSON: You know --

3 THE COURT: I absolutely understand.

4 MR. JOHNSON: So, as I said, we're not offering it  
5 for the truth of the matter, and I'm not going to be quoting  
6 this press release in my arguments to the jury on AppWare.  
7 I've got plenty of stuff on AppWare.

8 THE COURT: I understand. Go ahead.

9 MS. BRADLEY: One of the solutions that we had  
10 proposed to Novell on this, to give sort of sufficient  
11 context for it, was perhaps to leave in just the title, so  
12 that, you know, you can see some -- some set of context, that  
13 this appears to be in reaction to an announcement, but that  
14 we don't have to go into, you know, the entirety of the  
15 hearsay that extols the virtues of AppWare that's then in  
16 evidence, and with the jury in the jury room. There's just  
17 no need for it. It's unnecessary. It's hearsay.

18 MR. JOHNSON: Your Honor, if this jury goes through  
19 every one of the hundreds of exhibits that we have got here  
20 and finds this, God bless them. I'm not going to be arguing  
21 this. I'm providing some context so, if they look at this,  
22 they know why Microsoft's executives reacted the way they  
23 did.

24 THE COURT: If it was a different situation, I  
25 might -- if it's a videotaped deposition, the objection is



1 overruled. I understand -- unless there is something  
2 particularly damaging in there, I think that -- Mr. Johnson  
3 can argue it as -- for the truth that it contains and explain  
4 it. I'm going to overrule it.

5 MR. JOHNSON: Thank you, Your Honor.

6 MS. BRADLEY: And, Your Honor, I think that answers  
7 two of the three, PX 487 and PX 488. There is a third that's  
8 a slightly different situation, and that's PX 492.

9 THE COURT: Okay. Tell me about that.

10 MS. BRADLEY: Okay. So this is an email that's  
11 forwarded on by Bob Kruger to the Nov Squad, which Mr. Kruger  
12 has testified is a group at Microsoft that was keeping an eye  
13 on Novell. And he forwards the summary along. And there's  
14 just one portion to which Microsoft objects, and it's right  
15 below the heading, Summary. And it reads, "Armed with the  
16 Monday, April 24, InfoWorld review in which it beat out  
17 Microsoft Office and SmartSuite, as well as PC Data's report  
18 of 25 percent market share, Novell aggressively promoted  
19 PerfectOffice as the easiest-to-use,  
20 most-technologically-advanced suite on the market."

21 Now, that alone may be okay. And there may be some  
22 way that Microsoft or Novell could think of some conceivable  
23 non-hearsay use for that, except for the fact that the  
24 testimony itself, which Novell seeks to admit, to which  
25 Microsoft also objects, clearly seeks to admit this for the

1 truth of the matter asserted. And I'll read it to you. It  
2 appears at page 138 of the testimony. Do you have that in  
3 front of you as well?

4 THE COURT: I think I do. Yes.

5 MS. BRADLEY: Okay. And it says -- and then the  
6 email goes on, and it quotes this same portion to which we  
7 object:

8 "Armed with the Monday, April 24 InfoWorld review,  
9 in which it beat out the Microsoft Office and SmartSuite, as  
10 well as PC Data's report of 25 percent market share, Novell  
11 aggressively promoted PerfectOffice as the easiest-to-use,  
12 most-technologically-advanced suite on the market."

13 "Did I read that correctly?" the lawyer asked.

14 "Yes, you did."

15 "Does this paragraph accord with your recollection  
16 that at least one review of PerfectOffice showed it beating  
17 Microsoft Office and SmartSuite?"

18 "I don't recall at the time, but I trust that if he  
19 said that, that's what the review said, and then that makes  
20 sense."

21 "Does this paragraph also accord with your  
22 recollection that PerfectOffice was able to capture 25  
23 percent market share?"

24 They are seeking to offer the imbedded hearsay for  
25 the truth of the matter that PerfectOffice got a great review

1 and was better and that someone was saying that PerfectOffice  
2 had 25 percent share. It's plainly being sought --

3 THE COURT: What was the share of the Windows  
4 product? I'm just curious.

5 MS. BRADLEY: What was it's share on the Windows?

6 THE COURT: No. This allegedly --

7 MR. JOHNSON: Suite share, Your Honor.

8 THE COURT: Suite share.

9 MR. JOHNSON: And, in fact, we've already had  
10 testified to this effect. It's already in the record.  
11 Mr. Frankenberg testified to it. And, on cross examination,  
12 there was the point that this share was for a short period of  
13 time. I think it was the three-month period.

14 MR. TULCHIN: An effort to mislead the jury --

15 THE COURT: Whoa, whoa, whoa.

16 MR. TULCHIN: Oh, yes, there was. Yes, there was.  
17 And it was fixed. It was fixed on cross.

18 MR. JOHNSON: Please.

19 THE COURT: By the excellent cross examination.

20 It would seem to me that there is embedded hearsay  
21 here. It would seem to me that, beginning on lines -- page  
22 139 lines 22, through page 140 of line 4 probably should go  
23 out because that allegedly -- he doesn't really say that it  
24 does, but it seems to me the other simply he recalls at the  
25 time it got a favorable review. That's a fact. But it seems

1 to me that we do maybe get here that there was a 25 percent  
2 share, and it seems to me -- which he doesn't really say --  
3 he doesn't adopt that, I don't think, in his answer. I don't  
4 know that I would have known one way or the other.

5 So it seems to me that the question from 22 to 24  
6 does get in imbedded hearsay, so I would suggest just taking  
7 out from 22 on 139, to line 4 on page 140, if that's  
8 acceptable.

9 MR. JOHNSON: Fine, Your Honor.

10 MS. BRADLEY: And with respect to the document,  
11 redacting that portion of it?

12 MR. JOHNSON: Your Honor, that's the question.  
13 That's the prior question. You can't redact it from the  
14 document when that's the question.

15 THE COURT: Just as Mr. Tulchin corrected any  
16 problem with his cross examination, he can correct that on  
17 closing argument. I think trying to redact that would cause  
18 more problem than it's worth.

19 MR. JOHNSON: Thank you, Your Honor.

20 THE COURT: I think everybody understands that there  
21 was a limited period of time that the suites were 25 percent,  
22 and currently this article reads the share of the suite  
23 market was 25 percent. I think that can be cleared up. It  
24 was a temporary glitch.

25 MR. JOHNSON: We have already had that testified.

1 THE COURT: Exactly.

2 MR. JOHNSON: Right. To which able counsel --

3 THE COURT: I'm saying.

4 MR. TULCHIN: Sometimes it takes some cross  
5 examination to fix an effort to --

6 MR. JOHNSON: Please.

7 THE COURT: That's part of the litigation process.

8 MR. JOHNSON: Thank you, Your Honor.

9 THE COURT: Now, Mr. Schmidtlein wants to get in two  
10 exhibits. And my only question was, why don't you all think  
11 about this. This was on the frontier of what I was going to  
12 allow. I allowed it, which is fine. The reason I didn't  
13 admit the documents is because it seems to me that I  
14 shouldn't let in the documents. It's okay to have the  
15 testimony, but I shouldn't let in the documents, but if you  
16 feel strongly about it, let me know tomorrow morning.

17 MR. SCHMIDTLEIN: How about, if we feel strongly  
18 about it, we'll submit something by --

19 THE COURT: You can submit a short letter. Re:  
20 Exhibits, whatever they were, we feel strongly about this.  
21 And then I'll take it up. Thank you all.

22 MR. JOHNSON: Thank you, Your Honor.

23 MS. BRADLEY: Thank you, Your Honor.

24 THE COURT: How about the schedule? You still think  
25 you're going to finish on Wednesday or Thursday?

1 MR. JOHNSON: I don't know about Wednesday, maybe  
2 Thursday. It depends on the amount of cross on the experts.  
3 Steve, you're going to finish tomorrow with Mr. Alepin,  
4 hopefully even with a little time left over?

5 THE COURT: I figure Friday would probably be  
6 argument.

7 MR. JOHNSON: Yes. By Friday, we certainly hope to  
8 be done --

9 THE COURT: Maybe by Thursday afternoon?

10 MR. JOHNSON: -- absent some terrible event.

11 MS. NELLES: Your Honor, do you want to reserve  
12 Friday for argument? Is that what you're thinking?

13 THE COURT: Yeah. What I'm thinking is we could  
14 have them not -- actually, that's a good idea because if we  
15 really think that, I can tell them I think we will not be  
16 sitting next Friday so they can make plans.

17 I can wait 'til Monday if you want, but if we -- if,  
18 by the end of the day, you are pretty sure that's where we  
19 are, as a matter of courtesy to the jury, I can say we will  
20 be sitting but we don't think that -- there will be stage of  
21 the case where we think they don't have to come in, and then  
22 we could -- you then you all could tell me, and we could  
23 begin argument on Thursday afternoon or Friday morning,  
24 whichever if you prefer.

25 MR. HOLLEY: Okay. Can we wait until Monday to make

1 that decision?

2 THE COURT: You can absolutely make that -- you can  
3 wait until Monday to make the decision. The one that I want  
4 -- the only one I care about. I'm going to be here in any  
5 event. The only thing I care about is telling the jury as  
6 soon as possible, just so that occurs.

7 And could you all come back for just a second about  
8 the argument?

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