

1 THE COURT: I've got to reschedule something. I
2 don't sit Friday the 2nd of December or Friday the
3 December 16th -- is that right, or whatever. I guess the
4 16th. If I can give you notice of that on Monday, does that
5 give you all -- can you all work around that? I have got to
6 reschedule a trial.

7 MR. HOLLEY: Yes, Your Honor.

8 THE COURT: I'll let you know.

9 (Jury present)

10 THE COURT: Okay. We'll go until 1:45.

11 MR. HOLLEY: Thank you, Your Honor.

12 BY MR. HOLLEY:

13 Q Mr. Alepin, directing your attention back to the
14 document that we were looking at before the break, and I'm
15 on page 94 of 98 up at the top. It's drawing a distinction,
16 is it not, sir, between the solution that was found for the
17 Windows 95 robustness issue, which was to force an
18 application calling the namespace extension APIs to run in a
19 new process from what you testified about earlier, which is
20 the Windows NT solution, which was to create two separate
21 processes that run in conjunction with one another, one
22 being the tree view and the other being the remainder of the
23 Windows shell?

24 Do you agree with that characterization of what
25 Mr. Belfiore is saying here?

1 A You are at 94 of 98, on what portion? I'm sorry.

2 Q What I'm trying to do is avoid having to go line by
3 line through this document, and what I was trying to do
4 is -- I presume you have read this -- get you to agree with
5 me that what Mr. Belfiore was saying is that there is one
6 solution in the Windows 95 time frame, which is that you
7 would force applications that call the namespace extension
8 APIs to open in a new process. And he is drawing a
9 distinction between that and the solution for Windows NT,
10 which is to split the shell process in two and have one
11 process for the tree view with the namespaces and another
12 process for the rest of the Windows shell?

13 I don't mean to interrupt your reading, sir, but what
14 I'm trying to do is shortcut the distinction between the
15 paragraph that begins, there is a solution to this in
16 Windows 95, and the paragraph that begins, in order to allow
17 ISVs the greatest flexibility.

18 A I think that the -- I'm not sure what the question is
19 other than to respond that the rearchitecture that -- I
20 think the slight rearchitecture that is being discussed here
21 was the one to which I was referring, which was the desktop
22 process flag and the optional ability to do, as you say, to
23 protect the desktop and the task bar process from the
24 Explorer process.

25 Q It's your testimony -- and I don't want to repeat it,

1 but your testimony is that that rearchitcting, however
2 slight or complicated it was, was not made available in the
3 marketplace until late 1996 or early 1997?

4 A That's my understanding from my examination.

5 Q I thought I heard you answer in response to one of my
6 questions earlier that Microsoft's applications were using
7 the namespace extension APIs. Did you say that, sir?

8 A I did.

9 Q When you said that, you didn't mean to suggest, did
10 you, sir, that Microsoft Word or Microsoft Excel or
11 Microsoft PowerPoint or Microsoft Access used those
12 namespace extension APIs in any commercially released
13 version?

14 THE COURT: Subject to your objection long ago,
15 why don't you also say Microsoft Office.

16 MR. HOLLEY: I can do that as well, Your Honor.

17 THE WITNESS: I was using the term application to
18 distinguish it from the core operating system. So when I
19 said Microsoft -- when I said Microsoft application, I was
20 referring to the nonoperating system software.

21 BY MR. HOLLEY:

22 Q But you were not, sir, referring to Microsoft Word,
23 Microsoft Excel, Microsoft PowerPoint, Microsoft Access, or
24 the suite called Microsoft Office, you are not testifying
25 that they ever used the namespace extension APIs, correct?

1 A It is my understanding that your qualification of a
2 shipping product in this time frame is correct.

3 Q Well, let's eliminate any time frame. You told me in
4 Iowa four years ago that you had never discovered any
5 evidence that those five products that I mentioned to you
6 had ever used the namespace extension APIs, correct?

7 A In a shipping product is the qualification?

8 Q Yes.

9 A And I believe I also mentioned that I was still -- or I
10 had been still looking at the subject, but had not finished
11 looking at it.

12 I believe that it is possible that the Microsoft --
13 that Microsoft Office versions after 1997 made use of the
14 namespace extension in the implementation of Web folders,
15 but I'm not certain of that, so I would not be able to make
16 a definitive statement on that.

17 Q So let's just unpack that. Prior to 1997, you can
18 testify without qualification that you have never seen any
19 evidence that Microsoft Word --

20 THE COURT: Office productivity, does that cover
21 it all?

22 Go ahead.

23 MR. HOLLEY: Your Honor, I'm not trying to belabor
24 this --

25 THE COURT: Go ahead. Go ahead.

1 BY MR. HOLLEY:

2 Q Before 1997, sir, you have no evidence that any
3 Microsoft Office productivity application, by which I mean
4 the same list of five products that I gave you earlier,
5 called upon the namespace extension APIs, right?

6 A That is correct.

7 Q With the sole exception of -- what did you say, Web
8 folders?

9 A Web folders.

10 Q You think it is possible, but you are not prepared to
11 tell the jury with any certainty that even after 1997 any
12 component of Microsoft Office or Microsoft Office itself
13 ever called the namespace extension APIs?

14 A That's my understanding, that's correct.

15 Q Now you testified to the jury about a product called
16 Athena; is that correct?

17 A Yes.

18 Q A slide was put up on the screen showing Athena with
19 some crazy e-mail displayed in the bottom pane. Where did
20 that come from?

21 A That was a screen shot taken from some Microsoft
22 documentation or -- I'm not sure of the providence exactly,
23 but it was not taken from a running system that was
24 operating.

25 MR. HOLLEY: Now let's put that up, if we could,

1 please, with the thanks to the Novell people. If I could
2 see slide number 15 from yesterday entitled Athena at the
3 top, and it has a picture of a piece of software.

4 BY MR. HOLLEY:

5 Q Now there is a reference in the pane in the upper right
6 to something called IE3, and that's to version three of
7 Internet Explorer, correct?

8 A That's correct, Internet Explorer 3.0.

9 Q Which came out when?

10 A 1996. I believe it's 1996, yeah.

11 Q So it wasn't your testimony that Athena or anything
12 like Athena was included in the original version of Windows
13 95 release in August 1995?

14 A No, it was not my intent.

15 Q Now you are familiar with tools, one is called PE
16 Explorer, and there are other such tools that someone can
17 run on an application like Athena to find out what
18 interfaces in the operating system are being called by that
19 piece of software, correct?

20 A Yes.

21 Q And can you tell me what you have done in terms of
22 using tools like PE Explorer to determine what Athena is
23 calling inside Windows 95?

24 A Gosh, I did so many different programs and so many
25 different analyses some number of years ago, I'm not sure I

1 remember what I did specifically with respect to Athena.

2 Q Well, I would like you to look at what's been marked as
3 demonstrative Exhibit 100.

4 A Yes.

5 Q I will bring you one just in case you want to look at
6 it.

7 A I can see it here. Thank you.

8 Q Now the executable file for Athena was called
9 mailnews.dll, which stands for dynamically linked library,
10 correct?

11 A Yes.

12 Q When you use a tool like PE Explorer, you can find out
13 what is being imported into the program from different
14 dynamically linked libraries, DLLs, in the operating system,
15 correct?

16 A That's correct.

17 Q So what this screen shot shows is that Athena is
18 calling the functions listed below -- the heading functions
19 in shell32.dll, which is the shell portion of Windows 95,
20 correct?

21 A It's the dynamically linked library that contains the
22 namespace functions as well as the other shell extension
23 functions.

24 Q And I am going to represent to you, sir -- I don't know
25 whether you did this yourself, but I will represent to you

1 that what this screen shot shows are the functions in
2 shell32.dll that are called by Athena. And my question to
3 you is do you see any of the namespace extension APIs on
4 that list of functions?

5 Mr. SCHMIDTLEIN: Can we be heard, Your Honor?

6 (Side-bar conference held)

7 THE COURT: So far, we only have a representation
8 what this is. I think the evidence will come in in due
9 course.

10 BY MR. HOLLEY:

11 Q You don't see, do you, sir, in the list of functions
12 called in shell32.dll any of the namespace extension APIs?

13 A No, I don't.

14 Q You don't have any recollection of conducting an
15 analysis yourself using PE Explorer or any other software
16 debugging or disassembly tool that reaches a different
17 result than the one shown on demonstrative Exhibit 100?

18 A Sitting here now, I don't have a specific memory of
19 what I did a couple years ago, no.

20 MR. HOLLEY: Your Honor, I have no further
21 questions.

22 THE COURT: Mr. Schmidtlein.

23 Mr. SCHMIDTLEIN: Excuse me, Your Honor.

24 REDIRECT EXAMINATION

25 //

1 BY Mr. SCHMIDTLEIN:

2 Q Mr. Alepin, did you prepare a couple of different
3 expert reports for this case?

4 A Yes, I did.

5 Q I'm just going to put this in front of you. I'm not
6 going to move it into evidence.

7 Mr. SCHMIDTLEIN: I assume you've got a copy of
8 this report?

9 MR. HOLLEY: Somewhere.

10 THE COURT: Go ahead.

11 Do you need one, Mr. Holley?

12 MR. HOLLEY: Your Honor, I'm sure in this massive
13 paper, we have one, but I don't want to hold up the
14 proceedings.

15 BY Mr. SCHMIDTLEIN:

16 Q Mr. Holley was just asking you some questions about
17 what you did with respect to Athena?

18 A Yes.

19 Q If you look on page 21 of your report -- and you
20 submitted lengthy reports with lots and lots of footnotes.
21 And this is not designed to be a memory test, per se, but if
22 you look at footnote 101 on page 21 --

23 A Yes.

24 Q -- and in there it reads with respect to Athena, I
25 confirmed this by examining a public beta of Athena on

1 Windows 95. I acquired and installed a publicly installed
2 beta version of Microsoft Internet Mail and News, which was
3 referred to internally by Microsoft as Athena.

4 Does that refresh your recollection of testing you did?

5 MR. HOLLEY: Your Honor, I object to this question
6 as highly leading.

7 THE COURT: Overruled.

8 THE WITNESS: That's the recollection I have, but
9 I don't recall the specific results.

10 BY Mr. SCHMIDTLEIN:

11 Q You were asked some questions by Mr. Holley about the
12 robustness issue. Do you recall that?

13 A Yes.

14 Q You were asked about some of the testimony that you
15 considered as part of some of your opinions on robustness
16 issues. Let me show you -- I think Mr. Holley introduced to
17 you some deposition testimony from Mr. Nakajima. Do you
18 remember that?

19 A Yes, I do. I gave it back, though.

20 Q Do you have that transcript?

21 A No, I gave it back.

22 Q Rather than have you leaf through another huge
23 document, I'm just going to show you some excerpts from that
24 deposition.

25 And referring you to some of the testimony Mr. Nakajima

1 gave in his deposition where he was asked the following
2 question, had you in connection with testing of the
3 namespace extensions, had you collected any crash statistics
4 of any sort? Answer: No, I don't think so. He then later
5 goes on and was asked, did you implement any sort of formal
6 test plan? Answer: No. By around September, October 1994,
7 did you believe you had identified any major defects in
8 namespace extensions? Answer: No.

9 Was this testimony that you considered in coming to
10 your opinions and conclusions in this case?

11 A Yes. I considered the entirety of Mr. Nakajima's
12 deposition. As one of the principal authors of the
13 software, I thought it was important to focus on his view as
14 well.

15 Q Now do you remember being asked some questions about
16 Mr. Muglia's e-mail? I believe that was marked by counsel
17 as DX-21. Do you recall that?

18 A Yes.

19 Q Mr. Muglia was discussing issues regarding the next
20 version of Windows NT; is that right?

21 A He was discussing some concerns, yes, about the next
22 version.

23 Q Do you recall when the next version of Windows NT was
24 due to be released?

25 A Not until another two years hence, I think, or maybe

1 thereabouts, or maybe -- I want to say maybe second quarter
2 of 1996, so that would make it about 18 months away.

3 Q And that e-mail, I think as you remember, was on the
4 same e-mail chain that contained Mr. Gates's decision to
5 de-document and withdraw support from the namespace
6 extensions, correct?

7 A Mr. Gates's e-mail was attached, yes.

8 Q Were the issue that is Mr. Muglia made reference to
9 about having to do some additional work for Windows NT with
10 respect to the namespace extensions, was that issue or
11 concern referenced in Mr. Gates's e-mail as one of the
12 reasons for his decision?

13 A No.

14 Q I think Mr. Holley -- I don't know if he gave it to you
15 or maybe he just waved it around.

16 A He didn't throw it at me.

17 Q The book by Mr. Schulman, Unauthorized Windows, is
18 there any mention of the namespace extension APIs in
19 Mr. Schulman's book?

20 A I don't think so. I don't think so.

21 Q You were asked some questions about the common
22 controls. Do you recall that?

23 A I was.

24 Q Have you compared the functionality provided by common
25 controls with the functionality that was provided by --

1 would have been provided by the namespace extensions?

2 A Yes.

3 Q And tell the jury about the difference in the
4 functionality.

5 A Well, the difference in the functionality is that your
6 information sources are not integrated into the -- into your
7 desktop. By that I mean that the common controls allow you
8 to build a program that can display information and you can
9 format it and make it look like -- it's got tree
10 information sources and may have little -- the contents of
11 those trees, the branches on the other side. But when your
12 program leaves, exits the system, those information sources
13 disappear. And if you made a decision that this is where
14 your favorite things are, that's lost. So the system is not
15 remembering that you thought that this favorites folder was
16 important or you wanted to put it into the Windows Explorer
17 view that was available to you every time you turned on your
18 computer.

19 This was to be an integral part of the design of
20 Windows 95, the Chicago information model, if you will, as
21 we want users to be able to operate now off of their
22 desktop. They can see the things that they operate with.
23 They can quickly navigate to them. They can see previews of
24 them. They don't have to launch the program.

25 If you use list views and tree views, you might be able

1 to, when you were inside WordPerfect, see a preview of a
2 document, see the first page. But if you were in Windows
3 Explorer and you wanted to find what the document looked
4 like, but if you were in some other program and wanted to
5 see what that preview looked like, all of those things would
6 require you to connect to the namespace extensions. So you
7 lost the ability to be integrated into the shell of the
8 system, and that's the shell here. I'm using it as the
9 information -- the sources of information that are important
10 to you.

11 Q I think you have testified previously, there's been
12 evidence in the case that we had the documentation of the
13 APIs originally, and then -- in June of 1994, and then the
14 withdrawal of the documentation, the decision not to support
15 it any further in October of '94. And then there has been
16 re-documentation in June of 1996.

17 Do I have the timeline right there?

18 A Yes, the timeline, but it's March of --

19 Q March of 1996.

20 And, of course, in the interim we had -- August 1995,
21 we had the release of Windows 95, correct?

22 A That's correct.

23 Q During this entire time period from when the namespace
24 extension APIs originally provided some documentation in the
25 M6 beta in June of '94 to the time that they were

1 re-documented in March of 1996, were the APIs changed at
2 all?

3 A The APIs -- the important APIs were not changed from
4 the -- from what they were originally. They are -- from a
5 programmer's point of view, they are the same.

6 Q And you just looked at Mr. Nakajima's testimony on that
7 point. Mr. Holley asked you a number of questions about
8 concerns that were raised by Mr. Muglia, by Mr. Allchin
9 about the quality of these APIs, they were a terrible piece
10 of work, and all those other things.

11 During this entire time period, did you see anything
12 that Microsoft did prior to the redocumentation in March of
13 '96, did Microsoft do anything to change the documentation
14 of the APIs?

15 A I'm not sure I am following the time frame. Are you
16 saying from when to when?

17 Q Mr. Holley asked you a bunch of questions about -- I
18 suppose concerns that were expressed around the time that
19 the decision was made --

20 A Yes.

21 Q -- in October '94. In your review of the record and
22 review of the documentation that was released in March of
23 '96, did you see that anything was done that reflected that
24 these concerns caused Microsoft to do anything differently
25 in terms of the documentation that was put forth in March of

1 1996?

2 A Well, they improved the documentation. In fact, they
3 made -- in addition to restoring the information that had
4 been cut out of the API files, the shell arch file, which is
5 where programmers -- which is what was included in the
6 users' program, they restored that information, but they
7 also provided Microsoft standard documentation. By that I
8 mean when Microsoft publishes the APIs to customers, it goes
9 through a process that ultimately results in there being --
10 taking a specific format, this section comes before this
11 section, and we have one of these sections over here, and
12 there is another section where you can find error
13 information, and it's formatted in a certain way.

14 By 1996, March, the namespace application had been
15 produced in that standard format and Microsoft began to
16 provide programming examples using the APIs to encourage
17 the -- I don't know whether they were encouraging third
18 parties to provide documentation and examples, but
19 cottage -- minor cottage industry formed discussing
20 documenting and providing examples in journals and in
21 bulletin boards and other fora.

22 Q You were shown Defendant's Exhibit 3. Do you have
23 that? It's up on the screen.

24 A I don't want to talk about my defective eyesight as
25 well.

1 Q This is a document that Mr. Holley showed you earlier.

2 A I can't see it. Video input 1-D, is that out of range?

3 That's better. Could you blow it up or something?

4 Okay. Thank you.

5 Q And if you will go to the last page.

6 A Yes.

7 Q If you'll remember, this is the document that is sort
8 of the press release or the mock Q and A document that
9 Microsoft had put together for people who were going to tell
10 the ISVs about the fact that the namespace extensions were
11 no longer going to be supported.

12 A Right.

13 Q And if you look at the next to last Q and A there, the
14 mock question, what if I decide to use some of the
15 undocumented APIs, i.e. I'm a developer that has received
16 some of the preliminary documents on the topic. What will
17 the penalty be? Will you change the interfaces that had
18 been defined? Answer: We will not arbitrarily change these
19 interfaces, but because of how tightly these interfaces are
20 tied to internals of the shell, we cannot guarantee ISVs
21 that try to call them will work in future releases of
22 Windows 95, or even between interim beta builds. There will
23 be no support for ISVs who use this. It will be completely
24 at their own risk.

25 Is this one of the documents that you reviewed and

1 relied upon in reaching your conclusions in this case?

2 A Yes.

3 Q The reference to -- can you tell the jury what the
4 reference to interim beta builds is there?

5 A What that refers to is the milestone betas that
6 Microsoft had been producing in the lead up to Chicago. So
7 M6, which we have been referring to as the beta Microsoft
8 release in June of 1994, which for the first time contained
9 the partial documentation of the namespace APIs, was an
10 interim beta build. The next interim beta was M7, which
11 came out in November, I believe, of '94.

12 Q So does this document -- or the answer there tell ISVs
13 that Microsoft may not continue to have the APIs and support
14 the APIs with the very next beta release?

15 A That's correct, and that's essentially what happened
16 because they disappeared from the programming libraries
17 necessary to use -- those APIs necessary to write the
18 program that would compile to use those APIs.

19 Q Now during Mr. Holley's examination, I believe
20 yesterday, you were asked some questions about middleware.
21 Do you recall that?

22 A Yes.

23 Q Mr. Holley asked you some questions about whether a
24 middleware product has to be able to replace the operating
25 system to be a threat to the operating system. Do you

1 recall that?

2 A I recall questions on that subject.

3 Q Does middleware have to replace an operating system in
4 order for the middleware to be a competing platform for
5 software development?

6 A No, it doesn't. Not at all.

7 MR. HOLLEY: May I approach, Your Honor?

8 THE COURT: Sure.

9 Mr. SCHMIDTLEIN: We've actually marked this as
10 Defendant's Exhibit 577.

11 MR. HOLLEY: Your Honor, may we approach the
12 bench?

13 (Side-bar conference held)

14 Mr. SCHMIDTLEIN: It's the bottom of page 97.
15 This is the proposed findings of fact Microsoft submitted in
16 the government case. Another important source of
17 competition to Windows is middleware. It goes on, although
18 not itself an operating system, middleware can appropriate a
19 substantial portion of the operating system's value by
20 serving as a platform for software development. Because
21 middleware subsumes functionality otherwise provided by the
22 operating system, it plainly competes with operating
23 systems, and potential or actual middleware thus constrains
24 Microsoft's behavior.

25 Now the next two paragraphs contain similar

1 findings, admissions by Microsoft that are directly contrary
2 to the premise and the questions that Mr. Holley was asking
3 him. These are, in fact, supportive of and confirm the
4 testimony he's given about middleware.

5 MR. HOLLEY: Actually, Your Honor, it's --

6 THE COURT: Are these findings?

7 MR. HOLLEY: Proposed findings of fact we made to
8 Judge Jackson. He rejected every single one of them. So
9 one of them -- so to the extent that I guess this is some
10 sort of initial estoppel argument, which has never been made
11 before, the findings Judge Jackson made which are the
12 subject of collateral estoppel fly in the face of proposed
13 findings for Microsoft. It's an interesting document, but,
14 as I said yesterday, we're litigating about what might have
15 happened in 1994. We have the benefit of hindsight. They
16 have to prove -- because they're seeking treble damages, not
17 what Mr. Maritz thought when he testified back in 1994, but
18 what happened, and they have to prove that it happened and
19 they were injured.

20 Mr. SCHMIDTLEIN: We have to prove -- I disagree
21 with that. Microsoft's making statements, admissions that
22 are directly contrary to the position they are taking in
23 this case.

24 Your Honor, the next page, Netscape Web browsing
25 software is another example of middleware. It provides both

1 a user interface and a set of APIs, albeit currently a
2 limited one and, thus, competes with Windows.

3 Why am I not able to -- I can't use what they
4 said, what they admitted as an admission?

5 THE COURT: It may be you can cross-examine
6 somebody about it.

7 MR. HOLLEY: Not on direct.

8 Mr. SCHMIDTLEIN: Items directly contrary to the
9 line of cross-examination, and he agrees with this, the fact
10 that Microsoft --

11 MR. HOLLEY: Your Honor, maybe Mr. Schmidtlein and
12 I -- Mr. Schmidtlein attacks one of our witnesses on cross
13 with this same sort of impeachment. They can't introduce it
14 in their case.

15 Mr. SCHMIDTLEIN: I think we can introduce it in
16 our case.

17 THE COURT: I don't think you can. I will sustain
18 it.

19 (Side-bar conference concluded)

20 Mr. SCHMIDTLEIN: One moment, Your Honor.

21 We have no further questions for Mr. Alepin.

22 THE COURT: Anything further, Mr. Holley?

23 MR. HOLLEY: Yes, Your Honor.

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RECROSS-EXAMINATION

BY MR. HOLLEY:

Q Mr. Alepin, on redirect Mr. Schmidtlein asked you, as I understood it, what, if anything, happened between October 1994 when the namespace extension APIs were dedocumented, if you want to use that term, and mid 1996 when they were redocumented, and I think I heard you say nothing. Is that what you said?

A I think I gave more of an answer than that.

Q Well, you certainly don't disagree, do you, sir, that all of the things that Mr. Belfiore described in the e-mail to Mr. Schulman are things that changed between October of 1994 and when the APIs were documented again in mid 1996?

THE COURT: I'm confused now. Mid '96, March '96?

Mr. SCHMIDTLEIN: March '96 I think.

THE COURT: March '96. Actually I thought Mr. Schmidtlein went back farther, to June of 1994. I'm confused about the redocumentation.

MR. HOLLEY: Well, the redocumentation --

THE COURT: Or documentation.

MR. HOLLEY: So I think the evidence is that there was an article published in the Microsoft Systems Journal about the APIs, and I can't say exactly what month it was. Maybe Mr. Alepin remembers. The reason I'm saying mid 1996, it's because I didn't want to represent exactly what month

1 it happened. I'm not sure the evidence is clear on that.

2 BY MR. HOLLEY:

3 Q But my question to you, Mr. Alepin, is between October
4 3 of 1994, when Mr. Gates decided to withdraw support for
5 the namespace extension APIs and when they were documented a
6 second time in 1996, things were done to change the way they
7 worked; isn't that right?

8 A You are referring to with respect to the namespace
9 extensions?

10 Q Yes, sir.

11 A I don't believe that is the case. I believe that
12 subject to programming error that was detected or something
13 like that, the module in question that we talked about,
14 shell32.dll, follows Microsoft's practice of version
15 identification, and each version appears in the property
16 information for the DLL. The DLLs that are shipped -- the
17 DLL for Windows 95 is -- has the number 4.0.0.950. The
18 version of the -- the next version of the shell32.dll that
19 Microsoft ships is 4.7. -- 4.71 -- forgive me for not
20 knowing this. That is the one that produces the desktop
21 update. There are no versions of the shell32.dll shipping
22 for either Windows NT 4.0 or Windows 95 until the 4.71 --
23 the 4.71 version, which is the carrier of the desktop
24 process flag, and that makes me reply to you in that way.
25 Q Take a look, please, sir, at the exchange between

1 Mr. Schulman and Mr. Belfiore numbered at the top of page 94
2 of 98.

3 A Excuse me, it's going to take --

4 Q Let me find it.

5 A 94?

6 Q 94 of 98.

7 A Yes.

8 Q Under the heading limitations with the current
9 implementation, he says, in the second paragraph there,
10 there is a solution to this, and this is the problem of
11 programs calling the namespace extension APIs being in the
12 same process as the rest of the shell and the chance that a
13 misbehaved application will bring down the entire shell, in
14 Mr. Belfiore's words. Then he says in this paragraph, there
15 is a solution to this in Windows 95, and that is to allow
16 applications that are written as shell extensions to run as
17 rooted, i.e. each one runs in its own process.

18 And that change was made in November of 1994, right?
19 That change was made to force products that were calling the
20 namespace extension APIs to run rooted?

21 A I'm not sure whether the rooted and nonrooted feature
22 was something that was part of the original June 1994
23 version because the CAD view program used rooted namespaces.
24 And I believe that feature was present in there. In any
25 event, the Microsoft online services, when a solution is

1 proposed and accepted for the online services to where it's
2 always using the namespace extensions, it was decided they
3 were going to make use of that feature, which was in --
4 which was taking place in October -- that discussion took
5 place in October of '94.

6 So it leads me to believe also that the rooted, not
7 rooted feature was present earlier. It doesn't make any
8 difference to the point about the version shipping.

9 Q But it does make a difference in terms of the answer to
10 Mr. Schmidtlein's question, doesn't it? If, in fact,
11 Mr. Maritz issued an instruction -- and I'll go find the
12 document if you insist that I do it, but if Mr. Maritz
13 issued an instruction in October of 1994 that products,
14 including the MSN client, that called the namespace
15 extension APIs run rooted in a separate process, that would
16 be a change that occurred after Mr. Gates's e-mail, correct?

17 A It depends on whether it is a function of the
18 programming interface or not, if it's controlled by the
19 application or not.

20 Q You are not testifying, are you, sir, that Mr. Maritz
21 did not issue precisely the instruction I just said, which
22 is that after October 3rd of 1994, he told Microsoft's
23 developers that products calling the namespace extension
24 APIs should run rooted, meaning that they would not run
25 integrated into the namespace of Windows Explorer but would

1 instead run in their own process?

2 A I'm not disputing that.

3 Q Now I believe in response to a question from
4 Mr. Schmidtlein about the difference between common controls
5 and Windows 95 and the namespace extensions in Windows 95,
6 your testimony, in sum and substance, was that without using
7 the namespace extension APIs, Novell inside of its own
8 applications could add access to whatever information
9 sources it liked, including both parts of the Windows system
10 namespace and whatever custom folders Novell liked to add on
11 its own. That's what you said, isn't it, sir?

12 A I was following you, but I can't remember the start --
13 what the start of it was.

14 Q Let me do it again.

15 A Absent the namespace --

16 Q Without using the namespace extensions, just using the
17 common controls in Windows 95, Novell had the ability to
18 create a file open dialog that would include not only
19 elements of the Windows 95 system namespace, but also add
20 whatever custom file locations that Novell wanted to add;
21 isn't that right?

22 A It could do that.

23 Q It could do that. So the only issue, as I understood
24 your testimony, is that Novell wanted to modify Windows so
25 that Windows would show namespaces for Novell products like

1 its document management system, its picture viewer, its
2 search engine, it's e-mail client, and an FTP, HTTP browser.
3 That's your understanding; is it not, sir?

4 A No. I think it wanted to use Windows in the way that
5 Windows had been advertised to operate, to allow independent
6 software vendors to extend the Windows shell to include the
7 information sources that the independent software vendor
8 thought would attract customers to use their products
9 because in combination with the shell and with Windows 95
10 independent software product, it would be a better place to
11 work.

12 Q That would be true, this ability to expose Novell
13 products, like the QuickFinder search engine, even if the
14 WordPerfect word processing application and the Quattro Pro
15 spreadsheet applications were not even running; isn't that
16 right, sir?

17 A That was -- that would be an important element to it.

18 Q I would like to show you what's been marked as
19 demonstrative Exhibit 96, please.

20 So what we're talking about, as you understand it, is
21 not making WordPerfect a better word processing application
22 or not making Quattro Pro a better spreadsheet application,
23 but instead to add the five Novell products across the
24 bottom of this slide to the Windows shell?

25 A I mean -- that's an odd way of phrasing it. The idea

1 was to make those information sources available to the user
2 from the shell, just like the Windows Chicago design guide
3 said that you could.

4 Q I understand that's what the design guide said. But my
5 question to you, sir, is isn't it true that what we're
6 talking about here in terms of the namespace extension APIs
7 is not that Novell could make WordPerfect a better word
8 processing application or Quattro Pro a better spreadsheet
9 application, but instead that Novell could add a document
10 management system and those other five products across the
11 bottom to the Windows shell, to the Windows Explorer and the
12 Windows common file open dialog?

13 A No. I think it was to make the Novell PerfectOffice
14 product a better product for customers to use, that they
15 would be able to store their documents that they had used in
16 their document management system, and decide and locate them
17 from their desktop, and then launch the program if they
18 needed to launch the program, or preview the document if
19 they wanted to preview the document. But the fact was that
20 they could be able to preview documents that they were
21 working on from their desktop application productivity suite
22 without having to launch that suite.

23 Microsoft found this feature to be attractive in a
24 number of ways by making its viewer -- its shell browser
25 capable of previewing the Word documents. Internet Explorer

1 thought it was a good thing to be able to attach its
2 namespace to the shell so that it could preview Internet
3 pages by extending the namespaces to provide frequently used
4 relevant sources of information as the designers of Chicago
5 had intended. That made the users' computer a better
6 computer to use.

7 Q And it made Windows 95 a better operating system in
8 Novell's view, right, because adding the things below the
9 big wide red line were not about making WordPerfect better
10 or Quattro Pro better, they were about making Windows 95 a
11 more capable operating system, right?

12 Mr. SCHMIDTLEIN: Objection, asked and answered.

13 THE COURT: Overruled.

14 THE WITNESS: The way -- Microsoft said the old
15 way of doing things where a customer would launch a program
16 and then you would live in that program is not the correct
17 paradigm, necessarily, going forward. What Microsoft tried
18 to do was to get people to live from the shell and the
19 desktop. And that the WordPerfect was adapting its program
20 to operate in the mode in which it was told well behaved
21 Windows program -- Windows 95 programs would.

22 Q Well --

23 A Or should.

24 Q Should, would.

25 Mr. Harral testified at this trial, and I'm happy to

1 show you the transcript, but I will just read you a sentence
2 of his testimony and ask you if you agree with it. He
3 said -- and this is at page 270 of the transcript, lines 22
4 to 25 -- so all of the shared code technologies were
5 intended to go into the operating system for use by every
6 single product installed on the platform.

7 And you agree with that, don't you, sir? The whole
8 point of the five things across the bottom which are not
9 word processors and not spreadsheets is that they were going
10 to make the operating system more capable, and those five
11 things would be available to people using Windows 95 whether
12 or not a Novell application was running?

13 A That was the whole point of what Mr. Gates had said he
14 wanted to have happen when he laid out his vision for
15 Chicago.

16 MR. HOLLEY: I have no further questions, Your
17 Honor.

18 THE COURT: Mr. Schmidtlein, any questions?

19 Mr. SCHMIDTLEIN: Nothing further.

20 THE COURT: Thank you, Mr. Alepin.

21 I will be guided by you all. I called for the
22 extra 15 minutes. But prior developments, you can go home.
23 I will be glad to use the extra time or have the jury go
24 home ten minutes early instead of 15 minutes late.

25 Mr. SCHMIDTLEIN: I'm not going to make the jury

1 stay, Your Honor. You can make them stay.

2 THE COURT: I assume we're still on schedule?

3 MR. JOHNSON: Yes, Your Honor.

4 THE COURT: Pleasantly surprised with Mr. Holley's
5 cross-examination.

6 Mr. SCHMIDTLEIN: Surprised or pleased?

7 THE COURT: Have a nice evening.

8 (Jury excused)

9 THE COURT: Just a couple things. Number one, it
10 occurred to me a wonderful definition of robust would be a
11 good trial lawyer that's put up with me during the course of
12 trial dealing with antitrust law. Secondly, let me know on
13 Monday morning -- Teresa has already told them that it may
14 happen. I want to reserve this issue. Let me know so we
15 tell the jury as soon as possible if they will have Friday
16 off.

17 I assume that Novell may want to write a short
18 written response to the motion to strike that was filed by
19 Microsoft this morning. And since it's a motion to strike,
20 I assume there is no need to discuss it now, unless you want
21 to.

22 MR. JOHNSON: No. We would like to file a written
23 response. I just got it when we arrived this morning.

24 THE COURT: No. No. No. I assume we can -- I
25 think that's all I have.

1 MR. JOHNSON: The only thing I have, Your Honor,
2 is a further list of exhibits which have been cleared, which
3 we would like to enter into evidence. Obviously Microsoft
4 wants to take a look at these and get back to us. I would
5 also say, Your Honor, the long list of documents that
6 Microsoft proffered were fine with us.

7 MR. PARIS: We actually have a clean copy.

8 THE COURT: The only other thing, it may come up
9 next week and I alluded to it before, and I'm just saying
10 this to try to articulate it so you all can think about it,
11 because it may be in my head next week sometime.

12 This is a slight refinement on something I have
13 already said. Comparing this case to Aspen Ski, it would
14 seem to me, and I don't know whether it's right or wrong, it
15 would -- how many slopes -- I think there are three, maybe a
16 fourth. It doesn't matter. I am not saying it's wrong, but
17 it seems to me that to try to make this a little more
18 analogous to Aspen Ski, this case, and it's not a perfect
19 analogy, it is though the person who owned the three slopes,
20 the defendant, decided to build a tram line -- a tram line
21 to connect all three slopes, which improved its competitive
22 position. The plaintiff, the owner of the fourth slope, was
23 asking for a perpetual easement to tie the tram line built
24 by the defendant to a tram line that the plaintiff wanted to
25 build, and part of the easement was to connect into the

1 power source that was used by the defendant's tram line.

2 So, again, I'm not sure that's right, but I'm
3 trying to read authorities and come up with things. I don't
4 want to hear any argument on it today. I'm really just
5 spelling this out because it may come up next week, and I
6 want -- it could be that I'm completely off base. But Aspen
7 Ski was obviously an important case. It's unanimous, and a
8 subsequent Supreme Court said to be at the edge of antitrust
9 law, which I think is interesting. I think they're both
10 probably right. But it's a unanimous opinion at the
11 frontier of antitrust law. But the more I'm trying to
12 understand, and this is -- I have been thinking it through,
13 and since I mentioned this, I think I mentioned it a couple
14 of weeks ago, I added the idea of perpetual easement. I'm
15 not saying this for any reason other than to have you all
16 think about it.

17 MR. JOHNSON: Thank you for your thoughts, Your
18 Honor.

19 MR. TULCHIN: May I ask a question, Your Honor,
20 not on this subject?

21 THE COURT: I was going for suggest to you the
22 one, two punch.

23 MR. TULCHIN: We're not that good, Your Honor.

24 Would it be convenient for the Court if we
25 convened at 7:45 on Monday to hear this argument about our

1 motion to strike that you referred to earlier?

2 THE COURT: If it's important, but we could do it
3 after court. I was thinking we do it -- I don't want to
4 make all of you -- it seems to me -- I'm perfectly willing
5 to do it at 7:45. It doesn't matter if we talk about it
6 after.

7 MR. JOHNSON: I agree, Your Honor.

8 THE COURT: There's no rush.

9 MR. TULCHIN: Thank you, Your Honor. Have a nice
10 weekend.

11 (Whereupon, the trial was continued to Monday,
12 November 14, 2011 at 8:00 a.m.)

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