

1 THE COURT: What are the odds we'll go on Friday  
2 with the jury? Do we know yet? You don't know yet?

3 MR. JOHNSON: We're doing better, Your Honor. I  
4 would say that we're --

5 THE COURT: So your expert -- I assume your  
6 economics expert testifies tomorrow?

7 MR. JOHNSON: Correct. And I would assume we  
8 certainly complete him in two days, show the remaining tape  
9 we need to show. We're going to have some exhibit issues  
10 and things we have to deal with that we need to get in that  
11 there are some pending objections to, but I don't see it as  
12 an impossibility, and that can take place outside of the  
13 presence of the jury.

14 THE COURT: I'll tell them right now we think they  
15 don't have to come on Friday.

16 MR. JOHNSON: I think that's all right with us,  
17 Your Honor.

18 MR. TULCHIN: Sounds like we're on track for that,  
19 Your Honor.

20 (Jury present)

21 THE COURT: To the extent that we can tell, right  
22 now we think you won't have to come in on Friday.

23 Mr. Johnson.

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

25 We've got one more tape to play. I must say we're

1 clearly almost right on the mark. It's going to take us  
2 right until 1:30. It's an hour and six minutes long. It's  
3 the portions of the deposition of Russell Siegelman, a  
4 Microsoft executive. It was taken March 5, 2009.

5 THE COURT: I'm sorry, how long is it, an hour and  
6 15?

7 MR. JOHNSON: An hour, six.

8 THE COURT: Good.

9 (Videotaped deposition of Russell Siegelman was  
10 played.)

11 Q Mr. Siegelman, have you had your deposition taken  
12 before?

13 A Yes.

14 Q How many times?

15 A Approximately five.

16 Q Did you once work for Microsoft Corporation?

17 A Yes.

18 Q Years when you worked there?

19 A September '89 through roughly August of '96.

20 Q Okay. If there is a way that you can give us sort of a  
21 condensed version of what your job duties were during that  
22 time frame, I would appreciate it.

23 A I was the product manager on LAN manager. Then I  
24 became a group products manager for Windows for work groups.  
25 Then I worked for Bill Gates in an advisory capacity. Then

1 I became the general manager of Microsoft Network. And then  
2 I was promoted to vice president of MSN.

3 Q Okay. And that was your job through the time that you  
4 finished there?

5 A Correct.

6 Q Can you tell me a little bit about what you did for  
7 Mr. Gates in your advisory capacity?

8 A Yes. Bill wanted someone to help him figure out how  
9 Microsoft should get in the online services business, and I  
10 guess at the time the senior management team wasn't -- it  
11 wasn't obvious to him who should take on that role, so he  
12 asked me.

13 Q What do you mean by online services business?

14 A AOL, MSN, Yahoo. That kind of thing.

15 Q So can you describe a little bit what the product is,  
16 that online services product is?

17 A Yeah, sure. So an online service is a way for  
18 consumers to get online and get information, send e-mail,  
19 you know, do instant messaging. So information service  
20 available through the Internet.

21 Q When did you become the general manager of the  
22 Microsoft Network?

23 A That would have been I think roughly spring of 2002.

24 Is that right? No, I'm sorry. '89, '99, 2001 -- '90, '92,  
25 spring of '92. Thank you. It was a long time ago.

1 Q What were your job duties as the GM of this project?

2 A To develop an online service to compete with AOL from  
3 Microsoft.

4 Q And whose idea was it to develop that service?

5 A I would say, you know, primarily Bill Gates, but, you  
6 know, obviously I and my boss, Nathan Mervolt spent a lot of  
7 time in managing.

8 Q You just answered one of the next questions I had,  
9 which was to whom did you report. That was Mr. Mervolt?

10 A I worked for Gates, and then when we decided to start  
11 our own online service, I worked for Nathan.

12 Q What was the target audience for the Microsoft Network?  
13 Was there a target audience for the Microsoft Network?

14 A Yes.

15 Q What was it?

16 A I would say consumers who have had Windows.

17 Q Okay. Which Windows? There are several different  
18 variations of Windows. What was the first Windows product  
19 that Microsoft targeted as its platform for the online  
20 services?

21 A Well, I think when we first started, I think that was  
22 an open question because we didn't know, you know, you had  
23 to sort of -- we had an installed base. We had new versions  
24 of Windows come in, but I think over some period of time we  
25 decided that we were going to target Windows 95 as sort of

1 our first platform, first Windows platform.

2 Q Throughout the development period before the release of  
3 Chicago Windows 95, how many people reported to you?

4 A I don't know for sure, but I'd say roughly 500.

5 Q What was the -- what were they all doing? Let me ask,  
6 were they all coding?

7 A A lot were coding, but we did have customer service  
8 people. We had marketing people.

9 Q Exhibit 1 will be M1015565, an e-mail from -- it is  
10 actually an e-mail string from Mr. Joachim Kemplin to RussS.

11 Was your e-mail alias R -- RussS?

12 A Yes, that's correct, at Microsoft.com.

13 Q The bottom part of this e-mail is from you to  
14 Mr. Kemplin; is that right?

15 A Yes.

16 Q Who's Mr. Kemplin?

17 A You know, Joachim was, I believe, the VP in charge of  
18 the OEM sales division at Microsoft, at least for some  
19 period of time. Probably -- that's what would appear from  
20 this, but I don't know that he was actually in charge at  
21 that time.

22 Q And there is a reference to Mr. Miller. Who's that?

23 A So Bill Miller was someone working for me. I believe  
24 his title was VP -- not -- don't think it was VP. It was  
25 probably director of marketing -- or director of product

1 marketing.

2 Q A marketing guy?

3 A Yeah.

4 Q The first paragraph in your e-mail to Mr. Kemplin you  
5 refer to something called M7. Do you remember what M7 was?

6 A I can make a guess. Based on some personal knowledge,  
7 it was probably a beta release of some alpha release of  
8 either Marvel or Chicago.

9 Q There is also a reference to -- let me just read the  
10 sentence into the record. We expect to be in M7 and will  
11 talk publicly about the product in September.

12 Was there a time when the Marvel project was not  
13 publicly known?

14 A Yes.

15 Q What was -- was there some active effort to keep it a  
16 secret?

17 A What do you mean by active?

18 Q Were there directions or instructions given to you or  
19 anybody on your team not to discuss the existence of the  
20 project outside of Microsoft?

21 A I'm sure at some point that was the case because all  
22 products until they are announced are unannounced. And when  
23 they are unannounced, you don't want to talk about them.

24 Q So that was a typical policy at Microsoft, not to talk  
25 about a product until they were announced?

1 A If something is not announced, you're not supposed to  
2 talk about it. So, yeah, almost by definition their  
3 instructions not to talk about unannounced products.

4 Q Who makes the decision to announce a product?

5 Well, let me be more specific. Who made the decision  
6 to announce the Marvel product?

7 A Some combination of me, Gates, Farmer.

8 Q Do you have a recollection of the announcement of the  
9 Marvel product?

10 A You know, I honestly don't.

11 Q Was there a decision made to release Marvel only as  
12 part of Windows 95 and not as a separate product? And let's  
13 cabin this in a time frame, and that is up to and after the  
14 release of Windows 95.

15 A I mean, just by virtue of what happened in retrospect,  
16 it only got launched on Windows 95. And I don't believe --  
17 again, I wouldn't say this for sure, but to the best of my  
18 knowledge, I'm not sure that you could have downloaded it  
19 separately or that was ever stamped on separate disks.

20 It's possible that either the -- especially the  
21 download version -- well, and now you could suggest, you  
22 know, you could -- later on you probably could have  
23 downloaded it because -- well, so the answer is -- okay. I  
24 don't remember. I honestly don't know.

25 Q Do you recall discussions about the reasons for making

1 Marvel part of Chicago?

2 A Well, as I said earlier, I think one recollection I  
3 have is that we wanted to minimize our development resources  
4 so we could only choose maybe one or two Windows platforms.

5 The next thing I recall is that obviously the company  
6 thought Windows 95 was going to be a successful release and  
7 they wanted to make it as, you know, successful as possible.  
8 It was an opportunity for us to -- you know, meaning the MSN  
9 group to leverage that success and then all the marketing  
10 and all the announcement PR that Windows 95 was going to  
11 get.

12 So those are the things I recall. There might have  
13 been other reasons, but I -- those are the ones that I  
14 recall.

15 Q Do you recall any discussions about integrating Marvel  
16 into the operating system as opposed to making it available  
17 as some add-on or separate product?

18 A Yeah. I remember that, you know, Gates and maybe  
19 others had this notion that there would be distribution  
20 advantages by putting it in Windows, but, to be honest with  
21 you, in retrospect, I think that was kind of a misconceived  
22 idea.

23 Q But at the time there was a view that that would give  
24 the product an advantage, the wide distribution of the  
25 product --



1 A Yeah.

2 Q -- to Chicago?

3 A There was a thought I think in some circles in the  
4 company that MSN would have some advantage by getting  
5 distribution with Windows, yes.

6 Q What does it mean to get distribution with Windows?  
7 When you start up Windows 95, do you get an icon? Do you  
8 get some setup options? Do you remember how that you  
9 happened, logistically?

10 A Yeah. Well, that's a good question because I remember  
11 there were oodles and oodles of discussions, if you want to  
12 call them discussions, about how it would -- you know, you  
13 know, how you would first see and then turn on, if you will,  
14 launch I think is a better word, MSN.

15 I honestly it don't remember how it finally ended up,  
16 but I do remember there was a lot of back and forth to the  
17 Windows group. The Windows groups didn't want to do it this  
18 way, didn't want to do it that way. Gates wanted to do it a  
19 certain way.

20 I probably had a point of view at the time too, but I  
21 honestly don't remember what it was all about.

22 Q Let's go to Exhibit w, which is a Marvel marketing  
23 plan. That's MX7082716 through 38.

24 The actual text of that on the second page, there in  
25 the second paragraph, first sentence, says, the Marvel

1 client application will ship as an integral component of  
2 Windows 95 in the first half of '95.

3 That's consistent with your explanation about Marvel  
4 being part of Windows 95; isn't that right?

5 A Yes.

6 Q That's what that's what it means by integral component?

7 A I'm not sure technically what that means, integral  
8 component, but I mean my general understanding is it means  
9 that there's going to be software that runs the Marvel  
10 application in the Windows box. You know, integral like  
11 doesn't mean that Windows 95 won't run without it, which one  
12 might imply. You sort of have a technical version of --  
13 technical understanding of the term, but this is a marketing  
14 document. So integral component I think just means it's in  
15 the box.

16 Q What does that mean, it's in box?

17 A Well, okay. So when I say in the box, I mean that when  
18 you get the disk for Windows 95, it, you know, contains the  
19 Marvel code.

20 Now what -- how it gets launched, whether it gets  
21 installed on the default, those are all separate questions  
22 which, again, I don't -- I know there was a lot of debate  
23 about. I don't know where we ended up on all of that.

24 Q What was your background before taking over this  
25 project? Were you a software development guy? Were you

1 primarily a marketing guy?

2 A Well, you mean go back to --

3 Q Prior to --

4 A -- the university, or Microsoft?

5 Q Just prior to being involved with the MSN project,  
6 Microsoft Network project, had you been in coding?

7 A No. I was -- my roles at Microsoft had always been  
8 product management and then a GM. I was never a code  
9 representative.

10 Q What does product management do?

11 A It's a marketing job, but it's more focused on product  
12 decisions like pricing -- not -- not -- there was another  
13 job at Microsoft called program management. I was very  
14 involved in the features and, you know, very close  
15 interfaced with the engineers. Product management is kind  
16 of one step removed from that. It's really a marketing job.

17 Q Okay.

18 A Product management is really product marketing.

19 Q Okay.

20 A Sort of for product marketing.

21 Q I got it.

22 In that same paragraph there is a sentence that says,  
23 the basic services include e-mail, BBS and Internet  
24 newsgroup access, chatting, and the baseline offering of  
25 news, sports, financial market and weather information.

1 Is that an accurate description of what the envisioned  
2 services were going to be for Marvel?

3 A You know, if you had asked me before I read this  
4 document, I probably would have recited maybe only a couple  
5 of those because I do e-mail, you know, but, you know, now  
6 that this has refreshed me, my mind, I would say yeah. It  
7 seems like a pretty good description of what we were trying  
8 to do.

9 Q On the third page. At the very bottom under vision,  
10 the third sentence says, Marvel will provide access to a new  
11 way of thinking and communicating by extending the Windows  
12 desktop beyond the LAN based communication and file sharing  
13 to a worldwide community of people, ideas and information.

14 I have some questions about pieces of this sentence.  
15 What does it mean to be extending the Windows desktop beyond  
16 LAN based communication, if you know?

17 A Well, my best understanding of that sentence is that up  
18 until the time that, you know, services like AOL and MSN  
19 came along, users would connect other resources, let's say  
20 other files, but they would be in their local area network.  
21 That's sort of a L-A-N, LAN, local area network.

22 So there would be, you know, something within your  
23 corporate network basically, and this sentence suggests that  
24 with services like MSN and AOL, it's more focused on MSN,  
25 but it would have been true of AOL also that you can see

1 files and, you know, communicate with people outside of your  
2 corporate LAN. I think that's what that means.

3 Q Was there any discussion about the it Novell as a  
4 potential competitor in this market, given its role in the  
5 networking market?

6 A Not that I recall.

7 Q If you will go to page 5 at the very top, the very  
8 first full paragraph, it says, Marvel will provide a  
9 browsing tool, user interface, that will allow customers to  
10 find, view and execute the various Marvel basic and extended  
11 applications.

12 What was that browsing tool?

13 Let me ask it differently. What was the browsing tool  
14 intended to do before I ask you what it was?

15 A Well, the way I read this is this is that the browsing  
16 tool, and it's a funny -- it's funny you used that word. I  
17 caught it when I was reading this because, you know, there  
18 was no browser.

19 What everybody knows now as the Internet Explorer is a  
20 browser -- or mosaic is a better word. There was no browser  
21 there then. I mean maybe we were becoming aware, but I  
22 don't know what date this was -- September '94?

23 Q Uh-huh.

24 A So mosaic I don't even thing really -- was really well  
25 known in September '94.

1 Q Okay.

2 A So when you say browsing tool, I'm not really sure if  
3 he actually had in mind kind of what we think of today as a  
4 browser.

5 Q Did Windows 95 have a browser, the Windows Explorer?

6 A My recollection is when it first shipped, it did not.

7 Q Okay. I'm asking independent of the Internet Explorer,  
8 the Windows Explorer.

9 A Oh, the Windows Explorer.

10 Q Right.

11 A So there was always some -- not always. There was  
12 something in Windows 95 called the Windows Explorer, which  
13 is the window that you use to find files and things on your  
14 machine, yes. That's what I was saying that the Windows  
15 Explorer is.

16 Q Was that considered a browser for the system?

17 A Well, I think maybe you're asking me kind of a jargon  
18 question there because I don't see -- like I said, now  
19 everybody kind of just assumes everybody used the word  
20 browser all the time --

21 Q Right.

22 A -- but I think in those days we didn't. I think we  
23 would have probably used the word Windows Explorer or client  
24 or shell, or something like that. I think the word browser  
25 wasn't that well known or common in those days.

1           So I'm not -- to say that somebody might not have said  
2 that the Windows Explorer is a browser, but I'm not sure  
3 that that was -- I'm not sure I ever used it in that way.

4 Q       Actually, let me go down to where it says easier to  
5 use. The third sentence says, for example, Marvel  
6 applications can be browsed via the Windows 95 Explorer  
7 folder tree or from a Marvel icon based container view.

8           Does that help you?

9 A       So you are looking at the second sentence?

10 Q       Third sentence.

11 A       Third sentence.

12 Q       Where it says easier to use.

13 A       Okay.

14 Q       If it helps you to read the second sentence, please do.

15 A       Okay. So that -- okay, yeah. So that is -- speaks  
16 exactly to my last couple of sentences. It suggests that  
17 there were two ways to see and access MSN services. One was  
18 through the Windows 95 Explorer, and I can imagine how that  
19 would have worked, and then one would have been some kind of  
20 application that my group built. That was probably the  
21 thing that opened up when you double clicked on the MSN  
22 icon.

23 Q       Do you have you a recollection whether the Marvel  
24 product would actually be integrated into the Windows folder  
25 Explorer tree?

1 A Well, this sentence suggests that that was the case,  
2 and I have a vague recollection. I wouldn't -- if you had  
3 asked me before I read the sentence, I would have been  
4 pretty unclear about it. But now that this mentions this, I  
5 think, you know, I have some recollection that there was a  
6 way that you could get access to certain MSN features by  
7 double clicking on things in Windows Explorer. But my  
8 recollection also is not -- that wasn't true of all MSN  
9 services and that, frankly, very few people actually -- I  
10 mean like that became unimportant because we found that, you  
11 know, that very few people actually did that is my  
12 recollection.

13 Q Exhibit 4 is an MX5117033 through 34. This is an  
14 e-mail string starting with an e-mail from Mr. Gates to a  
15 list of people, then an e-mail from Mr. Evslin to a list of  
16 people, and an e-mail from Mr. Silverberg to a list of  
17 people.

18 Do you recall, independent of your meeting with counsel  
19 yesterday, this e-mail string?

20 A No.

21 Q Do you recall the events that are the basis of this  
22 e-mail string, mainly the decision not to publish the  
23 IShellBrowser extensions?

24 A I don't.

25 Q Do you have -- strike that. Let's just focus on the



1 very bottom part, e-mails from Microsoft. You read from the  
2 bottom up, right?

3 A Correct. Do you want to do the first page or the  
4 second?

5 Q Well, let's focus on the first page.

6 A Okay.

7 Q You received a copy of this e-mail; is that correct?

8 A So it appears, yes.

9 Q You have no reason to doubt that you did?

10 A No reason to doubt.

11 Q Do you have a recollection of what IShellBrowser was?

12 A I do not.

13 Q The very last sentence of that e-mail on this page  
14 says, I have decided that we should not publish these  
15 extensions. That's Mr. Gates speaking.

16 Do you recall Mr. Gates choosing not to publish  
17 extensions that Marvel relied upon?

18 A No, and I don't know that we actually did rely on them.

19 Q Okay. Do you have any recollection of discussions  
20 about whether or not to publish these IShellBrowser  
21 extensions?

22 A That I was personally involved in?

23 Q Yes.

24 A I don't recall.

25 Q Okay. Do you have any recollection of discussions

1 regarding whether or not Marvel could use extensions if they  
2 were not published? And now I'm asking in a broad context  
3 rather than just the statement starting other than the  
4 IShellBrowser extensions.

5 A I mean other than to the extent that -- I read this and  
6 understand more or less what this is about. I don't recall  
7 anything else.

8 Q What is your understanding of what this is about?

9 A My understanding of these e-mails, the way I read it,  
10 is that there was some code that either was in Chicago or  
11 had been considered to be in Chicago that Bill suggests here  
12 in his e-mail that he does not want to publish. I don't  
13 know what these extensions did, but apparently it had  
14 something to do with the shell, and it looks like Capone,  
15 which, again, if you had asked me before I read this  
16 e-mail -- set of, you know, e-mails or anything, I wouldn't  
17 even have known what Capone was, but apparently it was the  
18 e-mail client.

19 Q Do you have any recollection at all of the effect of  
20 Mr. Gates' decision on the Marvel development project?

21 A Say again.

22 Q Do you have any recollection at all of the effect of  
23 Mr. Gates' decision not to publish the IShellBrowser  
24 extensions on the Marvel development project?

25 A No. I have no recollection of that.

1 Q I thought you said earlier that the Marvel project was  
2 actually part of Chicago?

3 A I don't remember what I said. I think there was a  
4 document we commented on or I commented on that said  
5 something about integral component of Windows, and I think I  
6 even had it in my language there because I said in it -- in  
7 a technical way, I don't think that's a correct description.

8 I mean Windows runs fine without -- Windows 95 ran fine  
9 without MSN. Ninety-nine percent of Windows 95 users didn't  
10 even know MSN was there, let alone run it. So integral  
11 component would be too strong a word.

12 But was it present on the disk? I'm sure it was. Was  
13 it automatically loaded? I don't even remember because  
14 there was a big debate about that. Should it show up on the  
15 desktop? Should it not?

16 I don't remember where we netted it out on that, and I  
17 think that changed over time. I think we might have been on  
18 the desktop for some -- at some point. But then later on,  
19 you know, I think there was some other deal that pushed us  
20 off the desktop.

21 So I think we are kind of splitting words here a little  
22 bit.

23 Q Okay. All right. Let's go with Exhibit 5, which is  
24 M1010506 through 08, and I questions throughout this. So  
25 you might as well just read the whole thing.

1 A Okay.

2 Q All right. This says an e-mail attachment from Sean  
3 Nolan to; is that right?

4 A That looks correct.

5 Q Who is Sean Nolan?

6 A Sean Nolan was the developer engineer in my group.

7 Q Do you recall receiving this e-mail?

8 A I do not.

9 Q Do you recall the attachments, Marvel Explorer and  
10 IShellBrowser?

11 A I do not.

12 Q Do you recall Mr. Nolan doing some analysis of the  
13 effect of Mr. Gates' decision to withdraw the publication of  
14 the IShellBrowser interfaces?

15 A Other than the fact that this -- that seems to indicate  
16 that's what this is, but I do not recall that at all.

17 Q Okay. You have no reason to doubt that this was, in  
18 fact, sent to you, do you?

19 A No reason to doubt that.

20 Q And is it your understanding that this was, in fact --  
21 strike that.

22 Do you have any reason to believe that this was --  
23 well, let me change that also. Let's just ask about the  
24 title, Marvel Explorer and IShellBrowser. Do you see that?

25 A Yes.

1 Q Do you have any understanding of what that title refers  
2 to?

3 A Okay. So to the best of my knowledge, what this is  
4 about is that Marvel Explorer is the container that we -- I  
5 referred to earlier, some piece of the code that the user --  
6 the Marvel user, the MSN user would use to interact with the  
7 online service and the various information that services we  
8 were building, and IShellBrowser, I'm a little bit unclear  
9 about. It looks like some kind of Windows API, but what it  
10 did or why we were going to use it is really unclear to me.  
11 I don't know.

12 Q This was received by you the day after Mr. Gates'  
13 decision not to publish these extensions, correct?

14 A Looks like two days.

15 Q Okay.

16 A October 3rd, October 5th.

17 Q Okay. My apologies. I'm not good at math apparently.

18 Is it your -- strike that. The first bullet point says  
19 implications of losing Chicago implementation.

20 Is it your view that that relates back to Mr. Gates'  
21 decision?

22 A That is my assumption.

23 Q Back to the second page again. Sorry for the  
24 diversion. Mr. Nolan writes, the Explorer provides us with  
25 two main services, and he identifies two of them, Windows

1 Control and -- strike that. Window Control -- Window &  
2 Control UI and, number two, hierarchy management.

3 Do you recall these services that were provided by the  
4 Explorer?

5 A I mean I can imagine how the Windows Explorer would  
6 provide these things, but I don't recall any of this, no.

7 Q Okay. The full paragraph under the numbered paragraph  
8 says, since we are a Chicago only product and did not expect  
9 this bombshell, we do not have the luxury of NT based  
10 IShellBrowser host to fall back on as does Capone.

11 Do you recall the decision by Mr. Gates being  
12 characterized as a bombshell?

13 A I do not.

14 Q Do you recall anybody else complaining about the effect  
15 of Mr. Gates' decision on the Marvel project?

16 A I don't, but you showed me another e-mail in which it  
17 suggested Evslin was concerned about it as well.

18 Q Do you know what the phrase -- I mean do you know what  
19 it means when it says we do have the luxury of an NT based  
20 IShellBrowser to fall back on?

21 A I'm not sure, but the way I read the sentence, it says  
22 that we had an -- meaning MSN had an implementation target  
23 of only Chicago and, therefore, we had a written code that  
24 would run on NT, and he is suggesting if we had, we could  
25 use that code base. But since we didn't target NT, we don't

1 have a code base to rely on for an IShellBrowser.

2 Q Okay. In going back to your personal recollection, do  
3 you have any recollection about discussions about the  
4 problems associated with not having an NT base, code base to  
5 fall back on?

6 A No recollection.

7 Q Okay. Mr. Nolan then writes, redesigning our shell  
8 from ground up is not a realistic solution due to time  
9 constraints.

10 Do you see that?

11 A I see that.

12 Q Do you have any recollection of any discussions about  
13 the time constraints involved in redesigning the shell from  
14 the ground up?

15 A Other than this e-mail or other than this memo, I don't  
16 recall this. But what he is suggesting is consistent with  
17 what I knew to be the case, which is we were trying hard to  
18 get MSN ready for the Windows 95 launch, as I suggested  
19 earlier. So that would be consistent with this.

20 He's now faced with a new development challenge, and I  
21 think somewhere in this memo, you know, he's got to get 2.5  
22 months of -- you know, 2.5 months to complete the work. And  
23 so, you know, I don't recall it, but it's consistent with  
24 this.

25 Q Okay. Under possible solutions, Mr. Nolan identifies

1 five alternatives; is that right?

2 A That's correct.

3 Q Do you have any recollection of discussions of these  
4 alternatives?

5 A You know, other than what we've read in this, no. I  
6 don't recall any of these.

7 Q The first solution Mr. Nolan wrote was to continue to  
8 use the Chicago implementation, and he writes undocumented  
9 in quotes there.

10 Do you have an understanding of what that means?

11 A Well, if I coupled my understanding of the Gates'  
12 e-mail that you showed me a few minutes ago, I think what  
13 this suggests is that we could still use the Chicago API  
14 that he wants to use, but it would have to be undocumented  
15 because it's not going to be published as a Windows API. So  
16 he suggests that's one possible way for him to address this  
17 problem.

18 Q What's the importance of having a published API, to  
19 your knowledge?

20 A Well, my understanding about publishing interfaces is  
21 simply that if they are documented, ISVs can use the code  
22 and rely -- that it's -- be relied on -- let me say the  
23 documentation can be relied on to be correct and how the API  
24 is going to work, and it will be supported. And if there is  
25 a problem, you can call Microsoft and Microsoft will say



1 yes, that's how it works.

2 If it's not published or documented and you try to use  
3 it, let's say you see it, you know, because these API calls  
4 can be viewed by good engineers even if they are not  
5 published, and if you rely on an undocumented API, then all  
6 the things I said a minute ago may not be the case.

7 Microsoft may not support it. It may not work as you might  
8 think it is. It's not clear how it does work and, you know,  
9 Microsoft doesn't support it if it doesn't work the way you  
10 think it does.

11 So I think that's sort of the difference between an  
12 undocumented and a documented API.

13 Q Did Microsoft discourage ISVs from using undocumented  
14 APIs?

15 A I would assume, but that's conjecture on my part. That  
16 would have been a DOG issue or a Windows issue, not  
17 something I did.

18 Q Did Microsoft discourage you in your capacity as -- in  
19 your role as general manager for the Marvel project from  
20 using undocumented APIs?

21 A I don't recollect -- have a recollection one way or the  
22 other.

23 Q Okay. Solution number two is port Ren/Office source to  
24 Marvel shell. Do you have an understanding of what that  
25 refers to?

1 A I guess you'll have to clarify. I'm not really sure  
2 what Ren is. Was Ren -- what was Ren?

3 Q Option number three, port Explorer source to Marvel  
4 shell. Do you have an understanding what that refers to?

5 A Well, again, not sure, but I guess what he's suggesting  
6 is that we can get some code, source code that is the  
7 Explorer shell code and that the Marvel group could sort of  
8 take it and either share it with the Windows group or use it  
9 as our own and retool it for whatever use we would need. I  
10 mean that's the suggestion.

11 Q Okay. Did the Marvel engineers have access to the  
12 Explorer source code?

13 A Not to my knowledge.

14 Q The one, two, three, fourth sub bullet point refers --  
15 there's a phrase 270,000 LOC to wade through. What is that?  
16 Any idea?

17 A I believe that means -- LOC is usually lines of code.  
18 So this suggests that there is 270,000 lines of code that he  
19 would have to go through, and then he suggests we would have  
20 to take things out because we wouldn't want to ship like DBE  
21 and Net and Trail and Fail Safe, and whatever -- all the  
22 stuff we should take out.

23 The fifth and final option is write our own Marvel  
24 shell.

25 Q So you have an understanding what that refers to?

1 A I assume what that means is that we can start from  
2 scratch and write our own code to do whatever the  
3 IShellBrowser was supposed to do.

4 Q Okay. If we go to the second page, Mr. Nolan provides  
5 an analysis of the possible solutions; is that right?

6 A Correct.

7 Q His recommendation is to pursue option number one; is  
8 that right?

9 A Well, he says that's what he thinks the best option is,  
10 yes.

11 Q Okay. And failing that, the fifth option is the one  
12 that he recommended; is that right?

13 A That is correct.

14 Q Do you remember what course of action the Marvel  
15 developers chose?

16 A I know it's going to sound crazy because this was my  
17 project, but I have no idea. I mean just to set it in  
18 context -- I mean remember, this is one of so many small  
19 decisions 15 years ago, an engineer in the shell, Bill and  
20 Windows squabbling. I mean I was like, Sean, figure it out,  
21 and he sends me this memo, and I honestly don't know what we  
22 did.

23 Q Okay. Fair enough.

24 The last paragraph Mr. Nolan writes, writing the code  
25 ourselves has a number of disadvantages. Our rough current

1 estimate is that it would take one developer 2.5 months to  
2 complete and work out the major bugs.

3 Do you see that?

4 A Yes.

5 Q Do you have any recollection of discussions about the  
6 effort that would be required to write your own code?

7 A No, I do not.

8 Q Was there a consideration, to your knowledge, of just  
9 assigning more developers to working around this issue?

10 A You know, no. I don't have any recollection, but, you  
11 know, just one other consideration. When you talk about  
12 this is that, you know, not all developers are equal. I  
13 mean some understand shell code and user interface issues  
14 and some don't. So even if we have five developers, we  
15 might have had five developers on this, but I have no  
16 recollection of having any conversation with Sean about  
17 this, no.

18 Q Are you familiar with the concept of the mythical man  
19 month?

20 A Yes.

21 Q What is that?

22 A Well, a mythical man month is based on a book about  
23 software management and software development. Management of  
24 software development projects, and it sort of suggests --  
25 and I think it is more of a theory -- I don't if it is

1 empirically based that adding more engineers to a software  
2 product sometimes extends, not shortens the time it takes to  
3 finish it.

4 Q Do you have any idea whether that was an issue with  
5 Mr. Nolan's proposal to assign a developer to work around  
6 this extension issue?

7 A I -- I don't know.

8 Q It wouldn't necessarily be as simple as just adding  
9 five developers and then cutting the project by five times,  
10 would it?

11 A Generally speaking, people who run engineering --  
12 software engineering projects for a living would tell you  
13 that you just don't add five people and cut the time, you  
14 know, by four fifths.

15 Q Right?

16 A Typically is what they would tell you.

17 Q Otherwise you could just add 25 developers and get it  
18 done in a day, correct?

19 A Correct.

20 Q Let's just go to the next one. We have exhausted that  
21 one pretty good. Exhibit 6 is M1010467 through 468. This  
22 is an e-mail from you to Mr. Gates regarding the proposed  
23 IShellBrowser solution for Marvel; is that right?

24 A Correct.

25 Q Do you have any recollection of writing this e-mail?

1 A No.

2 Q Any reason to doubt that you did?

3 A No.

4 Q You wrote, we have fully researched the impact of  
5 IShellBrowser change on Marvel. The bottom line is that  
6 there is only one solution that doesn't cause huge risk to  
7 the Marvel project: Using the Chicago implementation of  
8 IShellBrowser.

9 Do you have a recollection that the solution that you  
10 proposed to Mr. Gates was to continue to use the Chicago  
11 extensions of IShellBrowser?

12 A Well, I don't have any recollection other than what I  
13 have read here, but I'm not even sure I agree with what you  
14 just said. I mean what I am suggesting here as the best  
15 solution for Marvel was to ship a special version of the  
16 IShellBrowser that was going to be part of Marvel, not part  
17 of Windows.

18 So, in other words, up until -- up until the other  
19 e-mails we've read, I think the suggestion was -- or one  
20 suggestion -- one possible suggestion was that we would  
21 continue to have the IShellBrowser as part of Windows,  
22 whether it be documented or not, and that Marvel would use  
23 it as part of our application.

24 Q Okay.

25 A This is slightly different.

1 Q What is this saying?

2 A Well, we --

3 Q How is that different?

4 A Well, what's different is that there is a separate  
5 piece of code that uses some of those extensions, but it's  
6 not necessarily part of Windows. It's a piece of code that  
7 sort of the Windows group maintains for Marvel.

8 Q Okay. I see. Now I understand where we are --

9 A Okay.

10 Q -- because you are now talking about the one, two,  
11 three sub options of continuing to use the Chicago  
12 implementation; is that right?

13 A Correct. Well, but, I mean the solution that I am  
14 suggesting here -- there's only one solution that I'm kind  
15 of suggesting, right? Isn't that how this e-mail works?

16 Q Well, it's your e-mail.

17 It appears to me that there's a solution with three  
18 subparts to it.

19 A Okay. Fair enough. So I jumped ahead. Let's go back  
20 to paragraph one.

21 Q Okay. Yeah, let's go back to paragraph one. You used  
22 the phrase huge risk to the Marvel project. Why did you say  
23 huge risk?

24 A I assume that this is to some degree conjecture because  
25 I don't recall exactly what I was writing here, but I assume

1 it means we're not going to be able to ship in time if we  
2 have to write a lot of code.

3 I mean, you know, I'm getting back to the Sean Nolan  
4 memo which was included here.

5 Q So the reference to huge risk is from the proposed  
6 decision by Mr. Gates to not publish those IShellBrowser  
7 extensions; is that right?

8 A I think what I'm suggesting here is that if the -- if  
9 the MSN can't use the Chicago implementation of the  
10 IShellBrowser, we're going to have a schedule impact. I  
11 think that's what that really means.

12 I think the reason I'm hung up a little bit is that  
13 there are a couple of different things or ideas running  
14 around here that you use a piece of code. But this piece of  
15 code, meaning the IShellBrowser -- but whether it's part of  
16 Chicago or not is the thing where I'm hung up.

17 Q Okay.

18 A I mean if my team took the IShellBrowser code and  
19 shipped it in a separate XE and it didn't end up in Windows  
20 at all, does that -- is that consistent with this, using the  
21 Chicago implementation of IShellBrowser? What does it mean  
22 to be the Chicago implementation of IShellBrowser? Is it  
23 who wrote the code? Who ships the code? What floppies it's  
24 on?

25 I know you're looking at me quizzically, but I don't



1 know how to answer that.

2 Q Well, I'm looking quizzical as you already know, I  
3 don't know how to answer your question to me about what you  
4 meant when you wrote using the Chicago implementation.

5 A Okay. Well, I guess I'm sounding argumentative, and I  
6 don't want to, but I -- honestly, this was written so long  
7 ago, one little detail, it is hard for me to remember what I  
8 meant when I wrote it.

9 Q Okay.

10 A And what I meant when I wrote it, I mean all I can  
11 assume is what I wrote here, which is not exactly item one.

12 Q Is it a variation of item one?

13 A It's a variation, but a significantly different  
14 variation. For example, he says one the negatives here is  
15 dependency on Chicago, and the way this eventually gets  
16 spelled out here, there is really no dependency on Chicago,  
17 right? Because it is not even going to be a part of  
18 Chicago. It is going to be a separate XE that's part of  
19 Marvel.

20 Again, that's why I'm just trying to parse this. I  
21 mean -- and, again, I don't remember any of this or what I  
22 really wrote, intend to write -- wrote -- write this -- when  
23 I did write it a long time ago.

24 Q What do did you think of your proposed solution?

25 A What did I think of it? Or what do I think of it right

1 now?

2 Q What did you think of it at the time?

3 A I have no idea.

4 Q Well, let's look at the second page, the last page.

5 A Yeah.

6 Q You wrote one, two, three -- actually five lines above  
7 Russ asks, this solution may sound like lunacy, but that  
8 should give us some pause for the approach that we are  
9 taking.

10 Does that refresh your recollection that, at the time,  
11 you believed the solution that you were proposing sounded  
12 the like lunacy?

13 A It's what I wrote, but does it refresh anything about  
14 the time and writing this e-mail? None, no.

15 Q Is it fair to say that at the time that you believed  
16 that solution --

17 A That is fair. That is fair.

18 Q Let's go back one page again. You write, the only  
19 option that gives Marvel acceptable risk is to use the  
20 Chicago implementation of IShellBrowser. There are three  
21 possibilities here. One, overturn the decision not to  
22 publish it and allow Marvel to use it. Two, don't publish  
23 it, but allow Marvel to use it in the Chicago code base.  
24 Three, create a private version of it for Marvel and ship it  
25 separately in Chicago.

1 Do you see that?

2 A Yes.

3 Q Now were those the three possibilities that you  
4 considered under the heading of use the Chicago  
5 implementation of IShellBrowser?

6 A Yeah. I would assume that is correct.

7 Q Okay. The first possibility was to overturn Mr. Gates'  
8 decision and allow Marvel to use those extensions, correct?

9 A Correct.

10 Q The second possibility was to allow Mr. Gates not to  
11 publish the extensions but allow Marvel to continue to use  
12 the Chicago code base, right?

13 A Correct.

14 Q The third option is the one that you actually  
15 advocated, which was to create a private version of it for  
16 Marvel and ship it separately in Chicago; is that right?

17 A Well, I didn't advocated it. I said assuming that you  
18 don't want to do one or two, that leaves us with three.

19 Q Fair enough.

20 A Clearly this refers a little on when I said it sounds  
21 like lunacy. So, you know, again, I'm just reading into  
22 this e-mail, but I don't think I advocated three.

23 Q Mr. Silverberg responded to your e-mail. That's at the  
24 very top part; is that right?

25 A Yes.

1 Q He proposed using your first of the three possibilities  
2 of using the Chicago implementation of IShellBrowser; is  
3 that right?

4 A Yeah. I believe what he is suggesting is option one,  
5 correct.

6 Q Do you remember having any discussions with Mr.  
7 Silverberg and others about that suggestion?

8 A I do not.

9 Q Mr. Silverberg writes in the second paragraph at the  
10 very end, other ISVs using the extensions are WordPerfect,  
11 Lotus, Symantec, and Oracle.

12 Do you have any recollection of other ISVs using those  
13 IShellBrowser extensions?

14 A I do not.

15 Q Do you recall what solution, having looked at several  
16 e-mails now, Marvel actually -- well, strike that. Do you  
17 recall what solution was taken for this problem?

18 A I do not.

19 Q Mr. Siegelman, Exhibit 7 is going to be M1012555. It's  
20 a one-page e-mail from you to MOS, dated October 13th, 1984.

21 A Okay.

22 Q This is an e-mail from you, correct?

23 A Yes.

24 Q This is dated just within a week or so after the series  
25 of discussions about the IShellBrowser interfaces, right?

1 A That's the way it looks.

2 Q The second paragraph says, the decision was made to  
3 have Marvel go out with Chicago M7.

4 Do you recall that -- well, strike that.

5 Do you know how Marvel was going to go out with Chicago  
6 M7 given Mr. Gates' decision on the IShellBrowser  
7 interfaces?

8 A I do not recall.

9 Q Do you know whether your group implemented the proposal  
10 that you advocated for dealing with Mr. Gates' decision --  
11 the one that you said was, lunacy?

12 A I don't know.

13 Q Let's go to the next one, then. Exhibit 8 is  
14 MX6025435.

15 A Okay.

16 Q This is a series of e-mails that was not sent or  
17 received by you; is that correct?

18 A Correct.

19 Q There is an e-mail from Mr. Maritz --

20 A Maritz.

21 Q -- to Mr. Gates. Re: Shell extensions, where in  
22 number two he writes at the last sentence, however, the  
23 Marvel guy has said there's no way they can move off current  
24 interfaces and still have a chance of shipping Win95. This  
25 is dated November '94.

1 Does this refresh your recollection that -- well,  
2 strike that.

3 Was that consistent with your view of the way that  
4 Marvel had to deal with Mr. Gates' proposed decision about  
5 dealing with the IShellBrowser interfaces?

6 A It seems to be consistent with the last e-mail we  
7 suggested -- that we reviewed that I sent.

8 Q Bullet point number three says, based on the assistance  
9 by Marvel, we will not disable the interfaces but will not  
10 document the IShellFolder and regular documentation, but we  
11 will have them documented in a resource kit so that if  
12 someone really, really does want to use them, they can.

13 Do you have a recollection of Mr. Maritz or Mr. Gates  
14 choosing to document the IShellBrowser in a resource kit so  
15 that Marvel can continue to use them?

16 A Otherwise, as I'm reading this document, I have no  
17 recollection.

18 Q Do you have a recollection of anybody in the systems  
19 group telling you that those interfaces could be broken?

20 A No, I don't have a recollection.

21 Q Did you get any assurances from the systems group that  
22 those interfaces wouldn't be broken?

23 A I have no recollection of that or to the contrary.

24 Q Okay. Do you have any recollection of discussions  
25 about how MSN would work future operating system releases

1 and updates?

2 A I have no recollection.

3 Q Let's go to Exhibit 9, which is the MSC00696981 through  
4 83. My question is going to be about the second page, Q and  
5 A, which is number six.

6 A Which section did you say?

7 Q It's on the second page, the back of the first page.  
8 It's under Q and A. It's number six.

9 A Issues to be prepared to address. Okay.

10 Q This is from November 12th, 1994, and this is an e-mail  
11 from Mr. Struss to Mr. Gates.

12 Under the Q and A section that I've pointed you to,  
13 Mr. Struss writes, the namespace extensions were initially  
14 pulled from Win95 and ISVs were informed of this change. In  
15 general, they've been okay with this. Just recently,  
16 because Marvel could not completely stop using them and  
17 still ship on time, the decision was made to provide  
18 documentation for these as dead API.

19 Do you have a recollection of Microsoft choosing to  
20 document these namespace extensions as dead API so that  
21 Marvel could continue to use them?

22 A I do not recall.

23 Q At the -- in the second paragraph at the last bullet  
24 point, it says, if ISVs want to duplicate the look and feel  
25 of the Explorer, they should look at the Chico app sample on

1 MSN not these interfaces.

2 Do you know what the Chico app sample was?

3 A No idea.

4 Q Having reviewed these e-mails, do you have any  
5 recollection whether or not Marvel continued to rely on  
6 those IShellBrowser interfaces through its release on  
7 Windows 95?

8 A This suggests that it did.

9 Q Okay. Mr. Siegelman, just a few questions for you.

10 First, I'll ask you to turn to Exhibit 2. This was a  
11 document dated September 1994. I'm not sure you got asked  
12 about this, but when did the first MSN product launch, do  
13 you recall?

14 A Windows 95.

15 Q And when was that?

16 A I believe it was August of '95, plus or minus a couple  
17 of months, maybe July '95.

18 Q So about a year after this marketing plan --

19 A Correct.

20 Q -- came out?

21 So do you know if -- so would this plan necessarily  
22 reflect what ultimately came out?

23 A No. It definitely did not actually.

24 Q Why do you say that?

25 A Well, because, for example, I notified when I was



1 skimming this that there was this whole section about Marvel  
2 extended services from Microsoft and third parties, and I  
3 actually don't think that really ever came to be, at least  
4 not the way it was discussed in here.

5 Q Okay. Let me just -- I'll ask you to turn to page 5 of  
6 that document.

7 You testified -- you were asked about section 2.4.2 and  
8 specifically the sentence that read, for example, Marvel  
9 applications can be browsed via the Windows 95 Explorer  
10 folder tree or from a Marvel icon based container view.

11 Do you have any recollection, sitting here today, about  
12 whether that happened in the final product?

13 A Well, I know there was a Marvel icon based container  
14 view and, from what I read in these e-mails, it suggests  
15 that the first half of the sentence would also have been  
16 true, but I actually don't recall that myself.

17 Q So you have no independent recollection of Marvel  
18 applications being browsed through the Explorer folder tree?

19 A I do not.

20 Q Okay. And if that were the case, if Marvel  
21 applications could have been browsed through the Explorer  
22 folder tree, would that have been an important feature?

23 A No, not at all. In fact -- no. In fact, actually I  
24 think even if that did end up being the case, as I think I  
25 suggested earlier in my testimony, most users ended up using

1 the product a lot like AOL, which is they launched the icon  
2 browser or, you know, the icon version. It brought up  
3 whatever the Marvel application container was. I mean  
4 that's how everybody got to the use this because that's just  
5 what people did with AOL and all of these services.

6 I think having integration with the shell or the  
7 browser window, or whatever, you know -- I mean the Explorer  
8 browser, it became irrelevant -- not became. It was never  
9 relevant for users.

10 Q You testified -- you just used the term having  
11 integration with the shell. What did you mean by that?

12 A Well, what -- the way I read this, it suggests that you  
13 can access Marvel applications through the Windows 95  
14 Explorer window. That's what I meant by integration.

15 Q And, in your view, that was not an important feature of  
16 the Marvel?

17 A We might have thought that before we launched it, but  
18 after we launched it and people actually used it, it was  
19 clearly obvious that it was not an interesting feature that  
20 users used.

21 Q Nothing further on that one.

22 I'll ask you to turn to Exhibit 4.

23 Am I correct that you just testified that you don't  
24 have any recollection of receiving this e-mail?

25 A Correct.

1 Q And do you have any recollection of the issues that  
2 were being discussed in the e-mail aside from what you read  
3 here today?

4 A Correct.

5 Q Did reading this e-mail refresh your recollection in  
6 any way about the issues being discussed in the e-mail?

7 A Yeah. It remained me that this was an issue that was  
8 tossed about, yes.

9 Q Do you have any recollection, sitting here today, of  
10 how the issues were resolved ultimately?

11 A Well, only from the other e-mails that we reviewed, but  
12 actually before we read the last couple, I honestly didn't  
13 know how it got resolved.

14 Q So when you testified about your understanding of the  
15 meaning of this e-mail, were you testifying based on what  
16 you read sitting here today?

17 A Yes.

18 Q And not on your independent recollection of these  
19 issues or how they were resolved?

20 A Correct.

21 Q Do you have you any knowledge as to whether the  
22 IShellBrowser extension was ultimately published?

23 A I don't know.

24 Q I'll ask you to turn to Siegelman Exhibit 5. And you  
25 testified that you didn't recall receiving this e-mail; is

1 that correct?

2 A Correct.

3 Q So when you testified about what Mr. Nolan probably  
4 meant by his statements, was that testimony based on your  
5 reading of the documents sitting here today?

6 A Correct.

7 Q And not on any independent recollection of these issues  
8 or their possible solutions?

9 A Correct.

10 Q And I'll ask you to turn to the final page of  
11 Exhibit 5, the first full paragraph. It finishes by  
12 saying -- well, I'll just read the whole thing. From our  
13 perspective, option number one is clearly superior. We can  
14 proceed as expected, squash our bugs and ship. If this is  
15 not possible, my recommendation is number five, i.e., we  
16 should write it ourselves.

17 And by it, do you understand that to be referring to  
18 the IShellBrowser extension? Does that statement suggest to  
19 you that it was possible for the Marvel team to write it  
20 themselves?

21 A Yes.

22 Q And he states and you were asked about this earlier in  
23 the final full paragraph, second sentence, our rough current  
24 estimate is that it will take one developer 2.5 months to  
25 complete and work out the major bugs.

1 Does that suggest to you that the Marvel team, or at  
2 least Mr. Nolan, believed that it would take 2.5 months to  
3 write it yourselves?

4 A Yes.

5 Q The Marvel team; is that correct?

6 A Yes.

7 Q Were you given any document for the IShellBrowser  
8 extensions?

9 A Personally?

10 Q Your group.

11 A Don't know.

12 Q Was your group able to get access to the developers of  
13 the IShellBrowser extensions?

14 A Say again. Were we given access to them?

15 Q Access to the people that actually wrote those  
16 extensions.

17 A Well, I mean they were on the Microsoft e-mail system,  
18 so I suspect we could have already sent an e-mail to them.  
19 If that is what you meant by access, the answer is yes.

20 Q Do you recall how the IShellBrowser was actually used  
21 by Microsoft Network when Windows 95 was released?

22 A No.

23 Q It was your view in hindsight that that functionality  
24 of integrating into the Windows Explorer was not  
25 significant; is that right?

1 A In retrospect, yes.

2 Q At the time, though, looking forward, was it considered  
3 important?

4 A In some segments, yes. I'm not sure what I thought, to  
5 be honest with you, at the time, but I know some people  
6 thought it was important. That's why it was on the table.

7 Q Okay. Did Mr. Gates consider it important?

8 A You know, I was just thinking that a second ago. I  
9 sort of -- I believe -- my best recollection is, yeah, he  
10 did. I think he did think it was important.

11 Q In the portion of the memorandum that you just looked  
12 at about the two and a half months to complete and work out  
13 the major bugs, how big a piece of Marvel was the shell  
14 integration component?

15 A As measured by how many lines of code or man years,  
16 or --

17 Q Let's go by lines of code.

18 A It's tiny.

19 Q So just to deal with that tiny issue would have taken  
20 two and a half months for the developer to resolve; is that  
21 right?

22 A Well, that's what this memo suggests.

23 Q You don't have any idea how significant it would be for  
24 other applications to deal with the loss of these  
25 interfaces, do you?

1 A No idea.

2 MR. JOHNSON: Boy, I'm good, Your Honor.

3 THE COURT: See you about eight o'clock in the  
4 morning. I will stay here with counsel.

5 (Jury excused)

6 THE COURT: Mr. Tulchin, do you still want to  
7 address the issue?

8 MR. TULCHIN: Yes, Your Honor, I'm happy to do so.  
9 There is also one evidentiary issue that one of my  
10 colleagues would like to address either this afternoon or  
11 whenever is convenient.

12 THE COURT: This afternoon will be fine.

13 MR. TULCHIN: Your Honor --

14 THE COURT: Let me ask one question before you get  
15 started. And it's not meant to be argumentative, I just  
16 don't know the answer. If you all agree upon the answer,  
17 tell me what the answer is. If you don't, just say you  
18 disagree.

19 I think I may have been under a misconception.  
20 The code that was written by WordPerfect after the APIs were  
21 withdrawn, they got -- they substituted for the withdrawing  
22 of the APIs, as I understand; is that correct? That's the  
23 first question. If they did, were they easily portable to  
24 cross to another platform? You all may disagree about that,  
25 and if you do, just tell me you disagree.

1 MR. TULCHIN: The answer is no to both questions.

2 THE COURT: Okay. So you disagree. Let me  
3 hear --

4 MR. JOHNSON: I think I would have to get  
5 Mr. Alepin, Mr. Harral and Mr. Richardson on the stand to  
6 answer that question. With all respect to Mr. Tulchin, I  
7 don't think he can.

8 THE COURT: Well, I want to hear your respective  
9 views because it impacts upon my thinking in some respects,  
10 but I don't quite know how.

11 Okay. The answer to the first question is --

12 MR. TULCHIN: If the first question --

13 THE COURT: I thought the whole purpose was to  
14 recreate the ability to get into Windows in a way that had  
15 been -- that you couldn't get in because the namespace  
16 extensions had been withdrawn.

17 MR. TULCHIN: It's not really quite right, Your  
18 Honor.

19 THE COURT: Tell me -- that's exactly where I'm  
20 coming from. What's your view, and then I'll hear  
21 Mr. Johnson's view.

22 MR. TULCHIN: What Mr. Harral and Mr. Richardson  
23 testified, as I understand it, is that when the support for  
24 the namespace extension APIs was withdrawn, they started a  
25 much more ambitious project, that's their option number



1 three, to build an advanced file open dialog, the purpose of  
2 which would be to allow WordPerfect to add functionality to  
3 Windows, to change Windows so that anyone using Windows,  
4 whether WordPerfect or PerfectOffice was open at the time or  
5 not, could utilize QuickFinder and other Novell technologies  
6 that were in the shared code. This goes way, way beyond  
7 simply replicating the namespace extension APIs.

8 In fact, one of the pieces of testimony that I  
9 showed Dr. Noll today, Your Honor, just briefly, was  
10 testimony from Mr. Richardson that before Gates' decision on  
11 October 3rd of '94, Mr. Giles had written the code that  
12 would permit Novell to tie into the namespace extension  
13 APIs.

14 THE COURT: But again, once they -- I inferred  
15 from that that once they were withdrawn, they couldn't use  
16 it anymore. They didn't think they could use it anymore.

17 MR. TULCHIN: They testified they could use it.  
18 They testified that they thought it was a big risk.

19 MR. JOHNSON: That's not what they testified to.

20 THE COURT: In any event, it was risky. I will  
21 hear from you in a second, Mr. Johnson.

22 MR. JOHNSON: Not even close.

23 MR. TULCHIN: I'm sorry, Your Honor. I don't want  
24 to get into an argument with counsel. I'm trying to address  
25 the Court's questions, and I am giving you my best

1 recollection what the witnesses said.

2           Interestingly, Your Honor, of course, as the Court  
3 knows, when it came to a decision about the load and go  
4 program, something that is in the complaint and that was  
5 argued in response to our motion for summary judgment as a  
6 very important decision that we were told at the time was  
7 anticompetitive. One, that's since been abandoned and,  
8 two -- and here's the point I'm getting to. We saw  
9 memoranda going to not only Mr. Frankenberg, but the four  
10 people -- four executives who Frankenberg said would make a  
11 strategic or tactical decision, Mr. Rietveld, Mr. Moon,  
12 Mr. Mella, and Mr. Calkins, Mark Calkins.

13           And the developers who testified here --  
14 Mr. Harral started by saying we more than 300 times on  
15 direct, the developers who testified here never identified  
16 who made this decision to choose option three other than  
17 they. There is no memoranda of any kind which presents  
18 these options to any of the executives who the CEO said  
19 would have been in charge of making the decision.

20           Now I think it's very important in evaluating what  
21 the facts are here.

22           THE COURT: We've gone so far afield. Somebody  
23 made a comment about that. I think we've gone far afield.  
24 I really had two questions. The first I thought was just a  
25 premise, but it was an incorrect premise. The second is

1 what I'm really interested in is whatever was written for  
2 whatever purpose, was it portable easily to another  
3 platform.

4 MR. TULCHIN: No, and it wasn't ported to any  
5 other platform.

6 THE COURT: That's a different question.

7 MR. TULCHIN: Yes, it is a different question, I  
8 agree, Your Honor. It was being written for Windows. The  
9 shared code group had one objective and one only in 1995 --  
10 this is the testimony of Mr. Gibb, Mr. Harral,  
11 Mr. Richardson -- which is to write shared code, the  
12 PerfectFit technology for Windows 95.

13 And as Your Honor has pointed out several times  
14 outside of the presence of the jury, those developers  
15 thought the Windows 95 technology was terrific. It was  
16 something they wanted to adopt. It was something that they  
17 felt would be good.

18 The shared code that they were writing so that  
19 they could try to get this advanced file open dialog onto  
20 Windows 95, and which Mr. Harral said may have taken as much  
21 as a year, was not code that could be installed on other  
22 platforms, you would have to do it again, to write to Linux,  
23 or Unix, or OS/2, none of which had any market share to  
24 speak of at the time.

25 THE COURT: So it wasn't code which was there or

1 which sort of at the tail end you would plug into Linux, as  
2 you understand it?

3 MR. TULCHIN: No, absolutely not.

4 THE COURT: Let me hear from Mr. Johnson. I was  
5 just -- and the answer may be arguable from the evidence, I  
6 just don't know. The reason for the question was listening  
7 to Dr. Noll, I thought he indicated -- and, again, I may  
8 have perceived what he was saying was that once that code  
9 was written, it could be easily cross-platformed, as it  
10 were. I didn't think that was the case from the evidence,  
11 but I could have been wrong. I asked my question.

12 Mr. Johnson.

13 MR. JOHNSON: Your Honor, thank you.

14 I just have to say, you know, the evidence is  
15 these developers were working around the clock. The  
16 evidence is that Mr. Gibb had weekly meetings about these  
17 issues. The fact that we don't have a neat little memo  
18 going to Mr. Frankenberg asking questions that, frankly, he  
19 would have given and so testified that that would have been  
20 the lead person in that group's decision, the developers  
21 involved, is hardly surprising to me. But let me get to  
22 your question about what happened here.

23 It is correct that Mr. Giles was able to take the  
24 documentation provided by Microsoft and was able to be  
25 advance the process, I believe the percentage was

1 80 percent, and said that we would have been -- Novell would  
2 have been in a position to produce a great application on  
3 Windows 95 absent the decision of Mr. Gates. When that  
4 happened, Mr. Harral and Mr. Richardson testified that they  
5 didn't give up on it, that they wanted to try to continue to  
6 use those interfaces if they could because that is what they  
7 had been claiming for months and months and months.

8           You may remember that Microsoft told Novell --  
9 told WordPerfect, it was still WordPerfect at the time, back  
10 in November of 1993, that they would document those  
11 extensions, and WordPerfect was very happy about that, and  
12 this is the way that they were going to go. They wanted to  
13 continue to use those extensions, so they tried to do so.  
14 And what happened? They were shut down by Microsoft, that  
15 any more information regarding the shell or integration with  
16 the shell was denied to them.

17           Obviously the order had come from above, fair  
18 inference, that Premier Support was no longer to provide any  
19 information that would help WordPerfect, or any other  
20 developer I'm sure, implement these extensions.

21           So that being the case, this is about December  
22 now, they have worked hard for several months, October,  
23 November, December, trying to make this option work. It was  
24 obvious that Microsoft would cut them off.

25           The second option, the common file open dialog,

1 which Your Honor mentioned, I want to address that because  
2 Your Honor said something yesterday that was inaccurate as a  
3 factual matter. I want to make sure Your Honor understands  
4 this. The version of WordPerfect -- of PerfectOffice that  
5 was put out by Corel did not use the common file open  
6 dialog. It used a custom file open dialog.

7 THE COURT: It that was written by Harral?

8 MR. JOHNSON: Yes, Harral went there --

9 THE COURT: I understand.

10 MR. JOHNSON: So did Richardson, because the  
11 common file open dialog was insufficient for their purposes.  
12 It was so insufficient, it would have been a major step  
13 backward --

14 THE COURT: I understand that.

15 MR. JOHNSON: -- given the functionality.

16 THE COURT: I thought somewhere in the evidence,  
17 and what confused me, I thought I heard at least a question,  
18 if not a answer, that the president of Corel directed the  
19 use of the common open file dialog. But, frankly, I  
20 understand I was confused by that because it seemed to me by  
21 the time Corel released its product, the other must have  
22 been written.

23 MR. JOHNSON: Right. The implication, which was  
24 advanced by Microsoft, was that such a decision hadn't been  
25 made. But, in fact, Mr. Harral went on to say that of

1 course not. They talked about lots of things, but it  
2 couldn't be done that way. It would have been a major step  
3 backwards. It would not have provided even the  
4 functionality that they had on DOS for years and years, and  
5 it would have been such a product, it would have been really  
6 the same result that we experienced with the delay, which  
7 would have been a failed product for Novell and WordPerfect.

8 THE COURT: With a segment of your clients, not  
9 all of them. It was mainly with enterprise customers, who I  
10 think had been partners before.

11 MR. JOHNSON: I don't agree with that at all, Your  
12 Honor, and let me explain why. You know, those product  
13 reviews and stuff we have, even novice buyers look at those  
14 reviews when they are going out to buy computer equipment.  
15 I can remember myself looking through PC Magazine and trying  
16 to figure out what to buy and not to buy during this time  
17 period. And I am certainly no enterprise user, I can assure  
18 you, and other people did too.

19 So if you put out, if you will excuse the  
20 vernacular, a crappy product, there is no way that you are  
21 going to be able to sell that either in the enterprise  
22 portion of the market or the individual portion of the  
23 market. People would have run from that, it would have  
24 become generally known almost immediately, because these  
25 magazines all published reviews of every piece of new

1 software that came out, and if it had become known that  
2 WordPerfect had just produced an application for Windows 95  
3 that was less functionality than they had on their old DOS  
4 versions, that would have been absolute death.

5 THE COURT: I'm sorry. Where I must have been  
6 wrong, and the testimony is the testimony. Now that I'm  
7 thinking about it, I mentioned enterprise because I thought  
8 the advantage -- I understand that they thought it was a  
9 step backwards, but it was for people who essentially had  
10 many different data sources. Maybe my recollection is  
11 wrong.

12 MR. JOHNSON: Certainly enterprise users did have  
13 multiple systems and multiple operating systems.

14 THE COURT: I thought that's what the step  
15 backwards was going to be.

16 MR. JOHNSON: So that was important to them. Of  
17 course, WordPerfect had historically been very strong in  
18 that market because they were cross platform and could do  
19 these things.

20 So getting back to what happened, so option one  
21 was the door was shut. Option two was completely  
22 unacceptable, would have put us in the same space we are  
23 because of the delay. We would have the same case today, it  
24 would just be a different set of facts.

25 And, three, they went to the third option, which



1 was to try to mimic, to try to create for themselves the  
2 functionality that Microsoft had denied them. And Mr.  
3 Richardson, you may remember, talked about it was one of  
4 these terms where you have no idea of the depth of what  
5 Mr. Richardson was talking about, but he talked about it as  
6 putting a wrapper around the namespace extensions within the  
7 Windows Explorer, the network neighborhood, the recycle bin,  
8 the briefcase. Because they couldn't get any information  
9 about that stuff in the Explorer, they had to create this  
10 wrapper around it and to try to mimic that functionality in  
11 the product they ultimately released. And it is that third  
12 option they took.

13           Now once you have created an application or you've  
14 created something that can work with one operating system,  
15 the extent to which you could port a particular feature is  
16 obviously going to be dependent upon whether the other  
17 operating system supported that feature.

18           I can't stand here today and say whether Linux or  
19 the Intel based Unix operating systems, or all these other  
20 operating systems had a corollary to the Windows Explorer,  
21 but I am certain that WordPerfect and Novell would have and  
22 did -- the record is that they did port these applications  
23 to other operating systems and took advantage of all the  
24 functionality of those operating systems that was available  
25 to them.

1 THE COURT: When did they do that, according to  
2 the evidence?

3 MR. JOHNSON: The evidence is Linux in early 1996,  
4 I think it was March, I can get you the exact date, Your  
5 Honor, but they ported WordPerfect to Linux. They ported to  
6 Unix throughout this period, and there are many different  
7 versions of Unix. There are versions --

8 THE COURT: When did Corel -- I'm sorry. I asked  
9 the wrong question. When did Corel come out with a product  
10 that wrapped around Windows 95?

11 MR. JOHNSON: The Corel PerfectOffice suite for  
12 Windows 95 came out in '96. I, frankly, don't have the  
13 month on top of my head, but obviously it was after the sale  
14 of the business to Corel.

15 THE COURT: So when you say they ported  
16 functionality, it wasn't that functionality, it was  
17 functionalities that existed in Windows 3.0, or something.

18 MR. JOHNSON: Well, Windows 3.0, I'm certain --

19 THE COURT: The predecessor.

20 MR. JOHNSON: Corel continued to port into other  
21 operating systems as well. I mean Corel wasn't as big a  
22 cross platform giant as Novell/WordPerfect was, but they  
23 continued to port WordPerfect and those products to other  
24 platforms even down the road. But, unfortunately, by then,  
25 of course, WordPerfect was effectively dead.

1 THE COURT: But as I understand it -- and I'll  
2 hear from Mr. Tulchin in a minute. Mr. Tulchin has his view  
3 of the evidence. I understand what you're saying. All I'm  
4 doing is trying to understand. Is what you're saying the  
5 record really is silent as to whether or not what Harral and  
6 Richardson developed could have been easily ported to  
7 another platform?

8 MR. JOHNSON: I agree with that, Your Honor. Even  
9 more important for you to understand I think is that's  
10 really not relevant to the issues in this case. The issues  
11 in this case are whether or not the conduct engaged in by  
12 Microsoft was anticompetitive and hurt competition in the  
13 operating systems market. And whether or not that  
14 functionality that was being offered by Windows 95 was  
15 present in other operating systems is not the point.

16 The point is with WordPerfect being  
17 cross-platform, with WordPerfect being successful on  
18 Windows, the applications barrier to entry would have been  
19 reduced. We would have had more competition in the  
20 operating systems market at the time and going into the  
21 future. And the antitrust laws of giving consumers a choice  
22 and better prices would have been served.

23 Thank you, Your Honor.

24 THE COURT: Thank you.

25 Mr. Tulchin, I will hear you briefly. Then if

1 Mr. Johnson wants to say something in response.

2 MR. TULCHIN: I will be brief, Your Honor. I will  
3 be brief. Let me take the last point first.

4 Again, Novell wants to disconnect its case to any  
5 harm that it suffered. Mr. Johnson's last statement is --

6 THE COURT: I'm not sure that's true. It wants to  
7 disconnect its case from having to prove that actions taken  
8 vis-a-vis the APIs hurt competition. It seems to me it's  
9 pretty clear what his damages are, and he says it's  
10 antitrust damages because it was antitrust damages. But I  
11 think it's pretty clear as to -- Mr. Johnson's is very clear  
12 what the damages are.

13 MR. TULCHIN: Let me just -- I think maybe we  
14 agree, Your Honor. I think maybe we agree and maybe I put  
15 it a little too broadly.

16 THE COURT: I do understand the disconnect  
17 between -- they could be right, but it's ironic if they are  
18 right because it's the one person in my opinion that they  
19 don't want to give credit to, which is that you have to  
20 prove the conduct directed at Novell was what caused the  
21 monopolization.

22 MR. TULCHIN: Exactly what I was going to say,  
23 Your Honor. That's point number one.

24 Point number two, Mr. Johnson conceded that there  
25 is no evidence in the record at all, and there are no more

1 no fact witnesses that he's calling except by videotape, if  
2 that, there is no evidence in the record at all that the  
3 shared code that was being written by Harral and Richardson  
4 could be cross-platform. No evidence. So he doesn't  
5 contradict what I said. If he had any such evidence, I'm  
6 sure it would be in front of you. No one from Corel has  
7 ever stepped forward to testify as to what it did, except if  
8 you count Harral and Richardson, who worked there briefly.

9 I will say, Your Honor, that the idea that what's  
10 actionable here is that the phone calls to Premier  
11 Support --

12 THE COURT: That's different. I'll hear you on  
13 that later at the appropriate time.

14 MR. TULCHIN: Well, okay, Your Honor. I think we  
15 agree.

16 THE COURT: No. I think my question is  
17 answered -- I might not have phrased it correctly what it  
18 was that Harral and Richardson was writing, but it is clear  
19 there is nothing in the record that shows that that was  
20 going to be easily portable to a cross-platform.

21 MR. JOHNSON: Your Honor, in fairness, I think, as  
22 usual, Mr. Tulchin always takes it a step too far.

23 There is evidence in the record, substantial  
24 evidence that the plan -- the continual plan of  
25 Novell/WordPerfect during this time period was that these

1 technologies -- the shared code was to be ported to the  
2 other operating systems.

3 Now, unfortunately, Novell never had the time to  
4 get to that because, unfortunately, the product was  
5 destroyed by Microsoft's product, and they sold it. And the  
6 evidence is they sold it because of Microsoft's  
7 interference.

8 THE COURT: In part, they also sold it,  
9 because Mr. Frankenberg said he wasn't particularly  
10 interested in it.

11 MR. JOHNSON: Well, Your Honor, I think that  
12 perhaps again is something that you ought to take a look at  
13 the record again.

14 THE COURT: I will. Excuse me. That was my  
15 impression from the record, that Mr. Frankenberg, despite  
16 the fact that he thought it was important back when he was  
17 at Hewlett Packard, he was really more interested in the  
18 networking capabilities of Novell. That's not for me to  
19 decide. That right now is not something that I need to  
20 understand.

21 MR. JOHNSON: All right. I don't think if you  
22 read the record fully, you can draw that conclusion. I  
23 think the record reflects that by the time they destroyed  
24 WordPerfect, he had come to recognize that it couldn't be in  
25 that business.

1 THE COURT: That may very well be the case.

2 MR. JOHNSON: I think if you -- I know you didn't  
3 allow us to put in the statement to the FTC, but it would  
4 make very good reading for you.

5 THE COURT: I thought I did.

6 MR. JOHNSON: No, you didn't. I tried twice.

7 THE COURT: I let you put something in from the  
8 FTC.

9 MR. JOHNSON: No. You allowed me to show it to  
10 the witness. You didn't allow me to put it into evidence.

11 THE COURT: I allowed him to testify about it.

12 MR. JOHNSON: Yes, you did. You allowed him to  
13 testify about it, which was consistent with the fact that  
14 the only reason he sold the business applications was  
15 because of the interference with Microsoft and their  
16 knowledge that they were not going to be permitted to  
17 compete in this field, that it was not a level playing field  
18 given Microsoft's conduct.

19 MR. TULCHIN: The testimony is the testimony, Your  
20 Honor. We'll be happy to show it to you.

21 THE COURT: Thank you. By the way, do you all  
22 have -- we may have gotten the opening statements. I would  
23 like to see the opening statements. Do you have copies of  
24 the opening statements?

25 MR. TULCHIN: Just from the transcript, Your

1 Honor, yes.

2 THE COURT: If somebody has got the opening  
3 statement -- do we have the opening statements?

4 MR. JOHNSON: Do you want the slides that  
5 accompanied them, Your Honor?

6 THE COURT: I can get those too. It's mainly --  
7 as you can probably tell from some of my comments, I have  
8 reread the memos relating to the proposed jury instructions  
9 because I thought it would help me get ready for maybe what  
10 I'm going to hear later this week. And my mind -- and I  
11 want to see why it is that my mind is where it is. And  
12 reading the opening statements may well --

13 MR. JOHNSON: We'll get that to you along with the  
14 slides. I'm sure Microsoft will too.

15 MR. TULCHIN: Shall we just file those, Your  
16 Honor?

17 THE COURT: No. No. No. Just give them to  
18 Teresa, or something.

19 MR. JOHNSON: We'll bring them in tomorrow  
20 morning, Your Honor.

21 THE COURT: Okay. Excuse me. I have gotten us  
22 way off. There's an evidentiary issue and then the issue  
23 about the -- and the motion pending --

24 MR. TULCHIN: There are two issues, I think,  
25 pending, Your Honor. One is our motion --



1 MR. WHEELER: Excuse me, Your Honor. Before you  
2 get started, may I be excused?

3 THE COURT: Of course you may. You have been --  
4 you and Mr. Jardine, you have been faithful, and subject to  
5 your clients being unhappy, you've got practices to work on.  
6 At any time you're not going to offend me if you have to go  
7 see a client.

8 MR. WHEELER: Thank you.

9 MR. TULCHIN: Your Honor, I will address the one  
10 issue and my colleague, Ms. Gao, will address the second.

11 I won't take a lot of time at this point, Your  
12 Honor, with our motion to exclude Novell's theory that  
13 PerfectOffice was middleware. There have been four briefs  
14 submitted. Yesterday Novell didn't want to address this.  
15 They said they weren't up to speed with the brief we had  
16 filed, and they filed a surreply last night.

17 When we were in Baltimore, Your Honor, in  
18 September I believe, we made a motion in limine on this very  
19 point. The reason we did is because the complaint says very  
20 clearly that the middleware here was WordPerfect, Quattro  
21 Pro and other technologies.

22 THE COURT: PerfectOffice. OpenDoc, or no?

23 MR. TULCHIN: OpenDoc and AppWare. PerfectOffice  
24 wasn't mentioned in the paragraph in question, which is 51  
25 of the complaint. And, of course, there had been a release

1 which was executed by Novell a few days before the complaint  
2 was filed, which is quite broad and sweeping, Your Honor has  
3 seen it several times, which says Novell releases Microsoft  
4 from all claims of any kind whatsoever other than those in  
5 the draft WordPerfect complaint, which was exactly identical  
6 to the complaint that was filed three or four days later, if  
7 my memory is right.

8           So our view was that PerfectOffice could not be --  
9 the theory that PerfectOffice was middleware cannot be  
10 asserted in the case.

11           In response, Mr. Johnson said PerfectOffice is  
12 just WordPerfect and Quattro Pro together in a box. That's  
13 all it is, those two products together in a box, and we'll  
14 bring the box to trial in Salt Lake City.

15           At trial, Mr. Harral and Richardson, and other  
16 witnesses, have made an entirely different point, that  
17 PerfectOffice is not just Quattro Pro and WordPerfect, but  
18 it includes all the shared code technologies, including the  
19 technologies that they say would have made Windows better,  
20 QuickFinder, et cetera.

21           So the very basis of this assertion to the Court  
22 that they could use PerfectOffice's middleware was based on  
23 what I think the Court may have been convinced of at the  
24 time, that it's just a semantical issue. PerfectOffice is  
25 just a semantical stand-in for the combination of

1 WordPerfect.

2 THE COURT: Not even a market for suites. That  
3 was surprising.

4 MR. TULCHIN: Well, Your Honor, I have a lot to  
5 say about Professor Noll and what he said on cross.

6 MR. SCHMIDTLEIN: We would love to hear it.

7 MR. TULCHIN: I think you will. You'll hear it in  
8 a week.

9 THE COURT: I thought Mr. Noll was a very  
10 thoughtful person. Some things I found, as with any  
11 witness, things I didn't fully understand, but I enjoyed  
12 having Mr. Noll.

13 Go ahead.

14 MR. TULCHIN: Your Honor, I will finish up here  
15 right now. What the Court said at the time was that our  
16 motion was granted in part. You said that the only mistake  
17 in the complaint was not to mention the Quattro Pro and  
18 WordPerfect together known as PerfectOffice, that seems to  
19 me to be nothing. If, in fact, the claim now is that  
20 PerfectOffice combined, bundled with NetScape and/or Java is  
21 the claim, it seems to me that's a separate claim, which I  
22 don't think can be asserted.

23 As the evidence developed at trial, what this has  
24 morphed into now is that PerfectOffice was a form of  
25 middleware. Alepin said it. Now Noll has said it. The

1 representation made by counsel for Novell, on which the  
2 ruling was based, was that PerfectOffice was just the  
3 semantical stand-in for the other two products.

4           So under the circumstances, our motion, of course,  
5 Your Honor, is to strike all references by either expert to  
6 PerfectOffice's middleware. There is no basis for it. That  
7 claim was released by Novell a few days before the complaint  
8 was filed.

9           THE COURT: Thank you.

10           Mr. Johnson, Mr. Schmidtlein.

11           MR. JOHNSON: I'm going to let John handle this  
12 one, Your Honor.

13           MR. SCHMIDTLEIN: What we told you in Baltimore is  
14 exactly what you've heard today, what you've heard  
15 throughout the entire trial. The shared code and the  
16 PerfectFit technologies are one and the same. When  
17 WordPerfect was being marketed separately before the  
18 creation of the PerfectOffice suite, shared code was part of  
19 WordPerfect. That's the part of the code that exposed the  
20 APIs, developers wrote. When WordPerfect was bundled with  
21 Quattro Pro and other technologies to be part of  
22 PerfectOffice, the shared code went with it, and they  
23 licensed it separately. They have talked about it more  
24 explicitly --

25           THE COURT: It was not added as a separate

1 product.

2 MR. SCHMIDTLEIN: No. They referred to it  
3 separately and they talked about it separately, but it was  
4 already there. For that reason, we don't think -- they keep  
5 talking about a settling. We didn't give up notice  
6 pleading. Okay. PerfectOffice has been part of this case  
7 from day one. It's been in every opinion, everything else.

8 Now Your Honor ruled back in Baltimore that the  
9 ruling was PerfectOffice plus Sun plus Navigator, what have  
10 you, nothing has changed. The testimony is absolutely  
11 consistent with that.

12 THE COURT: But essentially your answer is that  
13 WordPerfect -- it was always in WordPerfect?

14 MR. SCHMIDTLEIN: Correct, and that is what  
15 everybody has testified to.

16 MR. TULCHIN: Well, Your Honor, just very briefly.  
17 PerfectOffice is not in the complaint. There is no claim of  
18 this sort.

19 THE COURT: But WordPerfect is?

20 MR. TULCHIN: WordPerfect is, yes. But this is a  
21 separate product, and they have made this point. The idea  
22 that shared code of PerfectOffice was the same as the shared  
23 code that was always in WordPerfect is not supported by the  
24 evidence. This is a new theory. We were released on it.  
25 It's not a question of notice pleading. It's their

1 complaint. They gave it to us with the settlement. They  
2 said this is our only claim.

3 Now, of course, they are reneging on it.

4 THE COURT: I don't want to construe releases.  
5 I'm not very good at it.

6 Okay. I'm going to reserve on this because there  
7 seems to be a dispute about what the state of the evidence  
8 is. It's clear that the state of the evidence is that  
9 PerfectFit, the shared code, was always in WordPerfect.  
10 This is much ado about nothing. I just -- but Mr. Tulchin  
11 just said that's not the state of the evidence. So somebody  
12 clarify what the state of the evidence is.

13 Nice to see you.

14 MS. GAO: Good morning -- good afternoon, Your  
15 Honor. We just have one evidentiary issue that we wanted to  
16 raise, and it's DX-131.

17 THE COURT: Was that in deposition here or --

18 MR. JOHNSON: Your Honor, that is the first time  
19 I've heard about this.

20 THE COURT: Well, you will hear about it now. If  
21 you need time --

22 Would you identify yourself.

23 MS. GAO: Qian Gao. Last name is G-a-o. First  
24 name is Q-i-a-n.

25 THE COURT: Let me hear it. If it's a surprise, I

1 will --

2 MR. JOHNSON: It's a shock to me, Your Honor, but  
3 maybe something didn't get to me that should have.

4 MS. GAO: May I approach, Your Honor?

5 THE COURT: Go ahead.

6 I'm shocked, shocked, shocked. What movie is  
7 that? Casablanca.

8 MR. JOHNSON: Gambling here, shocked.

9 THE COURT: Thank you. Go ahead.

10 MS. GAO: DX-131A is an e-mail exchange that  
11 Mr. Holley showed Mr. Alepin last week. It was marked for  
12 identification, but it was not shown to the jury because  
13 there was a hearsay objection to it. It's a March 1996  
14 e-mail between Andrew Schulman and Joe Belifiore.  
15 Mr. Belfiore is the lead program manager for Chicago. He  
16 was responsible for the Windows 95 shell and user interface.  
17 He is on Microsoft's will call list. He testified  
18 in a deposition that he recalled having this e-mail exchange  
19 with Mr. Schulman in response to Mr. Schulman's request for  
20 documentation about how to create namespaces in Windows 95.  
21 According to Mr. Schulman's e-mail, which is at  
22 the very end, the last -- next to last page, he received  
23 Mr. Belifiore's name from Brad Silverberg, who was  
24 Microsoft's executive in charge of the Chicago team. And at  
25 his deposition Mr. Belfiore testified in detail about this

1 e-mail exchange and explained what he meant when he said  
2 that this gives us some background as to why these APIs have  
3 been delisted in the past. It also explains the solution  
4 that Microsoft was adopting in order to be able to publish  
5 the namespace extension APIs more widely in 1996.

6 This e-mail exchange is a classic business record  
7 and it was kept in the course of regularly conducted  
8 business activity.

9 THE COURT: Just so I'm focusing on this right,  
10 this might be -- this relates to the legitimacy -- or  
11 actually it is a challenge to Mr. Alepin's saying that one  
12 of the reasons he said it was illegitimate is there was not  
13 a legitimate reason. At some point in 1996, Microsoft  
14 released some product with the code in it. It this is what  
15 this is about.

16 MS. GAO: Yes, exactly. Mr. Alepin testified that  
17 when Microsoft redocumented the namespace extension APIs, it  
18 was still running in the same process.

19 THE COURT: Your position is going to be it was  
20 not in the same process?

21 MS. GAO: Exactly. This e-mail talks about that.

22 So Mr. Belfiore is clearly sending this e-mail  
23 from a Microsoft e-mail account, joe@microsoft.com, on  
24 behalf of Microsoft to explain the solution that Microsoft  
25 was adopting in order to be able to be publish namespace



1 extension APIs.

2 THE COURT: Mr. Johnson, do you want time to  
3 respond to this?

4 MR. JOHNSON: I think I do need some more time.  
5 This is actually a piece of a huge CompuServe thing.

6 THE COURT: My recollection is there was an  
7 objection to the whole thing. I think that it was  
8 Mr. Holley, I can't remember who it was, took the last  
9 couple pages out. There wasn't any objection to that. But  
10 now the question is whether this comes in as a substitute.

11 MS. GAO: Right. And, Your Honor, originally we  
12 had designated DX-131, which is a 98-page document, and the  
13 objection was that it was multiple documents and hearsay.  
14 We've now taken out all of the other extraneous pages.

15 THE COURT: As I understand it, Mr. Johnson may or  
16 may not have an objection. Let's give him time to look it  
17 over.

18 MR. JOHNSON: Yeah, I would like some time to look  
19 at it.

20 THE COURT: It's obviously an important piece of  
21 evidence arguably. Just give Mr. Johnson a chance to read  
22 it.

23 MR. JOHNSON: Thank you, Your Honor.

24 THE COURT: Thank you all. See you all at eight  
25 o'clock.

1                   (Whereupon, the trial was continued to Wednesday,  
2 November 16, 2011 at 8:00 a.m.)

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