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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

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

BEFORE THE HONORABLE J. FREDERICK MOTZ

November 18, 2011

Jury Trial

A P P E A R A N C E S

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For Plaintiff:

PAUL TASKIER
JEFFREY JOHNSON
MIRIAM VISHIO
1825 Eye Street, N.W.
Washington, D.C.

JOHN SCHMIDTLEIN
725 Twelfth Street, N.W.
Washington, D.C.

MAX WHEELER
10 Exchange Place
11th Floor
Salt Lake City, Utah

For Defendant:

DAVID TULCHIN
STEVEN HOLLEY
SHARON NELLES
125 Broad Street
New York, New York

STEVE AESCHBACHER
One Microsoft Way
Redmond, Washington

JAMES JARDINE
36 South State Street
Suite 140
Salt Lake City, Utah

Court Reporters:

Ed Young
Patti Walker
Laura Robinson
247 U.S. Courthouse
350 South Main Street
Salt Lake City, Utah
(801) 328-3202

I N D E X

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Witness Examination By Page

(No witnesses called.)

Exhibit Received

(No exhibits received.)

1 November 18, 2011

8:00 a.m.

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

3
4 THE COURT: Good morning, everybody.

5 You don't have to use the full five hours. You
6 can, but you don't have to.

7 Mr. Tulchin.

8 MR. TULCHIN: Thank you, Your Honor. Good
9 morning.

10 Microsoft, of course, moved yesterday when Novell
11 rested under Rule 50 of the Federal Rules of Civil Procedure
12 for judgment as a matter of law. And the presentation I'm
13 about to make I think shows overwhelmingly that Novell is
14 not entitled to get to a jury for any one of a number of
15 reasons. Indeed, Novell failed to submit proof sufficient
16 to get to the jury on almost, I think, almost every prong of
17 its case.

18 I do want to thank the Court. We have been here
19 and we have had four weeks of trial, and I do want to thank
20 the Court for your very professional approach to the trial
21 and to the issues and also, of course, Your Honor, to the
22 courtesies that you have extended to counsel. Microsoft
23 very much appreciates that.

24 The Court knows, of course, that this case was
25 filed in November, 2004, seven years ago. It pertains to

1 events of 1994 and into '95. There were, of course, three
2 events that Novell pointed to in its opposition to our
3 motion for summary judgment. Two have been abandoned.

4 There is one left, withdrawal of support for the
5 name space extensions, an act that took place in October of
6 1994, 17 years ago. Novell had seven years from the time
7 the complaint was filed to develop facts to fit its legal
8 theories, to find witnesses, and most of the former Novell
9 and WordPerfect people are within this jurisdiction, to find
10 witnesses who might support the theory. Four weeks of trial
11 have passed and they called four live witnesses and three
12 paid experts, and not one supported the essential --

13 THE COURT: The experts were alive. They may have
14 been paid, but they were alive.

15 MR. TULCHIN: I won't comment on the experts quite
16 yet.

17 And, Your Honor, of course the essential theory
18 that allowed them to get this far, a strange theory, but one
19 on which we are here, is that acts taken against Novell's
20 applications adversely effected competition in the PC
21 operating system market. Not one of Novell's witnesses
22 supported that theory. I'm going to go through some of
23 that, Your Honor, and I hope not to do it in too painstaking
24 a way.

25 I want to also say that the brief that Novell

1 submitted last evening, which I think was 104 pages, is
2 notable in a number of respects. Probably the most
3 important is that, to my read at least, the most vigorous
4 argument made in the brief is that the Court lacks power
5 under Rule 50 to throw the case out, because your rulings on
6 summary judgment and the Fourth Circuit's review of that is
7 the law of the case.

8 THE COURT: I have to stop thinking.

9 MR. TULCHIN: I am sorry, Your Honor?

10 THE COURT: I have to stop thinking according to
11 Novell.

12 MR. TULCHIN: Correct.

13 THE COURT: Which I am trying to understand based
14 on increased evidence.

15 MR. TULCHIN: Well, not only that, Your Honor, it
16 would be one thing to keep thinking, but it is another thing
17 when the state of the record is so different at trial as
18 compared to the assertions and arguments made on summary
19 judgment. I mean, one very important fundamental way in
20 which it is different is this, Your Honor.

21 In opposition to the motion for summary judgment
22 Novell relied on an assertion in the complaint, paragraph
23 75, that, quote, in many instances a user literally could
24 not open a document that he had previously created and
25 saved. And that, quote, Novell was suddenly unable to

1 provide basic file management functions in WordPerfect.

2 Now, the record in this Court --

3 THE COURT: I am sorry where was that allegation
4 made? My mind wondered. Where was that?

5 MR. TULCHIN: It is paragraph 75 of the complaint,
6 Your Honor.

7 No such allegation was made here. In fact, the
8 claim was exactly the opposite, and I want to come to some
9 of that, if I may. On October 19th, after the
10 cross-examination of Mr. Harral, Your Honor, you said the
11 following: Quote, if I have heard Mr. Tulchin right,
12 WordPerfect was available on the start sign, and I think you
13 meant the start menu, and was also available by icon, and
14 this was just a third way of getting to it. Somebody better
15 explain this as we go along, because it seems to me to be
16 inconsequential.

17 The explanation, of course, is that now at trial
18 we find, indeed, it is inconsequential. I will have more to
19 say about that in a few moments. But here is what Mr.
20 Harral said, the first witness, the one they led off with.
21 First at page 327 on direct, I don't know anything that the
22 WordPerfect word processor needed to do for a namespace
23 extension. They did have shell extensions, but I don't
24 recall the namespace extension that they needed to do.

25 On cross at page 476 I asked him about that very

1 testimony. I said your words were, quote, I don't know
2 anything that WordPerfect word processor needed to do for a
3 namespace extension. Answer, that is what I just said here.
4 I don't think he needed to do that for his product. That is
5 correct.

6 At 495 Mr. Harral said WordPerfect was not late.
7 QuatroPro was not late. It was shared code that was late.
8 And there is no dispute now, Your Honor, as opposed to on
9 summary judgment, that the assertion that there was some
10 sort of incompatibility that Microsoft created that
11 prevented Novell from having WordPerfect function on Windows
12 95 is false. The state of the record then and the state of
13 the record now are just radically different.

14 One other thing about the brief --

15 THE COURT: Just so I understand your position, I
16 take it that is true not only for 16 bit product but also
17 your position is that a product could have been developed
18 for the 32 bit product?

19 MR. TULCHIN: Absolutely. And there is no dispute
20 about that at this point, Your Honor, that both WordPerfect
21 and QuatroPro and Perfect Office as well, on the 16 bit
22 project as they were released in 1994 ran on Windows 95.
23 And also that new versions of that product that were being
24 developed for Windows 95 were perfectly capable of running
25 without the name space extensions. Indeed, when Corel

1 released its product in '96 they did run on Windows 95, all
2 those products.

3 One other little point about -- maybe it is not
4 little, but I have to say, Your Honor, that I read 104
5 pages, or maybe it was 105 of Novell's brief, and stunningly
6 the case that probably is the closest to ours on the facts,
7 or at least among the two that are closest, Four Corners
8 Nephrology, Tenth Circuit, 2009, is never mentioned in their
9 brief. The distinction they make about Christy Sports makes
10 no sense at all. To read their brief the plaintiff won
11 Christy Sports. I will come to that, but the idea that they
12 could submit 100 pages, 100 pages where they hardly refer to
13 the evidence at trial, hardly ever, except to some direct
14 testimony that was withdrawn in effect on cross, and not
15 refer to this case, or the Intel case that we'll come to,
16 Intergraph against Intel, it is remarkable.

17 But I want to start, Your Honor, with a few slides
18 about the fundamental theory of the case. The fundamental
19 theory, the reason they got past the clear bar of the
20 statute of limitations, which is this is a case about
21 conduct that adversely impacted the PC operating system
22 market. If we had been able to use the namespace extension
23 APIs, there would have been much more competition in
24 operating systems.

25 Slide 111.

1 This is Mr. Frankenberg. This testimony, the
2 first part of it is unanimous, Your Honor. Would you say
3 that Windows 95 was a significant step forward? Yes, it
4 was. And would you say as well that Novell was very excited
5 about Microsoft's impending release of Windows 95? Answer,
6 we were very excited and very interested, yes. He goes on
7 to say, yes, we wanted to take advantage of the features.
8 What Novell wanted to do with Perfect Office was to build
9 the Perfect Office suite in a way that would take advantage
10 of those features and do even more? Answer, I don't know
11 that it could take advantage of all of the features, but it
12 would certainly have taken advantage of the capabilities in
13 Windows 95 that would give it an advantage in the
14 marketplace, if that is your question. Now, that is at 1225
15 to 1226.

16 I just want to pause there Your Honor, because,
17 yes, Mr. Harral and Richardson say that if they could have
18 used the namespace extensions in the way that they
19 contemplated, they say, though there is no evidence in any
20 document to show this, that they would have had an advantage
21 in the marketplace against Microsoft in the office
22 applications market, of course.

23 Now, I pause here because that gets you to this
24 very fundamental question that the Court has posed about
25 Microsoft's obligation to give for free a competitor the

1 means to get such an advantage. But, more to the point,
2 Frankenberg goes on. Slide 112. Was it true that Novell
3 wanted to do even or by building the advance file open
4 dialogue? And he equivocates a little bit, so I asked him
5 was it your view at the time in 1994 and 1995 that if
6 Perfect Office, the new version of Perfect Office for
7 Windows 95 had been released by Novell, that that would have
8 made Windows 95 even more desirable in the marketplace than
9 it otherwise would have been? Answer, definitely. It would
10 have made Windows 95 more desirable in the marketplace. And
11 I asked would that have been a benefit to Microsoft? It
12 would have made Windows even more desirable for consumers?
13 Answer, that is true.

14 The testimony goes on. Now we're on 1227 to 28 of
15 the transcript on November 8th. He says especially for
16 those who use WordPerfect products. And I said, following
17 up on the logic that Frankenberg was offering, if anything
18 that would increase the sales of Windows 95, correct? Yes.
19 Having a good Perfect Office product out there would make
20 Windows 95 even more popular than it turned out to be, true?
21 Answer, true.

22 If Perfect Office had been released in 1995, and the
23 questions and answers go on, and he says presumably it would
24 have increased sales of Windows 95. And so I said, and it
25 was my last question on cross, Your Honor, and this is the

1 end of the case coming from the C.E.O. of Novell, that would
2 have made Windows 95's market share even higher than what it
3 turned out to be, correct? Answer, yes.

4 Now, there is more, Your Honor, and I want to get to
5 Professor Noll in a moment, but just an editorial comment.
6 The theory that the denial of support of the namespace
7 extension APIs hurt competition in the market in which
8 Windows competed is absolutely 100 percent wrong according
9 to Frankenberg. Who would be in a better position to know,
10 an expert or the former C.E.O.? But the experts actually
11 agree with Frankenberg.

12 THE COURT: Well, and I'll hear you that too, but
13 I take it that Novell's position has to be -- well, I know
14 its position is, which I have questions about, that the fact
15 that Microsoft was going to take a short-term loss by not
16 selling more operating systems shows that it was engaging in
17 anticompetitive conduct. How they reconcile that with the
18 evidence they rely upon where Microsoft really wanted to make
19 money was on the application side is still a mystery, but I
20 will ask Mr. Johnson about that.

21 MR. TULCHIN: But the fact --

22 THE COURT: Be that as it may, the theory is you
23 shouldn't look at this period of time or in 1996 or '97,
24 but that this action was taken because of a long term
25 concern that in fact -- I think the theory must be that

1 other operating systems would catch up, that because of its
2 history of being cross-platformed WordPerfect would be
3 cross-platformed and, therefore, the problem with your
4 analysis is that it does not take into account what would
5 have happened over time. I think that must be --

6 MR. TULCHIN: No, Your Honor, that can't be. That
7 can't be for two reasons, with all respect.

8 The first reason is that this is not taking some
9 short-term loss. What Frankenberg is saying is that if we
10 had had the use, which they did have, and that is a another
11 story, of the namespace extension APIs Windows would have
12 been stronger. Stronger.

13 Now, there is no evidence that Microsoft knew, and
14 I am jumping ahead in my outline, but I am happy to answer
15 the Court's question, there is no evidence at all that
16 Microsoft knew, that Bill Gates now on October 3rd, '94 that
17 Novell or WordPerfect had any plans to use the namespace
18 extensions in the way that their developers said they
19 planned to use them.

20 So if there was some theory here, some conspiracy
21 theory, that Microsoft deliberately withheld these APIs so
22 that Windows would get stronger, and had the APIs been
23 delivered to WordPerfect somehow that in the long-term would
24 have ignited competition, it is contrary to the facts of
25 what Frankenberg said, and they did have two experts, Your

1 Honor, in economics, Warren-Boulton and Noll.

2 And whatever else might be said about them, one
3 would have to say this: If there is some theory that
4 competition would be ignited in the long term, why didn't
5 their economists do a single thing, engage in some study,
6 make some market analysis, come up with something, market
7 share data, some evidence that that might have occurred?

8 THE COURT: It is also true, I mean, Mr. Alepin
9 didn't testify -- I mean, I realize it is very hard to
10 re-create and the law is clear that if someone engages in
11 anticompetitive conduct the Court should be generous in
12 allowing plaintiffs to, you know, recognize that it is
13 difficult to create a but-for world. But I think I am
14 right, and I will ask Mr. Johnson about this, that there may
15 be evidence of bad, quote, unquote, anticompetitive conduct
16 by Microsoft against other people. I don't think there is
17 any evidence through Mr. Alepin, the economist or Dr. Noll,
18 of the fact that within some period of time -- there is no
19 evidence that any alternative operating system would have
20 ever been developed.

21 MR. TULCHIN: Correct, Your Honor. Not only that,
22 but --

23 THE COURT: It seems to me to be critical to their
24 case. I could be wrong.

25 MR. TULCHIN: Critical.

1 Professor Noll said that OS2 was essentially dead
2 by '96 and it was not an effective competitor. He said
3 Linux was coming along. Linux, although it had been created
4 earlier, wasn't a commercially viable product until 1996.
5 But no witness, and this is after seven years in which this
6 complaint has been pending, no witness, no economist,
7 Professor Noll who says he is with Stanford and associated
8 with some institute, no witness said that here is what I
9 did, here is the study that I did to try to come up with
10 some alternative world in which some other operating system
11 would have flourished because of the several month delay,
12 which they allege, and it is a false allegation, which they
13 allege was caused by the withdrawal of support for the
14 namespace extensions.

15 THE COURT: But even giving the plaintiff the
16 benefit of the doubt on that issue, and I don't expect you
17 to, but think maybe I should, I should not look only at that
18 fact but also the other facts concerning things that
19 Microsoft did to other competitors which arguably could have
20 prevented the development of an alternative platform. I
21 don't expect you to agree with that. I understand Mr.
22 Johnson's point on that and I am prepared -- I still don't
23 see any evidence at all in the case that within any -- to
24 the present, frankly, although I think Dr. Noll did say that
25 at present maybe there is, that there was anybody ever

1 within any time frame, whether you cut it off in '96 or go
2 to '99, that there is any evidence that in fact this
3 alternative world ever existed.

4 MR. TULCHIN: We agree, Your Honor.

5 THE COURT: Therefore, even within the relevant
6 period of time, and the relevance is that within the
7 relevant period of time Microsoft's domination of the
8 monopoly in the operating market would have continued, as I
9 understand the evidence.

10 MR. TULCHIN: That is what we are getting to next.

11 Slide 135.

12 Because Frankenberg's testimony I think is the end
13 of the case, but I even took the chance of asking Professor
14 Noll about this, because I thought I understood what he was
15 saying. I showed him the exact testimony that I just read
16 to Your Honor. This is November 15th, just earlier this
17 week, at page 1,949. It was a very good year. I asked him
18 you have no basis for disagreeing with Mr. Frankenberg the
19 former C.E.O., do you, sir? Answer, I completely agree with
20 everything on this page. I see no reason to disagree with
21 him.

22 Here is Mr. Harral, slide 136, and this of course
23 is the point that Your Honor appreciated right at the outset
24 of the case, that what Novell and WordPerfect wanted to do
25 was to marry their products to Windows.

1 THE COURT: Well, I must say in terms of the view
2 that there is any -- I am probably wrong, and I was stuck by
3 Mr. Harral's enthusiasm for Windows. It was just -- he was
4 just all of a sudden -- it shocked me.

5 MR. TULCHIN: It came from every one of their live
6 witnesses, Your Honor, all four of them.

7 THE COURT: But mr. Harral was the first.

8 MR. TULCHIN: Yes, he was, and he was extremely
9 enthusiastic.

10 Here is one little quip from Richardson. This is
11 at page 613. Slide 137.

12 It was our intent to make the users experience on
13 Windows better because they had WordPerfect installed. If
14 there was some case predicated, as this one is, on harm to
15 competition in the PC operating system market, one would
16 expect evidence from somewhere, even from a professional
17 witness, who has testified many times against Microsoft,
18 somewhere that this conduct would have wound up in some
19 significant or material or noticeable way in changing the
20 competitive landscape, and everyone says exactly the
21 opposite. Microsoft windows would have been even stronger.

22 And, Your Honor, I just want to make one comment
23 about the evidence here. It is just a side comment, but I
24 think it is relevant to this motion, to the question of
25 whether Novell can get to a jury. The only witnesses

1 called, fact witnesses, were developers who were low level
2 employees of Novell. Harral was first. We were told that
3 he was their top guy. He said that he was the chief
4 architect, you'll remember that, on cross. He said it time
5 and time again.

6 He answered on direct and he used the word we more
7 than 300 times. I counted it. When asked about specifics
8 he said we did this, we thought that, we decided something
9 else. The first thing that I did on cross was to show him
10 Plaintiff's Exhibit 372.

11 Let's just bring up the first page for a moment.

12 This is an org chart. It is Novell's exhibit.
13 The business applications development organization. There
14 is Bruce Brereton, the vice president. Frankenberg only had
15 a vague memory of him. I'll come to that in a moment. You
16 have to search way, way down on the second page to find
17 Harral and Richardson in the shared code group. There is
18 Tom Creighton. Harral and Richardson spoke about him.
19 Richardson was one of three people who reported to Harral.
20 Harral reported to Johnson.

21 Let's go up a little bit on that page. There is
22 Harral. Harral reported to Jim Johnson. His name comes up
23 later. Johnson reported to Creighton and Creighton to
24 Brereton. And then the Court will remember that Mr.
25 Frankenberg said --

1 THE COURT: I am just curious, is Mr. Gibb on
2 there somewhere?

3 MR. TULCHIN: Yes, he is on the first page, Your
4 Honor. Mr. Gibb is on the first page. He reported to
5 Brereton too, along with Creighton.

6 MR. SCHMIDTLEIN: He is number four, Your Honor.

7 MR. JOHNSON: A low level guy.

8 THE COURT: I'll hear from you in due course.

9 MR. JOHNSON: All right. I just --

10 MR. TULCHIN: Well, Your Honor, some of the
11 outbursts from counsel which we have heard throughout the
12 case, I'm happy to defer and allow them to make their
13 presentation, and I hope I am given the same courtesy.

14 I was getting to Mr. Gibb. I remember on cross
15 when I objected to the question to Professor Noll about the
16 state cases that had been brought against Microsoft, and I
17 jumped to my feet on the grounds that it was misleading, Mr.
18 Johnson turned around and said that is for cross, and Your
19 Honor was upset and rightly so, on a deliberate effort to
20 elicit misleading testimony.

21 But back to the point, back to the point, Your
22 Honor. Mr. Frankenberg testified that if there had been
23 some strategic or tactical decision to make about the
24 namespace extension API issue, that decision would have had
25 to go to the four executives that he identified who ran the

1 business applications business unit. Ad Reitveld, who had
2 been the C.E.O. of WordPerfect and come to Novell, Dave
3 Moon, the chief technology officer, Glen Mella, the
4 marketing guy, and Mark Caulkins who was actually Brereton's
5 boss. Those were the four.

6 At pages 1141 to 1142 I asked him is your
7 testimony today that it would have been your expectation
8 that a decision about what choice to make, to spend a year
9 writing the advance file open dialogue or to get the product
10 out fast using the namespace extension APIs, that decision
11 would have been entrusted to the executives, the people we
12 just mentioned, Rietveld, Moon, Caulkins and Mella? Answer,
13 it may have been Mr. Waxman in place of Mr. Rietveld because
14 he any have heft by then, but, yes, of course. Of course.
15 By the way, Waxman replaced Rietveld around the middle of
16 '95 when Mr. Rietveld left the company.

17 It is the four executives of the company not
18 Richardson or Harral or even Mr. Gibb. And it is striking
19 to me, Your Honor, that in a case like this where
20 Warren-Boulton asks for billions of dollars, once you do the
21 trebling, billions and billions, it is striking that there
22 is not one piece of evidence, not a document or any
23 testimony from any witness, that this decision ever was
24 entrusted to any of those four executives. Frankenberg
25 himself said it, and Your Honor commented on this outside of

1 the presence of the jury, that he had nothing to do with the
2 decision. They say it was so important for their company,
3 it was so key. Noll, who is nothing if not an advocate --

4 THE COURT: You and I may disagree with their
5 assessment of Dr. Noll, but that is a different question. I
6 am not sure if I was standing there I might have the same
7 assessment.

8 MR. TULCHIN: Well, Your Honor, we don't need to
9 get to that today. But let me just say that Dr. Noll said
10 it was a suicide choice, and the only evidence in the case
11 is Mr. Harral very pompously saying on direct we decided
12 this. Frankenberg totally blows that away.

13 I'm also struck, Your Honor, by the Logo extension
14 memo, 155. I'm not using this to talk about the Logo
15 program. That is out of the case.

16 THE COURT: You're talking about the absence of
17 any similar memo?

18 MR. TULCHIN: Yes.

19 Let's look at it very quickly. I want to make one
20 point about the timing, Your Honor, which I think is not
21 unimportant.

22 Do we have that, 155? I'm sorry for the delay,
23 Your Honor.

24 Here is the memo that Frankenberg said when I
25 showed it to him would be a memo of the sort that, of

1 course, would have been written had the namespace extension
2 issue been a real problem for Novell. If anyone thought
3 that, oh, boy, we can't use those four APIs out of 2,500,
4 this is a problem for us. Frankenberg said we would have
5 seen this kind of memo to all of the executives. You can
6 see on the CC line the four people who Frankenberg
7 mentioned, and also Caulkins, to whom the memo was
8 addressed, and they are all there. Frankenberg is there
9 too. But there is Rietveld, there is Moon and there is
10 Mella. Let's go and look at Mark Caulkins. Ryan Richards
11 writes this to Mark Caulkins. And the other point about
12 this, Your Honor --

13 Could we show Mark Caulkins, please. Thank you.

14 The other point about this, Your Honor, that is so
15 striking is that this memo was written on January 12th of
16 '95. Now, you may remember Exhibit 636 that I showed to Mr.
17 Frankenberg. These are the minutes that were taken by Dave
18 Miller, the strategy officer for Novell, of a meeting
19 between Novell, including Frankenberg and Gates, and others
20 at Microsoft on January 10th, two days earlier.

21 You will remember, Your Honor, that I asked Mr.
22 Frankenberg one day on cross is there anything in here about
23 the namespace extensions? The memo goes on for eight or ten
24 pages, I have forgotten how many, with a series of issues
25 that Novell and Microsoft were discussing. Novell's

1 complaint about Microsoft and Microsoft's complaints about
2 Novell. Much of it had to do with competition in the market
3 that NetWare then dominated. You'll remember Frankenberg
4 said a 70 percent share, but I'm not allowed to use the D
5 word for Novell's products. The Richards memo to Caulkins
6 was written two days later.

7 The next day Mr. Frankenberg returned to court and
8 he had been nice enough in the evening to look at Exhibit
9 636, and he came back and he conceded that there was nothing
10 in there, nothing at all reflecting any discussion about any
11 issue pertaining to the namespace extensions. Likewise,
12 Your Honor, he couldn't remember any such discussion.

13 THE COURT: Maybe I have this wrong -- Dr.
14 Warren -- if everybody is concerned about lack of focus,
15 that was a completely false premise because nobody was
16 focused on WordPerfect at all, except Ad Rietveld who had
17 left.

18 MR. TULCHIN: That could be, Your Honor. The
19 point, of course, and I want to move along, and the
20 testimony from Frankenberg that I just referred to is at
21 pages 1181 to 1182.

22 Some of this, Your Honor, may have to do with the
23 spoliation problem that the Court is well aware of, that
24 Novell was very careful to keep a bad acts file, but it was
25 not until after this complaint was filed that anyone was

1 asked to retain documents, ten years later. That means that
2 there is a lot that is missing. But that can't be held
3 against Microsoft, of course.

4 Now, Your Honor, I wanted to address some of the
5 legal issues that the Court identified and that we agree
6 with that these are legal issues. But first before I do, in
7 light of the brief that Novell filed, and perhaps if there
8 is any presentation similar to that, what Novell will say
9 today, it seems to me really important to mention up front
10 right now that there is no evidence whatsoever at this trial
11 of a number of very key points that go to the heart of the
12 Novell theory. There is no evidence of deception. No
13 evidence of deception.

14 THE COURT: Mr. Johnson is going to disagree with
15 you on that.

16 MR. TULCHIN: There can't be, Your Honor, and I
17 will tell you why. Unless this is a case, unless the case
18 stands for the proposition, according to Novell, that once
19 you give one company a beta prerelease version of a software
20 product, you can never change it, that that change in itself
21 is deception, and there can't be evidence of deception.

22 THE COURT: But he relies on the internal memos
23 from the Hood Canal and somebody saying Bill says do it and
24 all of that.

25 MR. TULCHIN: Yes, Your Honor. Yes, they rely on

1 the Hood Canal memos. They were all written a year or
2 more -- I want to make sure I have the exact date right.
3 They were written in 1993.

4 THE COURT: I think it is March. I think it is a
5 year or more before the decision.

6 MR. TULCHIN: And the argument about the Hood
7 Canal memo is dependent upon some leap of faith that
8 Mr. Gates and other people at Microsoft predicted and
9 understood were certain that Novell was going to buy
10 WordPerfect. Those things have nothing to do with
11 WordPerfect or QuattroPro or Perfect Office which, according
12 to Frankenberg, didn't exist at the time. They can't. That
13 can't be about Novell's competition --

14 THE COURT: Well, you don't challenge that, but as
15 I understand it Perfect Office was in '94, so it didn't
16 exist.

17 MR. TULCHIN: No. There was a version of Borland
18 Office, 1.0 and 2.0 before that.

19 THE COURT: But not Perfect Office.

20 MR. TULCHIN: Correct.

21 Perfect Office 3.0 came out in December of '94.
22 That is correct, Your Honor.

23 The point about deception, if I can, Your Honor,
24 that somehow there is this bait and switch, it is not an
25 antitrust claim. There is no antitrust theory that

1 encompasses some bait and switch assertion. We have covered
2 that with the cases we have cited. But I think Frankenberg,
3 again, totally blows away any argument about deception.

4 THE COURT: Help me out on this, because frankly I
5 had not -- I didn't reread my prior opinion, but I think in
6 the summary judgment I did say that the deception, and you
7 can say I am wrong, and that is okay, and lots of people say
8 I am wrong --

9 MR. TULCHIN: Well, there has to be some evidence,
10 Your Honor. There has to be some evidence.

11 THE COURT: Okay.

12 MR. TULCHIN: There is no evidence here that
13 Microsoft told Novell you can rely on the namespace
14 extensions. Otherwise there can't be any deception.

15 THE COURT: Well, looking at the evidence most
16 favorably to the plaintiff on the beta issue, isn't it fair
17 to say that viewing the evidence most favorably to the
18 plaintiff, that it is understood in the industry, and the
19 agreement said what it said, and there is no question about
20 that, but it is understood in the industry that any changes
21 that are made are made only because of the feedback, which
22 is part of the beta process itself that, you know, if
23 something does not work, and so that is why you can't rely
24 on things that -- it seems to me that there is evidence,
25 viewed most favorably to the plaintiff, that it is

1 understood by people really in this industry certainly, that
2 you make withdrawals only in response to bugs that come up
3 during the course of the beta process.

4 MR. TULCHIN: Your Honor, I don't think that is
5 the evidence, but let me show you what Frankenberg said,
6 because I do think this is the end of the argument about
7 deception. There is no logical deception claim that could
8 be made in light of this. There are three slides. 138.

9 By the way, Your Honor, we didn't rely on the
10 contract as a defense or to immunize us from conduct that is
11 otherwise anticompetitive. The contracts are not being used
12 for that purpose at all. They are to show, and the law in
13 the Tenth Circuit is clear on this, that if you act in
14 accordance with industry practice, even a monopolist is
15 entitled to compete in the ordinary way.

16 Here is Frankenberg starting at page 1,201,
17 November 8th. Am I correct, Mr. Frankenberg, that when
18 Novell received a beta version of a Microsoft operating
19 system, at least during the time that you were at Novell, it
20 was understood by people at Novell that a beta version is
21 nothing more than a prerelease version of the product?

22 Answer, yes. Question, Novell sent out beta versions of
23 NetWare to various other software companies from time to
24 time, correct? Answer, yes, we did. And when Novell did
25 that, Novell made sure that the people who were intending to

1 use the beta understood that the beta could change? That
2 the product could change, right? Answer, yes. Question,
3 and you understood when Microsoft sent a beta version of
4 Windows 95 to Novell, that that prerelease version could
5 change? Am I right? Answer, yes, it could change. The
6 testimony goes on. If anything, it gets better.

7 Let's look at slide 139.

8 I won't read every question and answer, Your
9 Honor, because I don't want to take too much of the Court's
10 time. But I showed him Exhibit 618. This is his contract,
11 Novell's, and it says beta products are prerelease quality,
12 have not been fully tested and may contain errors and
13 omissions. He said yes. Novell in this agreement was
14 telling people this, correct? Yes. Was that something that
15 was widely understood in the software industry? Answer,
16 yes, it was.

17 And then the next two sentences say Novell does
18 not guarantee that beta products will become generally
19 available to the public. I'm stopping here. What this
20 means, Your Honor, is there is no caveat or qualification,
21 and counsel didn't go back to Frankenberg on redirect and
22 ask the question that the Court just posed. Does this mean
23 that the changes could be made only if some objective third
24 party, not the developer of the operating system, some
25 industry body reviewed the beta reports that come in from

1 ISVs, thousands of them?

2 THE COURT: I didn't understand that. I
3 understood that if any ISV encountered a bug, I didn't think
4 there had to be some independent bureau that was going to
5 review it. My understanding was that if you sent out a
6 beta, and the whole purpose of the beta was to see if this
7 is working, and if somebody comes up with a bug in it then a
8 change might be made. That is how I understood it. I
9 didn't understand it was going to be an independent bureau.

10 MR. TULCHIN: I understand, Your Honor. I was
11 sort of positing the situation. Who is supposed to decide
12 this? Of course the company that has spent all of this
13 money developing its product.

14 THE COURT: In the final analysis it is the
15 developer, I mean it is the company's decision.

16 MR. TULCHIN: There is just a little bit more on
17 this testimony. It is from Frankenberg.

18 Next slide, please.

19 It is at pages 1208 to 1209. I think, Your Honor,
20 this is just devastating to Novell's position. When I was
21 crossing Frankenberg we were looking at Exhibit 19, which is
22 a Microsoft beta agreement with Novell. I asked and you'll
23 see there that this product consists of prerelease code,
24 documentation and specifications. It is not at the level of
25 performance of the final generally available product and may

1 not operate correctly, and may be substantially modified.
2 The company, that would be Novell, assumes the entire risk.
3 I said is this consistent with what Novell has in its
4 license agreement? He said it is consistent with it, yes.
5 Question, they are certainly pretty much similar, right?
6 Answer, yes.

7 And then here is the last one, Your Honor. Again,
8 there was no redirect on this subject. Was it your
9 understanding at the time in 1994 when you were C.E.O. of
10 Novell, that when Novell got a beta version from Microsoft
11 of what eventually became Windows 95, that the beta version
12 might change?

13 Now, I may be spending a lot of time on this, Your
14 Honor, but if you have a claim of deception, if that were
15 Novell's claim and it called to the stand as a
16 representative of the company the former C.E.O., and he
17 gives that unqualified answer, he didn't say, well, yes,
18 under some circumstances you can change it, or only if there
19 is sufficient error reports received by Microsoft, he just
20 said he understood as C.E.O. that it could change. That is
21 the full state of the record on this from Mr. Frankenberg.

22 Secondly, Your Honor, I started by saying there is
23 no evidence of deception. I think this means that some
24 prior e-mails at Microsoft in 1993 when Novell didn't own
25 these products have to be understood in light of this

1 testimony. Betas can change. No one disputes that.

2 The second thing of which there is no evidence at
3 all is the assertion that the decision by Microsoft gave
4 Microsoft some unfair advantage, tilted the playing field.
5 Mr. Alepin has been their technical expert for years. He
6 served as technical expert for the class action lawyers in
7 Minnesota in a case that went to trial in '04.

8 THE COURT: I'll hear you on that, but just so
9 Mr. Johnson knows, it seems to me that at some point
10 Microsoft might very well have been thinking we don't want
11 this to get in the hands of Lotus or Novell because they
12 will get a head start from us in the application market to
13 which I say, so what. This is not a claim for competition
14 in the applications market.

15 And, secondly --

16 MR. TULCHIN: Exactly.

17 THE COURT: Secondly, or more to the point, I
18 don't see why it is that if I develop a product I have to
19 give it to a competitor so they can beat me. I mean, that
20 does not strike me as what American society is all about.

21 MR. TULCHIN: Of course.

22 Novell's counsel kept referring to Mr. Nakajima as
23 the inventor, which he was. The idea that there is some
24 obligation to share this, even if it were true, and there
25 really is no evidence, Your Honor, that it is true, that

1 Microsoft thought that Novell would use the namespace
2 extensions, and I'm going to get to that because that is
3 very important. There is no evidence that Microsoft ever
4 used it for their applications.

5 Alepin says this at 1641 to 43. Mr. Holley asked
6 him, question, before 1997 you have no evidence that any
7 Microsoft office productivity application, by which I mean
8 the same list of five products that I gave you earlier,
9 called upon the namespace extension APIs, right? Answer,
10 that is correct. The five were Office and Word and Excel
11 and PowerPoint and Access, the commercially released
12 products that might have competed against anything Novell
13 was working on.

14 I asked Frankenberg the same question. This is at
15 1115 to 16. He said I don't know one way or another. There
16 just is not any evidence that Microsoft ever did that.

17 There may be some evidence in the e-mails that
18 particular people at Microsoft thought about doing it, but
19 it never happened.

20 THE COURT: Just so I understand the record, it
21 was used in Marvel --

22 MR. TULCHIN: Correct. Marvel is a component of
23 Office.

24 I'm sorry. I got that wrong. Of windows.

25 THE COURT: Of windows. That could be important.

1 MR. TULCHIN: I was thinking about Office, Your
2 Honor. That was a blunder. I am glad Mr. Holley is here.
3 It is a good thing someone --

4 THE COURT: That could be important. Marvel was
5 part of --

6 MR. TULCHIN: Of Windows.

7 THE COURT: -- but they couldn't get it out, and I
8 think it also may have been the same in Capone, which was
9 never marketed, or according to Mr. Gates -- is that were it
10 remained was in Marvel and Capone?

11 MR. TULCHIN: I am sorry, Your Honor?

12 THE COURT: Did it remain in Marvel and Capone?

13 MR. HOLLEY: No, Your Honor, they were taken out
14 of Capone.

15 THE COURT: But did they stay in Marvel?

16 MR. HOLLEY: Yes, Your Honor. As to Marvel the
17 Court is absolutely correct.

18 MR. TULCHIN: Yes.

19 Thank you, Mr. Holley. And I apologize, Your
20 Honor.

21 THE COURT: You can apologize to the client.

22 MR. TULCHIN: I do that almost every day, Your
23 Honor. Sometimes the apology has been accepted and --

24 There is also no evidence, Your Honor, that
25 Microsoft intended to hurt Novell, that Mr. Gates on October

1 3rd, no matter what the e-mail says, and they will interpret
2 it and twist it into something that it doesn't say, there is
3 no evidence that Mr. Gates knew what Novell intended to do
4 with the name extensions. That is very clear. I'll come to
5 it in just a minute.

6 There is also no evidence after October 3rd that
7 Novell ever told Microsoft these extensions are really
8 important to us. They are really important. It is delaying
9 us. Would you reconsider? Do you remember Mr. Chase's
10 e-mail about the Logo program to Mark Caulkins, one of the
11 four executive who Frankenberg said would be involved in
12 these decisions? Mr. Chase said about the Logo program, we
13 don't want to give you an exemption, but if you have any
14 issues or concerns, let's set up a conference call. Brad
15 Struss would be happy to do so.

16 And, of course, you know what I am about to say
17 next, Your Honor. There has never been any evidence that
18 Novell complained to Microsoft, particularly in the period
19 from October 3rd to June 1, which was the question I asked
20 Frankenberg. In fairness I asked him about that period. I
21 asked him about eight months, October through June 1. And
22 there is nothing, nothing in evidence, no documents, we went
23 through that January 10th meeting, and Mr. Miller's notes
24 don't refer to the name space extensions.

25 If this had been important to Novell we would see

1 an e-mail from Caulkins to Struss or from Caulkins to Chase
2 or Silverberg, to whom he did send e-mails. We would see a
3 letter. We would see some internal memo. We asked
4 Microsoft to help us with these namespace extensions because
5 it is killing us, but Microsoft never knew that Novell was
6 being delayed for this reason, or that the APIs, for which
7 support was withdrawn, were important, important to Novell.

8 THE COURT: Well, again, this is a Rule 50 motion.
9 I hear you, but I believe that Mr. Frankenberg testified
10 that he did complain to Mr. Gates. One can question the
11 credibility of that because there are no memos, but in terms
12 of a Rule 50 motion don't I have to credit that?

13 MR. TULCHIN: Your Honor, here is what he said.
14 Rule 50 does not mean that the flimsiest, tiniest little
15 shred of evidence outweighs, when you're thinking about does
16 a case go to a jury, outweighs tons and tons on the other
17 side of the scale. It does not say that at all.

18 But Frankenberg said I complained generically
19 about undocumented APIs. I even asked him did you know what
20 the namespace extensions were in 1994 to five and he said,
21 no, I didn't. He said I complained generically about
22 undocumented APIs. Then I asked him but these were
23 documented. They were not undocumented. Novell got the
24 documentation with the MC6 beta and he said yes, they were
25 documented.

1 There is also DX6, Your Honor, which is that memo.
2 Just put that up very, very briefly.

3 It says Dave miller at the top. This was the
4 complaint that Novell actually did make to Microsoft about
5 bugs, and Frankenberg said, and I think he and Novell's
6 counsel may disagree a little bit on what this is about, but
7 Frankenberg said that was about bugs that effected the old
8 version of Perfect Office written for the 16 bit platform.
9 And the memo says, DX6, Dave thinks it is mostly our fault.
10 And the point of course there was that Novell was blaming
11 Microsoft for something, and when the chief strategy officer
12 for Novell was asked about it apparently he said it is
13 mostly our fault.

14 But, Your Honor, one other thing for which there
15 is no evidence and, boy, this is so important when you think
16 about the cases, the legal structure for this claim, there
17 is no evidence that any relationship between Microsoft and
18 Novell was terminated. Nothing was terminated. Microsoft
19 continued to help Novell. I'll come to that in a moment.

20 Novell's old products continued to run on Windows,
21 Windows 3.0, Windows 3.1 and Windows 95. The new products
22 that they were working on, developed for Windows 95, ran on
23 Windows 95.

24 THE COURT: Well, I will hear from Johnson on
25 this, but the theory of terminating the relationship, as I

1 understand the evidence, has to be that the relationship was
2 not terminated, but that the whole step backward question,
3 that because WordPerfect had developed through its no longer
4 existent sales force relationships with its enterprise
5 customers that gave it a functionality to -- I gather a
6 functionality to access different data basis, but I am still
7 not quite sure what it is. But, in any event, when it was
8 terminated that did not exist any longer simply to run
9 WordPerfect through the icon or through the start button,
10 that they had to use the tree to re-create that
11 functionality, as I understand the evidence. I could be
12 wrong.

13 Mr. Holley is shaking his head, no.

14 MR. TULCHIN: That is counterfactual that they had
15 to use the extensions. The it is counterfactual.

16 But, Your Honor, I would pose a question. That
17 can't be the termination of a relationship between the two
18 companies, unless Novell were to argue that the relationship
19 was a guarantee by Microsoft that Microsoft would write the
20 code necessary for Novell to make the products that Novell
21 believes are best suited for Novell to compete in the
22 applications market.

23 That is the relationship that they are talking
24 about, some guarantee that you, Microsoft, must have an
25 obligation to write code for us that we can use to beat your

1 brains out in the applications market. And, of course,
2 there is no evidence that Microsoft knew that they needed
3 these APIs to improve their product. Harral and Richardson
4 and Gibb all say now that they did need them, but no one has
5 testified that they told anyone at Microsoft that, so
6 Microsoft couldn't have had an intent to stop them.

7 But even if they did, again, nothing was
8 terminated. The relationship continued. Their products
9 continued to run on Windows. Again, unless the theory is
10 that once you send out a beta you're not only locked in
11 forever to the functionally in the prerelease version, and
12 can't change it without giving rise to what would be a tort
13 claim --

14 THE COURT: Let me just say on this whole law of
15 the case issue, I could have been wrong. This could have
16 been on the summary judgment record. I thought, and I have
17 said this a couple times before, I understood the record as
18 being that WordPerfect would not run on Windows 95. And,
19 frankly, what you read from the complaint, maybe I was not
20 all that crazy to think that.

21 MR. TULCHIN: Your Honor, that is clearly what you
22 did think. I might say that that is why I thought that the
23 Court was so surprised when on cross I showed Mr. Harral
24 that you just have to press the start menu and --

25 THE COURT: This started with the opening

1 statement.

2 MR. TULCHIN: Okay. Your Honor, let me go to some
3 of these cases.

4 I mentioned that Four Corners Nephrology is an
5 important case here that the Tenth Circuit decided two years
6 ago, and never mentioned by Novell in that 104 pager. What
7 is said there, 582 F3rd, 1216, at page 1,223, referring to
8 Trinco and Christy Sports the court says this: Quote, in
9 both of those cases the plaintiff argued that a putative
10 monopolist engaged in anticompetitive conduct by failing to
11 provide a rival access to certain of its facilities. In
12 both of those cases the claim was dismissed as a matter of
13 law.

14 Now, later on on the same page in discussing the
15 Trinco case the court says, a rival's decision to deny a
16 rival access to its own facilities in order to maximize its
17 own short-term profits reflect competitive zeal not
18 anticompetitive malice.

19 In Christy Sports a ski rental company complained
20 that the Deer Valley Resort refused to extend the company's
21 lease at the resort. In both of those cases, of course, the
22 plaintiffs lost, as happened in Four Corners Nephrology as
23 well, where the claims were at least about competition in
24 the same market not an adjacent market.

25 Your Honor asked I thought a very good question

1 about the trams --

2 THE COURT: As I understand it their only answer
3 to tram is that this is a case about deception, but we'll
4 come back to that. Your answer is that you're even better
5 because you let them have at least some of the easement.
6 You let them use the common file open dialogue.

7 MR. TULCHIN: It is much better than that, Your
8 Honor. It is much better. We built the tram that they
9 could use for nothing to the fourth mountain. It was called
10 the beta of Windows 95, where all that exciting new
11 technology was available to them for free.

12 Now, of course, we did this, Your Honor, because
13 it was in Microsoft's interest. This is not a charitable
14 organization, unlike what Mr. Gates is doing now. Microsoft
15 was trying to make money. That does not mean we weren't
16 giving them something for nothing. The tram was there for
17 them to use. What they say now is this, although they
18 didn't tell us this at the time, yes, we want to use your
19 tram to connect to your mountain. Thank you for building
20 this for us. It is great. But we want heated seats because
21 our customers expect a luxury experience. So you need to
22 install or provide us with the ability for us to install
23 heated seats on the tram, because we don't want our skiers
24 to have cold rear ends.

25 We say, and we can say one of two things, one, if

1 you want heated seats, build it yourself, Harral and
2 Richardson, and figure it out and build it. It is up to
3 you.

4 Two, you know, we have discovered that if we put
5 in heated seats there is a danger of an electrical fire
6 which will crash the whole system. If that is an antitrust
7 claim, somebody has to help me.

8 Or, Christy Sports, Your Honor, is another one.
9 Christy Sports, the facts of Christy Sports were actually
10 quite favorable to the plaintiff. The poor plaintiff said I
11 have my ski shop mid-mountain. I have been renting skis
12 here for ten years. There is a restrictive covenant that
13 you never enforced.

14 THE COURT: I agree with your assessment. The
15 facts are pretty favorable for the plaintiff.

16 MR. TULCHIN: The facts are pretty good for the
17 plaintiff.

18 Deer Valley comes along and says, well, wait a
19 minute, we don't want your rental skis anymore. We have
20 decided that we want to have a monopoly of the ski rental
21 business mid-mountain. You're out.

22 Our case is even crazier, because we didn't tell
23 them they were out. It wouldn't be this good for Novell,
24 but our case is something like this, and I was trying to
25 think of a good analogy. The Christy Sports shop has a big

1 neon sign on their store mid-mountain. Rent skis here. You
2 can see it from all over the mountain wherever you ski.
3 Deer Valley, the landlord says, wait a minute, I will renew
4 your lease and you can keep competing with us all you want.
5 Beat our brains in if your want, but you have got to take
6 down that sign. There is a new lease here at the same rent,
7 zero in Microsoft's case, and we are not charging for any of
8 these APIs, there is a new lease here, but that sign is
9 garish and it is not consistent with the image that Deer
10 Valley has of being a very upscale and hoity toity and you
11 have got to take the sign down. By the way, some of our
12 customers don't like it either.

13 If the plaintiff in that case sued, I mean, I
14 don't think you would get past the filing of the complaint.
15 It is not an antitrust case.

16 All that Novell is saying here is, sure, we could
17 use 2,500 APIs in Windows, we thought that Windows 95 was
18 fabulous, we wanted to marry it, we wanted to make Windows
19 better, we would have increased the desirability of Windows.
20 But we want that sign up, that garish neon sign and you need
21 to help us build it.

22 Now, Your Honor, the cases here are just so clear.
23 The Court asked Novell's counsel whether -- I think twice,
24 Your Honor, October 25th and 27th, whether there has ever
25 been a case in which the failure of one company, a company

1 that has monopody power to share technological information,
2 provided any basis for an antitrust action? Novell does not
3 cite Intergraph against Intel, but there Intel clearly was a
4 monopolist in manufacturing microprocessors. This is 195
5 F3rd, 1346, Federal Circuit, 1999. There was a disagreement
6 there. Intel was giving plaintiff proprietary information,
7 sort of like the APIs, and there was a disagreement about
8 some licensing issues of intellectual property, and Intel
9 then reduced the amount of the assistance and benefits that
10 it was giving to Intergraph. You'll find that at page
11 1,350.

12 Intel refused to authorize help to Intergraph for
13 removal of a bug or defect in the Intel system, which
14 required -- I'm quoting now from the decision -- which
15 required Intergraph to spend substantial time and resources
16 to solve the problem and delayed Integraph's product entry
17 into the market. Sounds like it is on all fours, Your
18 Honor. It is eerily similar. It required Intergraph to
19 spend substantial time and resources.

20 Now, I would say if we get to a jury and have a
21 summation, I am going to tell the jury that this decision
22 didn't cause any of that. That evidence is overwhelming.
23 But for the sake of this argument right now let's just say
24 that Novell was required to spend substantial time and
25 resources to solve the problem. Let's say that it delayed

1 their entry into the market. That is what counsel will say.
2 The District Court actually granted an injunction requiring
3 the plaintiff -- the defendant, I'm sorry, to restore that
4 assistance that it had previously given in the past.

5 On appeal Intel said and argued to the Federal
6 Circuit that there is no antitrust law that requires Intel
7 to provide these benefits to Intergraph. Of course, the
8 Court of Appeals vacated the injunction and held, quote, the
9 withdrawal of technical service is not a violation of the
10 antitrust laws, unquote. That is at page 1,366 of 195 F3rd.
11 It is almost on all fours, Your Honor.

12 The court even went on to say that the federal
13 antitrust laws do not create a federal law of unfair
14 competition or purport to afford remedies for all torts
15 committed by or against persons engaged in interstate
16 commerce. And that was quoted by the Tenth Circuit with
17 approval in a case called Gregory against Fort Bridger, 448
18 F3rd, 1195, at page 1,205, in 2006.

19 At the most, Novell would have a claim for some
20 business tort, come unfair competition claim. I feel very
21 confidence that that claim would go nowhere as well, but
22 this cannot be an antitrust claim. The Intergraph case is
23 clear on that. There have been some district court cases
24 along the same lines. In re Independent Service
25 Organizations, 989 FSup, 1131, at 1139 from the District of

1 Kansas. Into Networks against Honeywell from the District
2 of Utah, decided a month ago, Your Honor. It is 2011 Lexus,
3 I hope I have the cite right, 117589, at page star 16.

4 To be clear on this, I believe this statement that
5 I'm about to read to you from the Utah District Court is
6 dicta, but, nevertheless, consistent with Intergraph. The
7 Court said, quote, to allow one company to use another's
8 property, like Deer Valley was not required to invite
9 competitors onto its property to rent skis, is not a
10 violation of the antitrust laws. There is just no duty to
11 which the plaintiff can point. The Christy Sports case,
12 Your Honor, is also dead on, spot on on the question of
13 whether a temporary business relationship -- now, honestly,
14 in that case ten years was viewed to be temporary, and I am
15 not sure I would say that myself, but here --

16 THE COURT: You would if you represented the
17 defendant.

18 MR. TULCHIN: It depends where we were, Your
19 Honor.

20 I do hope to present everything that I say with
21 intellectual honesty, Your Honor, and that is always my
22 objective, and I hope that I have been true to it.

23 In Christy Sports the Tenth Circuit said this is
24 just a temporary business arrangement and it is subject to
25 change, and that can't be the basis for an Aspen Skiing

1 claim. That is what they said at 555 F3rd at 1190 to 91.
2 Here the relationship is the beta. That is what is being
3 complained about. We gave them the beta on June 9th, 1994.
4 It had in it the name space extension APIs. Documentation
5 was provided as well. You remember the cover page to that
6 big thick document, the reviewer's -- does anyone remember
7 the number? 388, PX-388. It is a plaintiff's exhibit.

8 When the beta was given to Novell, and this is
9 similar to what the contract says, but for good measure I
10 thought I would refer to it.

11 Can we pull that out a little bit so it is a
12 little more legible for everyone? Thank you.

13 The information is based on features and
14 functionality present either in the beta one release or
15 planned for a future release. This does not represent a
16 commitment on the part of Microsoft. That is what
17 Frankenberg says as well, of course. No surprise there.

18 But to go back to Christy Sports and what the
19 Tenth Circuit said there, here we have a temporary
20 relationship. We have the beta and it is clearly subject to
21 change. Nothing else about the relationship changed or was
22 terminated. The argument that Novell has, and it couldn't
23 be clearer, is that withdrawing support for the namespace
24 extensions APIs violates the antitrust laws, caused delay to
25 Novell in getting out its products of several months, and

1 that that conduct, the same conduct, impacted competition,
2 and they have to say adversely, Frankenberg says the
3 reverse, impacted competition in the PC operating system
4 market.

5 On this question of what changed, I asked
6 Frankenberg, and this is at 1130 to 1131 on November 7. It
7 was certainly the case, Mr. Frankenberg, that Microsoft was
8 trying to help WordPerfect, trying to help Novell come out
9 with a good product for Windows 95? And he was looking at a
10 document and he said, Your Honor, it does not say that here.
11 Question, no, I'm asking you from your recollection.

12 Answer, from my recollection I don't recall that
13 conversation where they were trying to help us, but they may
14 well have been. Question, isn't it the case, Mr.

15 Frankenberg, that people in the systems group at Microsoft,
16 and the systems group was Microsoft's name for the group
17 that was developing operating systems. Do you recall that?

18 Yes. Question, isn't it true that the people in the systems
19 group at Microsoft were trying to help WordPerfect Novell
20 produce a great application for Windows 95? Answer, I'm
21 sure they were, but I did not personally witness that.

22 Question, I am just asking for your general recollection.
23 Microsoft was trying to help, that is fair? Answer, yes.

24 1,131 of the transcript. He said the same thing at page
25 1,217, that Microsoft was trying to help.

1 Then there is Exhibit 172, a Novell document
2 written, Your Honor, six months after this supposedly
3 anticompetitive decision to withdraw support.

4 THE COURT: Wait a minute. I am confused.

5 MR. TULCHIN: 172. What did I say?

6 THE COURT: What is the date of the memo?

7 MR. TULCHIN: 172. This is a Novell document and
8 it is written on April 7th, Your Honor.

9 THE COURT: Of '95?

10 MR. TULCHIN: Yes, '95.

11 Can you show that, sir?

12 Interestingly, and this just an aside, but in the
13 third paragraph, the author, Scott Nelson, who, by the way,
14 sends this to Glen Mella and Todd Titensor, real executives,
15 as opposed to Harral and Richardson.

16 Second, we are now at a point where Win 95
17 development is our highest priority. Now, this may not be
18 for this motion, Your Honor, but this idea -- you know, they
19 were just starting to work on this and that is what a dozen
20 Novell documents show, despite what Harral said. And then
21 he says that the good news is that the cooperation between
22 Microsoft and Novell has been very good. The problems are
23 being addressed and fixed.

24 Now, Your Honor, this is not about the namespace
25 extensions, and I am not offering this to the Court with

1 some assertion that this pertains to that subject, or to the
2 work that the shared code group was doing. What is
3 important here is that Microsoft was still trying to help,
4 was cooperating. Even if this memo does not have to do with
5 the shared code work to develop a product for Windows 95,
6 there is no conspiracy here to hurt Novell. And, of course,
7 anyone thinking about this memo to Glen Mella and Todd
8 Titensor and others from Scott Nelson would say where is the
9 document -- where is even one document of this sort which
10 says Microsoft is not helping us with the namespace
11 extensions? There is nothing.

12 When you ask about termination of a profitable
13 relationship, nothing was terminated. The only thing that
14 happened was that four months after the M6 beta went to
15 Novell, Mr. Gates made a decision to withdraw support.
16 Unless the law has changed of Intergraph against Intel, that
17 decision has no anticompetitive consequences.

18 THE COURT: I am not going to quibble, is not
19 actionable under the antitrust laws.

20 MR. TULCHIN: Correct. Correct. And that was a
21 much better way to say it. Thank you.

22 I said earlier that there is no evidence that
23 Mr. Gates knew before October 3rd that Novell intended to
24 use the namespace extension APIs. Let's look at DX-17,
25 which was written in --

1 THE COURT: I am sorry. Could you say that again?
2 My mind wondered.

3 MR. TULCHIN: Yes. I don't blame you, Your Honor.
4 My wife tells me sometimes I have been talking too long too.

5 THE COURT: It comes with the territory.

6 MR. TULCHIN: I always say yes, dear.

7 THE COURT: That, too, also comes with the
8 territory.

9 MR. TULCHIN: The point I was saying, Your Honor,
10 is that there is no evidence Mr. Gates knew that Novell was
11 going to use the namespace extension APIs. I want to show
12 the Court Exhibit 17. This is an e-mail written by Mr.
13 Struss in September. You will remember that at page 49, it
14 is actually the fourth page of the document, because the
15 first one says page 46 at the bottom, at the top there
16 are -- I should say first that Mr. Henson of Microsoft
17 conducted a little survey of major ISVs and what, if
18 anything, they planned to do with the namespace extension
19 APIs. So at the top of the fourth page there is a report
20 about WordPerfect. You actually have to go back and look at
21 the prior page just briefly. There it is.

22 WordPerfect. Product. No feedback on which one?
23 Have they started work? Very likely based on Tom
24 Creighton's feedback now. Let's go to the next page, 49.
25 At the top there is a lot of stuff about likely based on

1 speculation, and then there are comments. A detailed survey
2 was sent to WordPerfect but the results are unlikely to be
3 informative. Tom, and counsel for Novell says, and it is
4 logical to say this, that is probably Tom Creighton of
5 Novell, who was Johnson's boss, and Harral reported to
6 Johnson, Tom made the comment that there would be hell to
7 pay in the press if we change the interfaces from the
8 initial release of Chicago to the next release. They will
9 try to get feedback to us, but they don't want to tip their
10 hand.

11 Of course, competitors often don't tell their
12 rivals what their plans are for their next product. Novell
13 very understandably might not want to do that. Let's look
14 at the more recent e-mail. This is in September. We go to
15 the first page --

16 THE COURT: What was the date of that? I missed
17 it.

18 MR. TULCHIN: There actually is not a date, Your
19 Honor.

20 THE COURT: But the first one was September before
21 the decision --

22 MR. TULCHIN: Yes. This e-mail on the first page
23 of Exhibit 17 was written by Mr. Struss, September 22nd.
24 You'll see it does not go to Mr. Gates. Below it, and we
25 are now obliterating the part, but there is this report from

1 Mr. Henson.

2 Sorry. We have the wrong section.

3 Mr. Henson here. This is Mr. Henson's report of
4 the survey that he did when he talked to important ISVs.
5 That is what I showed you earlier. His report was for
6 WordPerfect. They say there will be hell to pay in the
7 press if we change anything.

8 Now, of course, they never went to the press.
9 There is no evidence that there were any press complaints,
10 let alone comments to Microsoft about the namespace
11 extensions, so one would conclude from this that they were
12 not bothered by it when they found out. They threatened to
13 go to the press, hell to pay, but no one ever did.

14 Then to go back to where I was going to go, Brad
15 Struss, September 22nd, says below is a summary, Scott H.E.,
16 and that is Scott Henson, pulled together from a couple of
17 weeks ago, so earlier in September, of what ISVs current
18 thoughts are. Only three have begun actual work. The rest
19 are in the plan to do so stage. Scott had to educate them
20 some on what these different terms mean, et cetera.

21 Now, Struss, who is on our witness list if we get
22 that far, then says in the middle of the page,
23 WordPerfect -- and you'll rear, Your Honor, from DX-22, that
24 Struss was, according to Mark Caulkins' e-mail about the
25 Logo program, Struss was designated to be the contact at

1 Microsoft for Novell. So Struss was the guy who talked to
2 Creighton all the time. And Struss says this is more recent
3 than the Henson thing. WordPerfect. They have not begun
4 any work on iShellFolder, sShellView, et cetera. The first
5 two are namespace extension APIs and the et cetera means
6 what it means.

7 If Capone integrates into the Explorer then they
8 will also, quote, figure it out if it is not documented,
9 unquote. If Capone does not, they will just create a
10 standalone e-mail application. For common dialogues the
11 current plan is to use the Microsoft dialogues, but I don't
12 believe they have investigated this enough to know for sure.
13 Mr. Gates didn't get this. But in September Struss is
14 reporting that according to WordPerfect they have not
15 started any work, and they don't know for sure what they are
16 going to do. That is the state of the record of what
17 Microsoft knew when Gates made his decision.

18 Then let's talk a little bit about the state of
19 the record of what happened after Gates made the decision.
20 This, according to Novell, is a problem for which Microsoft
21 should pay billions of dollars.

22 THE COURT: Should we take a break here?

23 MR. TULCHIN: Sure, your Honor. I can finish in
24 about 20 minutes.

25 THE COURT: We'll take a break.