

1 (1:00 a.m.)

2 THE COURT: Just so you all know, five hours isn't
3 enough. My plan is to, if it is okay with you all, but no
4 time pressure, but we'll go until 3:15, 3:30 and then I have
5 got to leave to catch my flight. If we're not finished,
6 which I hope we are, but if we're not finished, um, then we
7 will just have the jury come in and begin with the testimony
8 at 8:00 on Monday morning and I'll reserve ruling on the
9 motion and we'll finish it up Monday afternoon.

10 Is that okay with everybody?

11 MR. JOHNSON: Yes, Your Honor.

12 THE COURT: You don't have to use all of the time but
13 nobody should feel time pressure.

14 MR. JOHNSON: Thank you, Your Honor. Could we put
15 that exhibit, Defendant's Exhibit 230 back up, again. And
16 what I wanted to draw Your Honor's attention to is that
17 Paragraph 4.

18 THE COURT: Right.

19 MR. JOHNSON: Bring that up. What they're talking
20 about here is that yes, a bunch of people left Quattro Pro
21 Group, but what they're talking about is just getting people
22 together to work on bugs such that they can fix bugs. This
23 is not about the product not being ready, this is -- you
24 don't sit still just because shared code is a critical path.
25 You don't ignore obviously what you can do in the meantime.

1 This is not about Quattro Pro being late or being delayed
2 until December. This is not about the product not being
3 done. And we have specific testimony with respect to that,
4 Your Honor. But before we get to that, but before we get to
5 that, I want to show you what Mr. Frankenberg said, and what
6 Your Honor's reaction was to Mr. Frankenberg's testimony.

7 If we could turn to page 1145 of the testimony of
8 Mr. Frankenberg. And turning to -- starting at line four,
9 and just let's see if we can bring that whole page up,
10 doesn't help much, but here I'll read it Your Honor.
11 Question, and it goes onto say, and again we're talking
12 about this Exhibit 230, we feel that it is essential that
13 these key people have a full development environment at home
14 such that they can fix bugs. Doesn't this tell you, Exhibit
15 230, Mr. Frankenberg, that the Quattro Pro team was not
16 ready even then in December of 1995? And Mr. Frankenberg
17 responded, it would imply it wasn't released. Certainly
18 saying it wasn't released to manufacturing, but -- so having
19 the ability to fix bugs from home implies that they could
20 respond to further testing. So clearly the product wasn't
21 complete. It just doesn't say how far from completion it
22 was. And then if you go down a little further Your Honor
23 states --

24 THE COURT: No, I remember. This is just Mr. Gibb
25 knows more about this than Mr. Frankenberg. That's what got

1 me off on the unfortunate conversation about what
2 Mr. Frankenberg learned.

3 MR. JOHNSON: In fact, Your Honor, if you go to the
4 next page, 1146, you state, and starting at line six, I
5 understand your point, but the fact of the matter is you
6 have got plenty of arguments things that wouldn't have
7 happened anyway as I understand the testimony of one of the
8 witnesses that talked about the critical path. This became
9 irrelevant because of the delay, catching up. I don't think
10 Mr. Frankenberg knew that.

11 And you were pointing out, and correctly so, that
12 Mr. Frankenberg doesn't know about this. So why are you
13 doing this, Mr. Tulchin? And you go on down further at the
14 bottom of that page, that's not the issue, I wanted to stop
15 because it seemed to me that you've clearly established
16 Mr. Frankenberg really was not involved in the ins and outs
17 of this decision. And, of course, we had the unfortunate
18 remarks.

19 So Mr. Frankenberg clearly wasn't in the loop here.
20 So let's -- let's go to the person that was in the loop and
21 Your Honor asked on that same page, who was that guy again
22 and I said Mr. Gibb. And so if we turn to Mr. Gibb and
23 starting at page 808, if we can get to 808, please.

24 And starting at line 8, let's just bring up that whole
25 page. Now during the opening statements in this case,

1 Microsoft's counsel made a reference to a document that
2 stated that numerous Quattro Pro developers submitted
3 resignations, again this is the Exhibit 230, before the
4 PerfectOffice 95 product shipped and suggested that this was
5 a cause for the delay in PerfectOffice 95 shipping, some 10
6 months after windows was released. Do you recall this
7 incident of Quattro Pro developers resigning? Answer, yes.
8 What do you recall when that incident took place? Answer,
9 so it was like at the end of the year, right, end of 1995,
10 December-ish in there. Question, and can you tell -- can
11 you tell me what sort of impact, if any, that had on the
12 PerfectOffice Suite delivery?

13 Well, you know, it wasn't good. I mean it is not like
14 it was good news but they had fixed -- you know, they were
15 basically code complete and had basically everything in
16 there. And so again, it surprisingly wasn't critical path
17 for releasing the product. Even though the bulk of the team
18 quit because they were basically done. Again, the focus was
19 to be Windows 95 compliance, so I think you meant compliant.

20 THE COURT: Let me see the previous page. It is not
21 quite what I recall. Go ahead.

22 MR. JOHNSON: Okay. I just read it to you, Your
23 Honor.

24 THE COURT: I know. I know.

25 MR. JOHNSON: From Line 8 down.

1 THE COURT: Go ahead down to the next. Keep going.
2 Keep going.

3 MR. JOHNSON: Okay, Your Honor?

4 THE COURT: So what concerns me he says they were
5 basically done which would imply that they weren't done.

6 MR. JOHNSON: No, Your Honor. In fairness, they're
7 talking about fixing bugs. In other words, you don't stop
8 working on software just because the shared code isn't
9 complete. You've got the engine, it's sitting there, it's
10 basically he says it is -- he says basically code complete
11 and had basically everything in there. That's what
12 Mr. Gibbs said.

13 So, again, it surprisingly wasn't critical path in
14 releasing the product even though the bulk of the team quit
15 because they were basically done. Now, you never stop
16 fixing bugs, Your Honor. But the point of the matter is the
17 engine was ready to go. They were simply waiting on shared
18 code. And he goes on, it turned out not to be critical
19 path. And in another aspect of his testimony, again let's
20 turn to Page 904, Line 5, question, did Quattro Pro end up
21 being critical path of the PerfectOffice Suite 95
22 development? Answer, no, I mean absolutely not. It was
23 shocking actually and they had a lot of challenges to do but
24 every week, week after week, it was shared code. Shared
25 code. It was not Quattro Pro.

1 So Your Honor, I think given the testimony of
2 Mr. Gibb's, I think given the limited nature of Defendant's
3 Exhibit 230 which is only talking about fixing bugs, the
4 fact of the matter is there certainly would not have been a
5 situation in which this court would rule as a matter of law
6 that Quattro Pro was the reason for the delay. And again --

7 THE COURT: Well, actually I'll tell you the truth I'm
8 not sure what -- to analyze it -- it wasn't -- according to
9 Mr. Gibb, it wasn't critical path because this was
10 essentially done by December and we know the product wasn't
11 issued until May, but it wasn't done by December.

12 MR. JOHNSON: Well, Your Honor, no -- I don't think --
13 I don't think that is a fair inference.

14 THE COURT: Well, I think that's a fair point.

15 MR. JOHNSON: And in fact, Your Honor, if we turn back
16 to that 809, Mr. Gibb's testimony, if you can get back to
17 Page 809, please, and looking at starting at Line 9 which is
18 a little further than I read, if the shared code team had
19 delivered their product on time, would Quattro Pro have
20 caused PerfectOffice to have shipped outside this 60 to
21 90-day period after the release of Windows 95? Answer, I
22 don't think so. You know, there's no way to perfectly know.
23 But every indication was that we would have shipped and so
24 we would have. And in fact, he goes on later to say, you
25 know, we had a back up plan, we would have issued a coupon

1 on Quattro Pro if we needed to.

2 THE COURT: The market is going to love that.

3 MR. JOHNSON: No, it is not an uncommon practice. I
4 think Lotus actually did it with their SmartSuite when they
5 tried to get it out for Windows 95. They actually included
6 a coupon, I believe, for the latest version of 123, or
7 AimingPro, one or the other. I don't know the details. But
8 it not an uncommon practice in the area of the release of
9 software products because, Your Honor, frankly, the critical
10 time to market and the importance of that within the
11 industry.

12 THE COURT: Okay. That is helpful. Thank you.

13 MR. JOHNSON: Your Honor, getting back to the
14 MiddleWare story, I think it's important that the court
15 recall that this is not about dicing and slicing the
16 MiddleWare to see what any one piece of MiddleWare might
17 have done or might not have done in the market at this time.

18 In the findings of fact, and in the government case,
19 which are collaterally estopped here, the court pointed out
20 that Microsoft feared the threat from MiddleWare, and they
21 feared the threat as a category of software. Not simply as
22 individual pieces of MiddleWare, but rather that the entire
23 category of software was the problem. So when Mr.
24 -- Professor Noll talked about ubiquity and it had to be
25 cross-platform, the fact of the matter is that the

1 MiddleWare products that we are talking about had both.

2 The third -- the third requirement that Mr. Tulchin
3 stated was a requirement for us to win, I suppose, is
4 absolutely absurd. Professor Noll never said that in order
5 to reduce the applications barriers to entry that MiddleWare
6 had to support full-fledged general purpose applications.

7 It is about -- now I'll return to my analogy, it is
8 about getting the players on the field. It is not about
9 whether they win the game or not. This is why you have to
10 look at the whole picture that occurred during this time
11 period with respect to all of the MiddleWare products that
12 were trying to get on the field. The finding of fact that
13 Microsoft likes to put up there that talks about that there
14 was no MiddleWare at the time which would support
15 full-featured applications was in fact in the relevant
16 market discussion. And what Judge Jackson was doing was
17 saying no, Microsoft, you can't put this MiddleWare in the
18 relevant market. This MiddleWare does not yet support
19 full-featured applications so you cannot say this is a
20 substitute for an operating systems product. To say that
21 that is the standard that we have to meet in this case is
22 absolutely ridiculous. In fact, if that was the standard
23 for harm to competition, the government would have lost the
24 case because neither NetScape or Java or NetScape and Java
25 combined would have supported full service full-featured,

1 whatever the code word is, applications at the time of the
2 government's case.

3 THE COURT: But I'm not worried about the government's
4 case. I'm worried about this case. And this -- that is --
5 let me ask you because it is not easy and -- but I think I
6 have finally articulated what I think a potential problem is
7 and I could wrong. I don't see how, particularly given the
8 evidence, that the uncontradicted evidence in the
9 foreseeable future Novell wanted to write WordPerfect to
10 Windows. I mean there is no doubt about that. They wanted
11 to marry the product. And I realize they had to because it
12 was dominant, but they obviously were also excited about the
13 technology. I don't see -- I understand your theory, but as
14 a matter of fact, where is the evidence that there was any
15 possibility, reasonable possibility, that within a relevant
16 timeframe, I'll take it beyond '96 but I frankly don't know
17 when it ends, but it ends sometime, there is no evidence
18 that there was any alternative operating system to which
19 WordPerfect could have written which is essential to both of
20 your theories, both of the theories of WordPerfect would
21 became so popular that it would commoditize Windows 95, or
22 that it was going to, through its MiddleWare capabilities
23 and exposing APIs, it didn't matter what operating system it
24 ran on. It seems to me that -- and I absolutely understand
25 and agree with the law that a person who violates the

1 antitrust law can't completely take advantage of the fact
2 that it's difficult to recreate what the alternative world
3 would have been. I am sympathetic to that because that is
4 -- that is, you know, that's the, you know, the benefit to
5 the person who they found to violate the law. But it seems
6 to me there has to be in this case as a matter of evidence,
7 there has to be some evidence to support that sometime
8 within the reasonably foreseeable future, WordPerfect was
9 going to go away or PerfectOffice was going to go away from
10 Windows to another operating system. And I understand your
11 theory, but as a matter of fact I don't see how, absent some
12 kind of evidence, and we know -- we know that as 1999 it
13 doesn't exist by the fact that --

14 MR. JOHNSON: Your Honor, by 1999 Microsoft had killed
15 it all.

16 THE COURT: But where is your evidence that something
17 else would have happened?

18 MR. JOHNSON: I will give you that evidence and we'll
19 show you in great detail. It's actually in my presentation
20 and I'll get to it in a moment. But let me just state
21 generally again.

22 THE COURT: I'm sorry, Mr. Johnson, that is the third
23 time you have done that. This is absolutely classic, you
24 know, I have told my law clerk you're wonderful but you
25 don't tell a judge I'll get to it in a minute, you tell me

1 when I ask a question.

2 MR. JOHNSON: I just wanted to finish up with some of
3 the factual points but we can go right to it if you would
4 like. Here you go. Here is a start for you, Your Honor.
5 This is Defendant's Exhibit 231. This shows that in 1993,
6 1994, and 1995 WordPerfect was writing --

7 THE COURT: But that's not my question. There is no
8 question -- and I'll give you that in terms of analyzing
9 that, there is no question that as a matter of history
10 WordPerfect was a cross-platform. They believed in it and I
11 accept it. What is missing is the fact that looking into
12 the future that because of particularly since it likes
13 Windows 95 so much that it is looking forward it was going
14 to be cross-platform. And there has to be something, that
15 seems to me for your theory to prevail as a matter of
16 evidence, that there actually, within sometime, some
17 reasonable timeframe, some likelihood that WordPerfect just
18 as it had been cross-platform in the past there was another
19 operating system to which it might migrate and I don't know
20 where that evidence is.

21 MR. JOHNSON: Your Honor, there is multiple witnesses
22 testimony in this case that Novell and WordPerfect before it
23 not only was cross-platformed, as you see by Defendant's
24 Exhibit 231, but that it planned --

25 THE COURT: Absolutely.

1 MR. JOHNSON: But that it planned -- but it planned
2 for PerfectOffice to be cross-platformed going forward into
3 the future. And you know Mr. Tulchin --

4 THE COURT: Where is that evidence?

5 MR. JOHNSON: Well --

6 THE COURT: Tell me how that can possibly be when your
7 developers and everybody, Mr. Frankenberg, thought that
8 Windows 95 was such a technological break through, if it was
9 such a technological break through, how was it that
10 everybody else was going to have a comparable operating
11 system that was going to provide the kind of functionality
12 that WordPerfect saw that it was going to be accomplished
13 through Windows 95? That to me is a problem.

14 MR. JOHNSON: Your Honor, again, it is not about
15 winning the game. You seem to think we needed to have
16 evidence to prove that we would win the game.

17 THE COURT: No, I -- I don't think this. And this is
18 where a matter of antitrust theory I absolutely understand
19 you but this is a court where you have to have evidence.
20 And I don't know where there is any evidence in the record
21 that within 96 or any time reasonably thereafter there was
22 any indication that there was going to be a switch by
23 WordPerfect to another operating system. Indeed, the
24 evidence is absolutely to the contrary.

25 MR. JOHNSON: Your Honor, look at Mr. Adam Harral's

1 trial testimony in this proceeding. Did Novell plan to
2 continue to make PerfectOffice for Windows 95
3 cross-platform? Answer, yes, it did. The features that
4 were inside of PerfectOffice were some of the foremost in
5 the company, and they were looking at moving those features,
6 some of them back into DOS, over to OS/2, into the
7 Macintosh. They were looking at -- at Unix and Linux. All
8 of those were plans that they had after the Windows 95
9 release.

10 THE COURT: Okay.

11 MR. JOHNSON: Now I also point you to the testimony of
12 Mr. Frankenberg. And I don't think I have a slide for this,
13 Your Honor, but let me read it to you. Question, this is
14 Mr. Frankenberg, question, and during your tenure with
15 Novell, did WordPerfect continue to develop versions of
16 WordPerfect for multiple operating systems? Answer, yes, we
17 did. Question, and during your tenure, did Novell also
18 develop a version of WordPerfect for the Linux operating
19 system? Answer, yes, we did.

20 THE COURT: But there's no indication from that
21 testimony that it had the same functionality that it got
22 through Windows 95.

23 MR. JOHNSON: But it doesn't have to have the same
24 functionality, Your Honor. It doesn't matter whether it had
25 this same functionality. Every operating system is

1 different. The point of the matter is if there is
2 cross-platform applications, if WordPerfect is
3 cross-platform, which it clearly was, the next time a buyer
4 goes out to buy a computer, if that WordPerfect application
5 will run on Linux and the buyer doesn't have to spend \$400
6 to get Microsoft's Windows and instead can spend nothing,
7 zero, for Linux, he has a choice. He has the ability to --
8 the barrier to entry has gone down and a consumer has the
9 ability to make a choice that will create competition in the
10 operating systems market. This is the entire -- this entire
11 period and all of the products we're talking about were
12 providing an opening in that gate for the players to get on
13 the field so that they could provide some competition for
14 Windows. When windows cut them all out --

15 THE COURT: But withdrawal of APIs has nothing to do
16 with it?

17 MR. JOHNSON: Well sure it does because --

18 THE COURT: Why?

19 MR. JOHNSON: Because taking the APIs meant that
20 Microsoft destroyed WordPerfect on the Windows platform. We
21 went into the tank. We missed the critical time to market.
22 We were gone. All of that enormous install base, which you
23 have heard so much about in this case, all of those people
24 or the vast majority of them, came to Windows 95 and said I
25 can't even get WordPerfect for Windows 95. Guess what they

1 did? As Dr. Noll testified and showed you that graph with
2 that big spike and that big spike was all the people
3 switching their Suites from PerfectOffice to Microsoft's
4 Office or to Lotus's SmartSuite because we were not
5 available in the market. WordPerfect --

6 THE COURT: Is there any indication, and these are
7 good answers, thank you for the testimony that is helpful,
8 but is there any indication what was being written for Unix
9 was, and again I come back to Harral's enthusiasm for
10 Windows 95, but it's got break throughs, anything that was
11 being written for Linux which was not comparable to writing
12 to Windows 95 either the existing product or one that --
13 that they didn't need APIs for.

14 MR. JOHNSON: Your Honor, if I'm not a word processor
15 user, I can get all of the functionality I want from
16 WordPerfect whether it is on Unix or Linux or Windows 95.
17 Now Windows 95 might have, and I am frankly not a technical
18 expert, but Windows 95, maybe it has some gee whiz stuff on
19 it. But the point of the matter is when the consumer goes
20 to the store buying that new computer and he can get gee
21 whiz, a little bit of dingles here for \$400 or I can go to
22 take the free or virtually free operating system, that is an
23 opening in the market. The gate is open. The players are
24 able to take the field. They're able to buy something other
25 than the monopolist's product.

1 THE COURT: But the gee whiz is exactly what you're
2 complaining about because gee whiz was exactly what Harral
3 saw as a technological break through.

4 MR. JOHNSON: Your Honor, yes Harral wanted the gee
5 whiz. Yes they're developers they love the gee whiz.

6 THE COURT: Wait a minute. Why would they use
7 Microsoft open common -- if this was your theory of the
8 case, why didn't they use the Microsoft common file open
9 dialogue.

10 MR. JOHNSON: Because they couldn't. Because that was
11 not equal, that was not equal to what they had done before.
12 We discussed this in considerable detail.

13 THE COURT: But you're talking about new purchasers
14 who would go out and buy something for Linux that wouldn't
15 have this function.

16 MR. JOHNSON: No, Your Honor. No, no, no. If we had
17 released the common file open dialogue we used Microsoft's
18 common file open dialogue, we would been just as dead as we
19 were being late. It would have been a failure. Our market
20 share would have dropped just as much if not more if we
21 produced a bad product. And the point of that is, and here
22 is the -- here is the connection you have to understand.
23 Try not to relate the particular harm with the gee whiz
24 stuff for Harral and Richardson with the impact on the
25 market, on the operating system market, from knocking out

1 WordPerfect generally. Because when you knock out
2 WordPerfect generally, you no longer have this great word
3 processing application which is not only cross-platform but
4 which also contains MiddleWare including as Your Honor
5 knows, AppWare. So this cross-platform MiddleWare
6 technology which would have been available had WordPerfect
7 survived, would have provided an opening for another
8 operating system to take advantage of those cross-platform
9 applications and the cross-platform -- and the MiddleWare
10 for other application developers to write to, and would have
11 provided some real competition for Microsoft's Windows 95.
12 By knocking us out, it is the same thing as --

13 THE COURT: No, I understand. But my bearings are
14 knocked right now. The gee whiz is the very heart of your
15 case and that -- it is not like --

16 MR. JOHNSON: No, no.

17 THE COURT: It's not like the gee whiz -- I mean
18 Harral and Richardson, these programmers of yours, are your
19 witnesses and -- and they're and the -- Gibbs I guess used
20 the word cool, that was the very thing that they say they
21 needed. You know to do what you're talking about, they
22 could have used the common open file dialogue and also
23 frankly looking at the market, I mean now my bearings are
24 knocked, but the -- I think it was Dr. Noll talked about
25 that you really ought to be remembering during this period

1 of time there were a lot of more people buying computers,
2 you know, individual consumers, because the internet was
3 being opened up. And I think he made the point that the --
4 and it wasn't in Microsoft's favor, but it is relevant to
5 now, to the extent that you're looking forward it is not
6 just the percentage of the existing install base, but the
7 number of additional people that they were getting. Now if
8 they -- if Novell had used the common open file dialogue, it
9 could have had those customers, according to what you're now
10 saying, and Microsoft didn't keep you from using the common
11 open file dialogue and was going to give it to you free.

12 MR. JOHNSON: No, that is not the case, Your Honor.
13 The testimony from Mr. Harral, which I showed you just a few
14 moments ago, was by taking away these APIs they couldn't
15 even use the common file open dialogue. But even more
16 importantly, Your Honor, even more importantly, to go back
17 and try to use the common file open dialogue would have
18 meant just another way of committing suicide. It would have
19 been a worthless product. It would not have -- it would --

20 THE COURT: No, it wouldn't have been a worthless
21 product.

22 MR. JOHNSON: Yes, it would have.

23 THE COURT: It may have been to the enterprise
24 customers who were used to the bells and whistles and
25 couldn't reach them any more, but that -- but that's a whole

1 different constituency.

2 MR. JOHNSON: Your Honor, if I open up PC Magazine and
3 it has got the annual review, they did it more than
4 annually, they did it all the time, review of new products,
5 and it said that Microsoft Word is terrific and integrates
6 terrific with Windows 95 and it adds a whole bunch of new
7 features, and wonderful product. And then I turn to the
8 review of WordPerfect and it says, this is a giant step
9 backward for WordPerfect. This application doesn't even
10 have the functionality that WordPerfect has historically
11 been known for. Do you really think that that product would
12 have had any traction in the market for word processors
13 either among enterprise buyers or common people like me? I
14 don't know about you, Your Honor, but when I first got into
15 buying computers, I was looking at those magazines, I didn't
16 know anything about them.

17 THE COURT: You were smarter than I was. I just
18 bought --

19 MR. JOHNSON: That is a real mistake, Your Honor. But
20 people look at those magazines. In fact we had all kind of
21 evidence here and Microsoft posited that those reviews drive
22 sales and they're absolutely right. There can be no
23 question about that. So the -- you need to get off the
24 common file open dialogue. That was not a solution that was
25 acceptable that would have resulted in a product that was

1 useful on Windows 95.

2 THE COURT: According to Harral and Richardson and
3 Gibb.

4 MR. JOHNSON: According to our witnesses, yes, Your
5 Honor. According to the evidence in the case.

6 THE COURT: Two developers and a project manager.

7 MR. TULCHIN: And Frankenberg.

8 MR. JOHNSON: Yes, Your Honor, and even more than
9 that, I think that what -- perhaps what you're confusing and
10 maybe if I state it this way, that is an -- the issue of the
11 Namespace extensions and their denying us and what that did
12 to us, is certainly an issue of causation with respect to
13 whether Novell was damaged by Microsoft's conduct. That's a
14 Clayton Section Four question.

15 What we are talking about, however, when I talk about
16 getting the players on the field, is the question of harm to
17 competition, that competitive process, under Section Two of
18 the Sherman Act. That is the question where you look at
19 what happened to WordPerfect and Dr. Noll says yes, the
20 demise of WordPerfect was a significant contributor to the
21 anticompetitive harm in the operating systems market.

22 And he said, and clearly Your Honor weighed in on this
23 because Microsoft tried to tie him into a hypothetical that
24 would only involve getting rid of WordPerfect, and that
25 nothing else happened in this market during this time

1 period. And Dr. Noll, he's honest as the day is long, said
2 if you had just -- if you had just knocked off Novell, and
3 you had not acted in an uncompetitive manner with respect to
4 all this other MiddleWare and all these other applications
5 and the OEM channel, none of that occurred, yeah I couldn't
6 sit here and say that that would have had some giant impact
7 on competition in the operating system market. And Your
8 Honor and the Fourth Circuit correctly observed that that is
9 not -- that is not the analysis here. Dr. Noll is not -- is
10 not required to look at some hypothetical market where all
11 of these other things didn't occur. He is entitled to look
12 at the state of the market as it exists and say given the
13 weakened state of the other ISVs and applications, these
14 MiddleWare products like NetWare and Java and what was going
15 on in the OEM channels and all of the other stuff we are
16 talking about, that Dr. Noll can say with great confidence
17 and yes, knocking off Novell, given the state of the market
18 and what had happened, absolutely was a significant
19 contributor to harm the competition in the operating systems
20 market. And it is because WordPerfect, had it -- had
21 Microsoft not acted in the way that it did, it would have
22 been sitting on the shelf at or about the time Windows 95
23 came out, and all of those millions of WordPerfect users who
24 came into the store, be they enterprise or individuals,
25 would have said ah, here is my new PerfectOffice Suite, the

1 one I have used forever and know the best.

2 THE COURT: Didn't use PerfectOffice for forever, I
3 think it is December 1994.

4 MR. JOHNSON: WordPerfect, Your Honor, well certainly
5 WordPerfect which was the real driver for these Suites. The
6 word processors after all I know there are accountants and
7 there are people that like the spreadsheet, but that is not
8 the important thing.

9 THE COURT: Mr. Frankenberg sure thought it was
10 important because he -- he devoted all of the resources to
11 put out Suite. But be that as it may, go ahead.

12 MR. JOHNSON: So I hope you understand there is a
13 difference between the causation question as to what
14 Microsoft did to us and the damages which flow from that,
15 and the question of whether this conduct closed the gate
16 which meant that another competitor couldn't get on the
17 field, another competitor that had the ability because it
18 was cross-platform, because it contained MiddleWare, to
19 reduce the applications barrier to entry in the operating
20 systems market.

21 THE COURT: And my question to you is simply, and I
22 think you have answered it, where is the evidence that
23 during the relevant period which I'm prepared to say is 1996
24 and the reasonably foreseeable future, where is there any
25 evidence whatsoever that there was another operating system

1 even being conceived of that contained all of the what you
2 call, now call bells and whistles, which -- that Harral said
3 were all of the benefits that caused WordPerfect to be so
4 excited about the Windows 95? Where is there one iota of
5 evidence that there was something else to which it could
6 have cross-platformed that would provided the benefits that
7 Harral saw in the Windows 95?

8 MR. JOHNSON: Your Honor, I don't know. There might
9 have been. It is irrelevant though.

10 THE COURT: That is -- that is a fair question, it may
11 be irrelevant and that is --

12 MR. JOHNSON: It is irrelevant and I think Your Honor
13 needs --

14 THE COURT: Well, let me follow-up. Why is it
15 irrelevant when the contrary point of view is the reason the
16 operating system monopoly was maintained during the relevant
17 period was because Microsoft had produced a superior
18 product, Windows 95?

19 MR. JOHNSON: Well, Your Honor, I think that might be
20 a question of fact for the jury to decide. In other words,
21 was it a matter of superior efficiency that Microsoft
22 maintained this monopoly through the period of the 1990s?
23 Not according to the government case. Was it --

24 THE COURT: But I'm not judge Jackson and this isn't
25 the government case. This is the case where you're seeking

1 treble damages and you've produced Harral and Richardson and
2 Frankenberg and Gibb who all say this was a wonderful
3 technological break through which to me means it is a
4 superior product. Now if in fact there was something else
5 in the stage of development which is within the reasonably
6 foreseeable future might have been used to provide
7 comparable benefits, then I understand your position. I
8 don't understand your position when according to your
9 evidence in this case Windows 95 was according to your
10 evidence the superior product.

11 MR. JOHNSON: Your Honor, I'll just have to add this
12 and we'll move onto something else. I -- I think it is
13 irrelevant whether the options that were -- could have been
14 made available to consumers was comparable or equal to
15 Windows 95. The question is whether consumers would have
16 been offered choices. Choices is what the antitrust laws
17 are all about. We don't care about who wins or who loses
18 under the antitrust laws. What we're trying to protect is
19 the competitive process. If consumers had the ability, if
20 this product which we say and the evidence reflects, if this
21 product had had the capability, and Dr. Noll so testified
22 that it did, to reduce the applications barrier to entry
23 protecting Windows monopoly, then knocking them out harmed
24 competition in the operating systems market. You are very
25 focused on this thing about equal functionality. That is

1 not the issue. The issue is choice. The issue is the
2 ability of the consumers not to have to go to the store and
3 only see Windows 95 on the shelf. They were the monopolist.
4 They had the power to exclude competition, they had the
5 power to raise prices, and the antitrust law says, okay, you
6 build a great product and that's the only reason that you
7 are the only one out there, fine and dandy. But when you
8 engage in anticompetitive conduct in order to destroy
9 threats, no matter how small they might be, and this gets
10 into the issue of are they allowed to kill the children
11 before they grow into adults, which was examined obviously
12 in U.S. V Microsoft and Your Honor in fact quoted language
13 from that opinion on that point in your summary judgment
14 opinion, that we're not going to allow the monopolist to
15 wipe out these threats before they have gotten to the point
16 where they could provide some real competition for Microsoft
17 in the operating systems market.

18 So when Microsoft points to findings of fact in 1999,
19 then nothing had happened, yeah, nothing had happened, they
20 wiped out all of the threats. They destroyed WordPerfect.
21 Lotus SmartSuite was a shell of itself. Had extremely tiny
22 marketshare. NetScape was virtually destroyed. Java. All
23 of these, all of these items, all of these things that could
24 have provided some competition to Microsoft in the operating
25 system market were killed. It is no wonder. In fact, you

1 know, the funny thing about it is today Microsoft is in
2 court arguing that Google was doing the same thing to them.
3 But the fact of the matter is, in this period of time
4 Microsoft cut off, cut them off at the legs all of the
5 threats that could have threatened Windows' monopoly and
6 operating systems. And it is that conduct, that
7 anticompetitive conduct, which allowed them to maintain
8 their monopoly because if that anticompetitive conduct
9 hadn't occurred, WordPerfect would be on some large
10 percentage of the -- of the users of word processors or
11 Windows 95, NetScape would have been ubiquitous on all of
12 the computers that people have today. Java languages would
13 have been in wide use and application developers would have
14 been writing to that. Application developers --

15 THE COURT: Where is the evidence of that? That is my
16 question.

17 MR. JOHNSON: Okay.

18 THE COURT: And that is exactly what the issue has
19 always been. Your theory makes sense. There is no evidence
20 of it.

21 MR. JOHNSON: Your Honor, you can't -- the antitrust
22 laws will not allow you to kill a nascent threat whether or
23 not, whether or not that threat has blossomed into something
24 that absolutely has and Mr. -- Professor Noll's slide the
25 wall comes tumbling down. Clearly in this time period the

1 wall did not come tumbling down. Clearly what we are
2 talking about here is that Microsoft moved against the
3 nascent threats before the wall could come tumbling down.

4 THE COURT: And it is probably time to move on, but I
5 could be wrong, but I mean I fully acknowledge that, but
6 what I -- I had a hard time articulating throughout the case
7 and it is -- I have phrased it different ways, it is facts
8 colliding with theory and things of that nature, the more I
9 think about it, I am absolutely sympathetic to the fact that
10 whatever evidence you produced about the alternative world
11 you get the benefit of the doubt on since it was Microsoft
12 which caused the alternative world not to exist. I
13 understand that. But simply as a matter of trial and your
14 theory, doesn't there at least have to be some evidence as
15 to what the alternative world would have been particularly
16 in light of the evidence of your developers that they loved
17 Windows as a technological matter.

18 MR. JOHNSON: There is evidence of what that world
19 would have looked like and most of it comes right from the
20 mouths of Microsoft's executives. It is the evidence with
21 respect to the MiddleWare threat presented by Novell,
22 WordPerfect and its technologies. And I would like to go
23 through that. In fact, I would like to, and I thought it
24 was very interesting and maybe we can segue into this and
25 work through some of the what I think are some of the

1 important legal issues that Your Honor is grappling with, is
2 that Mr. Tulchin never once talked about the opinions which
3 exist in this case.

4 So I think that we need to take a look at those
5 opinions and let's talk about the legal issues which arise
6 as a result of the decisions that Your Honor made and the
7 Fourth Circuit in this case. I have to turn this thing on?
8 Slide one.

9 THE COURT: I am correct that you want me to retract
10 something I wrote in one of my prior opinions? You want me
11 to take the position -- you think I was wrong when I said
12 that the conduct had to cause harm in the market. You agree
13 at least to that extent that what I said is not the law of
14 the case?

15 MR. JOHNSON: I am sorry.

16 THE COURT: Maybe Mr. Martin knows the answer? Maybe
17 he knows what I'm asking.

18 MR. MARTIN: Refers back to what we talked about --

19 THE COURT: Good to see you again.

20 MR. MARTIN: I'm thrilled to be back. What we talked
21 about in the jury instructions was we didn't agree with the
22 mechanics at which you reached the result, but we agree with
23 the result. And the fact that all of the analysis that you
24 gave was the correct analysis, it was just sort of jumbled
25 around a little bit so that it wasn't the injury to us that

1 harmed competition, it is the conduct that harmed the
2 competition. And did that conduct then harm us. So while
3 it is law of the case that your decision is correct, it is
4 not law of the case that the analysis doesn't have to be
5 correct. Does that make sense? We didn't appeal the way
6 you reached your correct result because there is no reason
7 to appeal that. But the result is correct.

8 THE COURT: In any event, I have somebody who was
9 taught to think on the evidence as it is presented to me and
10 I am simply not impressed with the fact that if I was wrong
11 before I have to be wrong now. Now that I have more
12 evidence before me and now that I'm thinking better, I'm not
13 impressed with the argument that I have -- I have to
14 continue with error because I made error before.

15 MR. JOHNSON: Your Honor, we don't -- and we don't
16 think that. But we think Your Honor did have it right the
17 first time.

18 THE COURT: Well that is --

19 MR. JOHNSON: We also think, Your Honor, that we tried
20 this case with Your Honor's and the Fourth Circuit's
21 decisions in mind. And we tried this case to meet the
22 standards that Your Honor set forth in its opinion and that
23 the Fourth Circuit said in affirming you in this case. And
24 that obviously is one of the reasons why there is a doctrine
25 called law of the case. So this is from your opinion and

1 Novell has raised an issue of triable fact as to whether
2 Microsoft's Novell injuring conduct was anticompetitive and
3 whether that conduct caused anticompetitive harm in the PC
4 operating systems market.

5 And Your Honor held, and Your Honor may recall that in
6 Microsoft's motion for summary judgment in which they filed,
7 and which this opinion responded to, argued that our
8 evidence was insufficient to prove anticompetitive conduct
9 or harm to competition as a matter of law.

10 Microsoft argued, among other things, that it had no
11 quote affirmative duty to assist, or to continue assisting a
12 competitor, and that therefore Novell's claims was barred
13 under cases such as Trinca.

14 THE COURT: I assume you don't disagree with that
15 proposition at all. Even Aspen Ski, the instruction was you
16 don't have to cooperate with anticompetitive.

17 MR. JOHNSON: I don't disagree with the proposition
18 that as an initial matter that a company has no duty to
19 cooperate. I do think that this case that we have here as
20 Your Honor held, and we're going to go through that right
21 now, not only falls outside of the confines of Aspen Ski,
22 but that even if we analyze it as a refusal to Deal case
23 under Aspen Ski that we still have a cognizable cause of
24 action here. So in response to Microsoft's motion, Novell
25 cited much of the evidence which we have now presented at

1 trial. And we think that we have demonstrated a prime facie
2 case with respect to exactly what Your Honor said in the
3 opinion. Your Honor held -- why is this not working? Power
4 on. That is good. Thank you.

5 As an initial matter Your Honor said it is not
6 entirely clear that Microsoft's conduct was merely a refusal
7 to cooperate. Novell has presented evidence that Microsoft
8 affirmatively misled Novell about Windows 95 and entered
9 into anticompetitive agreements with OEMs. As to
10 Microsoft's -- now your observations in 2010 are just as
11 true today as they were then. In the trial of this matter,
12 we have presented substantial evidence that Microsoft
13 affirmatively misled Novell about Windows 95. Indeed, the
14 evidence is overwhelming that WordPerfect and Novell, as
15 well as other ISVs, were affirmatively misled by Microsoft
16 with respect to the Namespace extensions.

17 As you have heard Mr. Harral testify, and this is
18 PX-105, Your Honor, one of Microsoft's top executives, the
19 program manager for Chicago, David Cole, he was directly
20 responsible for the marketing and product managing of
21 Windows 95, came to WordPerfect personally in November
22 of 1993 to evangelize the Namespace extension functionality.
23 Microsoft's purpose in visiting WordPerfect, according to
24 Adam Harral who attended this meeting, was to encourage
25 WordPerfect to be a great Windows 95 application, and to

1 adopt the look and feel of the new operating system so that
2 WordPerfect's shared code technologies were congruent with
3 the way that Windows 95 was trying to approach its users.
4 That is from the testimony of Adam Harral. At this meeting,
5 Microsoft told WordPerfect that it was going to document the
6 shell extensions. They explained how the extensibility
7 would work and what controls WordPerfect would have.
8 According to Mr. Harral's testimony, Microsoft discussed and
9 evangelized the Namespace extension APIs and promised to
10 provide WordPerfect with information to enable WordPerfect
11 to plug its own technologies into the Windows 95 platform so
12 that any user who was living in the shell could find and
13 utilize WordPerfect features and functionality. In fact,
14 WordPerfect talked at length, at length, with Microsoft's
15 representatives about WordPerfect's document management
16 system, its clip art libraries, and hooking its Quickfinder
17 technologies into the operating systems. Again, that is all
18 from Mr. Harral.

19 Now Microsoft's evangelism of the Namespace extensions
20 was not only to WordPerfect, it was to the entire ISV
21 community. Novell has presented evidence with respect to
22 Microsoft's conferences and the presentation of Mr. Joe
23 Belfiore who was the program manager for the Chicago shell.

24 THE COURT: Now let me just ask, and I'm not
25 suggesting that Microsoft -- Microsoft and their personal

1 intent is not relevant in figuring out Microsoft's
2 deception. You don't think those people didn't actually
3 believe -- they didn't subjectively believe that at the
4 time, do you?

5 MR. JOHNSON: Not these people.

6 THE COURT: Not these people right.

7 MR. JOHNSON: Right, not these people. Mr. Belfiore
8 urged the ISVs to use the new controls provided in Chicago.
9 In fact, his presentation said you not only could use these
10 controls, you should use these controls including the
11 Namespace extensions.

12 The presentation detail to all of the ISVs, how they
13 could create custom Namespaces within the Explorer as well
14 as to access the new Namespaces that were being provided by
15 Microsoft such as Network Neighborhood and Briefcase. Both
16 the ability to create new Namespaces and the ability to
17 access Microsoft's Namespaces was important to WordPerfect
18 and to other ISVs.

19 Now the evidence further reflects that WordPerfect was
20 not the only ISV that was using these extensions. PX-215,
21 Your Honor, which I will just reference, we actually saw it
22 a little earlier today in Mr. Tulchin's presentation,
23 indicates that Oracle, Symantec, Stack Electronics and DCA
24 had already started work with the Namespace extensions and a
25 dozen other companies were investigating their use. And

1 that was in September of 1994.

2 In other words, Mr. Gates' decision in pulling the rug
3 out was not only pulling the rug out from under WordPerfect,
4 but from multiple ISVs which undoubtedly resulted in the
5 loss of many innovations that would have provided consumer
6 benefits in this era. Now true to Mr. Cole's promise to
7 WordPerfect, Microsoft partially documented the Namespace
8 extensions in the M6 Beta released in June of 1994. The
9 evidence in the record is that even prior to the receipt of
10 this partial documentation Novell developers were working on
11 plans to utilize the Namespace extensions in the new product
12 for Windows 95. With the receipt of this partial
13 documentation, the unrebutted evidence on the record is that
14 Novell was 80 percent complete in developing a file open
15 dialogue within a shared code group for Windows 95 by
16 October of 1994. In other words, WordPerfect Novell had
17 spent many months investing in the technology evangelized by
18 Microsoft.

19 During that time period, the unrebutted evidence is
20 that Microsoft continued to provide further support with
21 respect to the Namespace extension technology through
22 premier support. Now, as we know, Mr. Gates unilaterally
23 withdrew both the documentation and the support for the
24 Namespace extensions on October 3rd, 1994.

25 THE COURT: Let me ask you now quite frankly I doubt

1 very seriously that Mr. Tulchin is going to make this
2 argument to the jury. Let's suppose that what happened was
3 that the very worst thing that Mr. Frankenberg ever did for
4 Novell was to make a very persuasive presentation about
5 Corsair at the Agenda 95 Conference and that that spooked
6 Mr. Gates which made him think oh my God, they're so far
7 ahead of our people that I don't want them to have our
8 intellectual property and came back and made the decision
9 then. You would agree with me that if that is what
10 happened, and as I said I doubt Mr. Tulchin is going to make
11 that argument, if that is what happened, there was no
12 deception. That because he didn't make up his mind until he
13 became concerned.

14 MR. JOHNSON: On the contrary, Your Honor.

15 THE COURT: You think it was deception even though he
16 hadn't made up his mind before?

17 MR. JOHNSON: If that was in fact the record in this
18 case, maybe that question would be presented. But that is
19 not the record in this case.

20 THE COURT: But I just want to get my head on
21 straight. If he didn't make up his mind until he made up
22 his mind or shortly before for whatever reason, I think
23 there is no deception by having made these statements
24 earlier. It is just that --

25 MR. JOHNSON: I disagree, Your Honor. I disagree.

1 These extensions had already been documented. These
2 extensions had already been given to the ISVs at
3 WordPerfect. Given the reasons that Mr. Gates gave for
4 pulling these extensions at that point in time, that was
5 premeditated predatory action on behalf of Mr. Gates.

6 THE COURT: Well, the statement caused the harm, your
7 point is that it was relying upon the exposure of the APIs
8 before, that's where the focus has to be. I'm saying if he
9 hadn't made up his mind yet, that is not deception.

10 MR. JOHNSON: Your Honor, the record in the case
11 though is he made up his mind a lot earlier.

12 THE COURT: That's a whole different question.

13 MR. JOHNSON: Right. Let's get to that. The evidence
14 reflects that in June of 1993, at Hood Canal which is
15 Mr. Gates home, his home compound I guess he calls it, get
16 away, executives within systems and applications devised a
17 plan to gain access to the extensibility APIs that were
18 planned for Chicago. The proposal showed here, the Radical
19 Extreme, was to hold back the extensibility features from
20 Chicago for the sole benefit of Microsoft's Office
21 productivity applications cutting out WordPerfect and other
22 ISVs. The excuse to be offered to ISVs for this Radical
23 Extreme approach was for Microsoft to say, quote, we
24 couldn't get it done in time, dot, dot, dot. Now that is
25 clearly pretextual reasons. At least the inference is there

1 that it is extensible.

2 Now the documents reflect that Mr. Gates personally
3 approved of the plan to ship the extensible shell in office
4 and to make Chicago non extensible. At the end of this
5 e-mail, Your Honor, Plaintiff's Exhibit 52, Bill G. says, do
6 it. It is also obvious from the record, Your Honor, that
7 Mr. Gates' notion of fair competition was not accepted by
8 many within Microsoft although there certainly were some
9 exceptions. Mr. Muglia, in particular, noted that providing
10 ISVs with the shell extensibility provided in Chicago would
11 force Microsoft, quote, to battle against their competitors
12 on even turf, referring to, of course, Word and Excel.

13 Now, Your Honor, if Microsoft had decided then and
14 there not to evangelize the Namespace extensions, not to
15 offer this exciting technology to WordPerfect and other
16 ISVs, then this court might have been faced with some sort
17 of unilateral refusal to deal with issues. But that is not
18 what happened here. The evidence reflects that more
19 fair-minded individuals within Microsoft, namely the top
20 executives within the systems division of Microsoft,
21 decided --

22 THE COURT: I like Mr. Silverberg too but maybe not
23 because he is a nice person but because he is in another
24 line of business.

25 MR. JOHNSON: Well, we think Mr. Silverberg had it

1 right.

2 THE COURT: That is a different question.

3 MR. JOHNSON: And in this e-mail, Plaintiff's
4 Exhibit 473, which is written in September of 1993 that
5 these four gentlemen, Bob Muglia, Jim Allchin and David Cole
6 got together in September of 1993 and decided to document
7 the Namespace extensions. In Brad Silverberg's own words to
8 make them A-list. That decision was made by Mr. Cole and
9 the other system executives just two weeks before Mr. Cole
10 came to WordPerfect to advise them that the Namespace
11 extensions would be documented.

12 Now Mr. Gates' decision, on the other hand, made over
13 a year later, is based on the exact same considerations laid
14 out in the Hood Canal retreat in June of 1993. One, Chicago
15 would not give ISVs the extensibility of the Namespace
16 extensions. Second, the purpose of the plan was to grant
17 those benefits to Microsoft's Office productivity
18 applications in Office. Three, the extensible shell will
19 not be available to others until long after office had been
20 able to capture the market. All for the purpose of
21 disadvantaging the likes of Notes and WordPerfect.

22 Now this court has noted that Mr. Gates' action
23 resulted in a short-term loss for Microsoft within the
24 operating systems market. And the evidence certainly shows
25 that the actions resulted in Microsoft's long-term gain

1 widening the moat and protecting Microsoft's operating
2 systems monopoly.

3 THE COURT: But look, what he was worried about is not
4 nice. What he was worried about was competition in the
5 applications market. And that last -- your fourth bullet
6 point on the right hand side clearly shows that the concern
7 is Office is not going to be able to compete with the likes
8 of Notes and WordPerfect and that he wants to hold back
9 until windows 96 is released.

10 MR. JOHNSON: Your Honor, what this exhibit
11 demonstrates is that Mr. Gates all the way back in June of
12 1993, was going to -- was going to gain the interfaces in
13 order to advantage his own products. That is what this
14 slide and this evidence indicates.

15 THE COURT: But you can't infer, and indeed I think
16 your very thrust is to the contrary, and your very -- is
17 that somehow sometime he was going to -- he was going to
18 sacrifice short-term profits. He wanted to maximize
19 short-term profits and perhaps not nicely, but he wanted to
20 maximize short-term profits because whatever the loss on the
21 operating system side and he probably didn't think he was
22 going to lose anything on the operating side, he was going
23 to pickup on the applications side because he wouldn't have
24 to compete with Notes and WordPerfect.

25 MR. JOHNSON: Your Honor, let me address that point

1 directly because Your Honor has raised it before.

2 THE COURT: I have.

3 MR. JOHNSON: And I think it is wrong.

4 THE COURT: Okay.

5 MR. JOHNSON: Let me explain why. The willingness of
6 a monopolist to accept a short term loss is, of course,
7 classic behavior of a monopolist's intent in maintaining a
8 monopoly. You have suggested that Microsoft's conduct may
9 somehow be justified by the increase in profits that may
10 have resulted in --

11 THE COURT: I'm not saying it's justified one iota. I
12 am just saying it's a matter of evidence, it's classic
13 inference, but go ahead. Don't -- don't say I suggested it
14 is justified, I'm not suggesting for a second it is
15 justified.

16 MR. JOHNSON: Okay. Let's just say that he gained
17 profits in the Office productivity market as a result of his
18 action. With all -- with all respect, the effect of
19 anticompetitive conduct on the profits of a monopolist in
20 some other market is irrelevant to the analysis.

21 THE COURT: It's not irrelevant if your claim is from
22 monopolization of the operating system market. I have got
23 plenty of problems with this case and I don't think you have
24 rethought it once and you told me at the bench this was the
25 same claim whether it was in the applications market or in

1 the operating system market, you're wrong. It makes it a
2 whole different level of complexity. And you still could be
3 right but -- but I swear you really -- I think you and your
4 client both, just like Mr. Gibb was all upset that he wasn't
5 in the tent when there was Word and being served with
6 Windows, there is a huge conceptual difference. And it --
7 and I frankly don't think you have come to grips with it.

8 MR. JOHNSON: Your Honor, I -- I think when we both
9 then when we pled this case and now, that we understood that
10 the same facts prove both monopolization of the Office
11 productivity market and it also proved monopoly maintenance
12 in the market for operating systems. That is -- that is
13 what we pled and that is what our claims were. It is true,
14 of course, that we lost those claims with respect to
15 monopolization of the applications market on the statute of
16 limitations. There is no debate about that. But that does
17 not mean that we were incorrect in claiming that the same
18 conduct resulted in monopolization in the operating systems
19 market. Profitability elsewhere, and in this case not in
20 the operating systems market but in the applications market,
21 cannot be a business justification for anticompetitive
22 conduct. Some other market, some impact --

23 THE COURT: I'm not suggesting it is, but I absolutely
24 think we're talking about the facts. Obviously if somebody
25 is willing to take -- if they have a monopoly in a market

1 and they're willing to take short-term losses, it is a
2 reasonable inference, absent other proof, that their purpose
3 in taking the short-term loss was to benefit from a
4 long-term gain in the market in which they have a monopoly.
5 That is a factual inference. All I'm suggesting is that it
6 is not justification, it is not anything else. You cannot
7 draw that inference when the evidence was suggested, indeed
8 your own theory would suggest, that what they're trying to
9 do is to make up money in the applications market. It is
10 not justified. It is not anything. I'm just saying that
11 the first it is a factual inference to be drawn from the
12 fact that you take a short-term loss in a market where you
13 have a monopoly, it is perfectly reasonable to say oh my
14 God, that shows that you -- that you want a long-term gain.
15 I don't -- I just don't think you can draw that same
16 inference where your, you know, where the evidence shows
17 that you're going to make up for any loss in one market by
18 -- by profits in another market. That is all I'm saying. I
19 don't think it's a matter of antitrust doctrine, it is a
20 matter of inference.

21 MR. JOHNSON: It is actually a matter of antitrust
22 economics. And the reason that the profits in that other
23 market are not relevant, the only way that those can be
24 relevant is if the conduct improved consumer welfare in that
25 market. Now not even Microsoft has had the gall to suggest

1 that knocking off WordPerfect improved consumer welfare in
2 the Office productivity applications market. So as a matter
3 of antitrust economics, Your Honor, and this is the only
4 point I'm making here, the fact that Microsoft had
5 additional profits in the Office productivity applications
6 market is irrelevant unless Microsoft could show that that
7 conduct somehow improved consumer welfare in that market.
8 It did not. For that reason, as a matter of antitrust
9 economics --

10 THE COURT: We agree to disagree on this. I don't
11 expect Mr. Tulchin to be making the argument that they were
12 going to try to make money on the application in front of
13 the jury. I don't think I'm going to hear that. But I'm
14 telling you what I think and we will agree to disagree.

15 MR. JOHNSON: Okay. Now, the evidence also reflects
16 that Microsoft's anticompetitive conduct resulted in
17 Microsoft's ownership of the key franchise applications
18 sitting on top of Windows. That evidence is unrebutted on
19 this record. As Mr. Gates' e-mail reflects, by August
20 of 1997 Microsoft had captured 90 percent of the Office
21 productivity applications market. In 1994, during the
22 relevant time period, that share was about 60 percent. As a
23 matter of basic antitrust economics, Microsoft's
24 monopolization of the Office productivity applications,
25 which we don't have a plan for here, but the fact of their

1 monopolization of the Office productivity applications
2 market widens the moat protecting Microsoft's operating
3 systems monopoly.

4 Now whatever you may think, and we're going to get to
5 the cross-platform MiddleWare theory of this case, there can
6 be no denying the force of this evidence, nor is there any
7 denying that the Fourth Circuit accepted that theory of harm
8 to competition in the operating systems market.

9 THE COURT: And neither I or the Fourth Circuit before
10 had the testimony of Mr. Harral, Mr. Gibb and Mr. Glenn --
11 what is his name?

12 MR. TULCHIN: Richardson.

13 THE COURT: Richardson, that this great new product we
14 wanted to be married to. And we -- they didn't have it
15 before them, I didn't have it before me. And that -- that
16 may change the landscape. They didn't have it before them.
17 And right or wrong, it is something which is new now that
18 the case has gone to trial. And the implication may be
19 nothing. I'm not saying that -- what I'm saying is that
20 simply in terms of what was before me and the Fourth
21 Circuit, I had not heard Mr. Harral, Mr. Richardson and
22 Mr. Gibb testify about and Mr. Frankenberg testify about
23 what a great new product Windows was and what we want to do
24 is to write to Windows and make it a better product. And I
25 and Novell and Microsoft are all going to be benefitted.

1 That was not before me.

2 MR. JOHNSON: Your Honor, we have heard you on that
3 loud and clear.

4 THE COURT: But you're the one telling me what was
5 before me. I'm telling you that was not before me. It was
6 not before the Fourth Circuit. And if it is significant, it
7 changes the analysis. That's all I'm saying.

8 MR. JOHNSON: Your Honor, we don't think it does, but
9 we understand Your Honor's thoughts on that subject.

10 THE COURT: Do not talk to me any more about the law
11 of the case because things have changed.

12 MR. JOHNSON: Microsoft's affirmative actions taken to
13 mislead Novell also takes this case out of the purview of
14 the Christie Sports case. As the court there noted,
15 Christie Sports might well have presented a proper antitrust
16 claim if the evidence was that Deer Valley had first invited
17 an investment and then disallowed use of that investment
18 which imposed costs on Christie Sports that had the effect
19 of injuring competition in the relevant market. That is
20 what Christie Sports says. That is exactly what happened
21 here. Microsoft invited us, indeed begged us to make an
22 investment in Chicago, and in particular, in the use of an
23 exciting new technology presented by the Namespace
24 extensions, and then disallowed use of our investment. The
25 year we spent investing in those extensions plainly had the

1 effect of injuring competition in the operating systems
2 market because of the result of Microsoft's action. Thus,
3 for the reasons stated, in this court's opinion in 2010,
4 this case does not present merely a refusal to cooperate and
5 is well outside whatever lines are created by Aspen Ski and
6 Christie Sports.

7 Let me briefly address the beta agreement argument
8 raised by Mr. Tulchin. Mr. Tulchin presented a lot of
9 argument about the beta licensing agreement and allegedly
10 what the standards in the industry gave it sort some of
11 unfettered right to change everything in its beta release.
12 That evidence is clearly disputed and is certainly a factual
13 issue. I would refer the court to Mr. Raikes' statement
14 where he stated that publishing an API was the equivalent of
15 putting a stake in the ground. And that was something that
16 ISVs could rely on both now and in the future. That is from
17 Microsoft's -- one of Microsoft's own top executives. The
18 purpose of documenting an API is to put a stake in the
19 ground. Moreover, Mr. Harral observed that in his 31 years
20 in the industry he had never seen such an extraordinary
21 event.

22 Now this court has already instructed the jury that
23 Microsoft's beta agreements do not protect it if it has
24 engaged in anticompetitive conduct. That is right both as a
25 matter of law and as a matter of common sense. No more than

1 Microsoft can use its intellectual property as a sword to
2 harm a competitor, it may not hide behind the shield of a
3 disclaimer to avoid liability for its anticompetitive acts.

4 Now Your Honor in that March 2010 opinion you went on
5 to state after saying that this case was outside of Aspen
6 Ski because of the deception involved, and we have gone
7 through that, the court stated even assuming Microsoft's
8 conduct should be characterized as a refusal to cooperate,
9 there is a question of fact about whether it was
10 anticompetitive under Aspen and Trinca. Microsoft's conduct
11 ran contrary to the preferences of operating system
12 consumers. And this court agreed that a fair inference
13 arose that Microsoft's conduct in this case was an effort to
14 sacrifice short run benefits and consumer goodwill in
15 exchange for a perceived long run anticompetitive impact.
16 And that inference was confirmed by the evidence in this
17 case.

18 Now, in your March 2010 opinion, the court also
19 pointed to the fact of the history of voluntarily --
20 voluntary and therefore presumably profitable Microsoft
21 Novell cooperation both generally over the years and
22 specifically in sharing API information pertaining to
23 Windows 95 to optimize application functionality on
24 Microsoft's operating systems. And I'm literally quoting
25 from your opinion here.

1 The evidence of this long-term voluntary and mutually
2 beneficial relationship is legion in the evidence before
3 you.

4 THE COURT: Well, that is what I was trying to ask you
5 inartfully before where I'm sure you'll tell me now where is
6 the evidence that Microsoft tried to destroy that in light
7 of what I now understand is the ability of WordPerfect to
8 operate both on the start menu and on -- as an icon. That
9 -- that to me is a -- that to me is a troublesome issue. I
10 understand you on deception, but this, it seems to me, that
11 in fact Microsoft did nothing to destroy a long-term
12 profitable relationship because it still allowed WordPerfect
13 to appear on Windows 95. That's -- I tried to ask that
14 before and I asked it inartfully and --

15 MR. JOHNSON: Yes, Your Honor, I think really the same
16 facts, if we even get into this question of Aspen Ski and
17 Christie Sports, and that is they have evangelized the
18 Namespace extensions to us. This was voluntary action on
19 behalf of Microsoft. We didn't, you know, demand it, or
20 coerce it. They came to our offices in Utah. They
21 evangelized this technology to us, that was voluntary
22 cooperation. The history of such voluntary cooperation with
23 respect to APIs and Windows operating systems go all the way
24 back into the 1980s. And, in fact, that is why we played
25 that little section of the deposition of Mr. Myhrvold

1 earlier this week I guess, all the days kind of mix together
2 for me, but we played that because he was back evangelizing
3 WordPerfect back in the late 1980s for OS/2. And then he
4 did it subsequently, of course, for Windows. And so we had
5 a continual years and years and years and years of voluntary
6 cooperation in a mutually beneficial relationship between
7 the parties because as the evidence confirms, Microsoft
8 needs these applications. Applications are what sell
9 operating systems. The evidence in this case is
10 overwhelming both from Microsoft's own mouth and, of course,
11 our people as well that these findings of fact in the
12 government case are absolutely true. That applications
13 drive the world of operating systems. So this was a
14 mutually beneficial relationship.

15 With respect to WordPerfect, this relationship was not
16 only mutually beneficial, it was contractual. WordPerfect
17 was urged to join and did join. Here is another finding of
18 fact that says the same thing, I'm sorry I skipped it, but
19 it is all about Microsoft must convince ISVs to write
20 applications to take advantage of the new AIPs so that
21 existing Windows users will have incentive to buy an
22 upgrade, et cetera, et cetera. And he goes on at
23 considerable length about this mutually beneficial
24 relationship between the OS provider and the applications
25 provider. Now with respect to WordPerfect, as I said, it

1 was contractual. WordPerfect was urged to join and did join
2 Microsoft's first wave program. The purpose, according to
3 Microsoft, was to ensure a critical mass of key Chicago
4 applications to ship within 90 days of Chicago's shipment
5 and supporting the key features necessary to make Chicago
6 successful. These first waivers, like WordPerfect, got
7 special technical informational and marketing assistance to
8 maximize their chances of success. First waivers, Your
9 Honor, were further required to submit in writing their
10 confirmation of their intent to ship within 90 days of
11 Chicago's release.

12 THE COURT: This is a facetious question, but
13 Microsoft had a potential counterclaim for breach of
14 contract?

15 MR. TULCHIN: Barred by the statute of limitations.

16 MR. SCHMIDTLEIN: I think they waived that.

17 THE COURT: Waived it a long time ago, as I understand
18 this. They could have theoretically at least sued for
19 breach of contract, correct?

20 MR. JOHNSON: Yeah, now --

21 MR. SCHMIDTLEIN: I think the antitrust violation is a
22 defense to the contract.

23 THE COURT: I'm not saying it wasn't a defense but --

24 MR. JOHNSON: Now Microsoft has the temerity to
25 suggest in its papers, and Mr. Tulchin did it here today,

1 that it did not terminate this voluntary mutually beneficial
2 relationship. A fair inference from the evidence is that
3 Microsoft did just that. They pulled the rug out from under
4 Novell with respect to the Namespace extensions and denied
5 any further information about this shell that would have
6 assisted Novell in meeting these first wave commitments. As
7 the court stated, and I'm quoting again from the court's
8 opinion, quote, Microsoft did not just withdraw a charitable
9 helping hand, rather, Microsoft allegedly first cooperated
10 in an effort to improve its own product, subsequently misled
11 Novell into relying on information provided pursuant to that
12 cooperation, and then withdrew its cooperation after Novell
13 reasonably relied on Microsoft's representations. That is
14 from your opinion at 747.

15 And then in distinguishing your -- Your Honor's two
16 prior refusal to deal cases, Daisy Mountain and In Re:
17 Microsoft Antitrust Litigation, the court noted that
18 Microsoft did more than just refuse to discuss information
19 about Windows 95. Novell has also raised a genuine question
20 of fact about whether Microsoft misled Novell about the
21 characteristics of Windows 95. That question of fact has
22 not disappeared with the evidence in this case. So the
23 court in its 2010 opinion has concluded on summary judgment
24 that Novell had presented sufficient evidence to raise a
25 genuine question of fact, both with respect to if we just

1 consider it outside of the purview of Trinca or if it was
2 within the purview of Trinca.

3 I would like to talk now, Your Honor, about --

4 THE COURT: If you can tell me what purview of Trinca
5 is I would appreciate it. Don't even try.

6 MR. JOHNSON: Well, Your Honor, one of the things
7 about this case is that after a jury verdict, I hope, this
8 will -- this case will be going to the home of Aspen Ski,
9 and perhaps we can get some guidance in that regard. I
10 think Trinca, frankly, Your Honor, was more about the
11 regulatory scheme than anything else.

12 THE COURT: I agree with you.

13 MR. JOHNSON: Thank you, Your Honor. Let's talk about
14 harm to competition in the operating systems market. Again,
15 this court after a close examination of the expert report of
16 Professor Noll concluded that Professor Noll's proposed
17 testimony raised a genuine issue of fact as to whether
18 Microsoft's conduct directed at Novell was a significant
19 contributor to anticompetitive harm in the PC operating
20 systems market. The Court further held that Novell had no
21 obligation to create some hypothetical marketplace where
22 Microsoft's anticompetitive conduct against others was
23 ignored.

24 Indeed this court quoted with approval the D.C.
25 Circuit's observation in the government case against

1 Microsoft that it would be contrary to the purposes of
2 Section Two to immunize a monopolist for anticompetitive
3 conduct which in fact significantly contributed to
4 anticompetitive harm simply because that harm was caused by
5 conduct directed at multiple small threats none of which
6 could prove that the conduct directed at a single firm would
7 have by itself significantly contributed to the defendant's
8 monopoly if none of the other small firms had been similarly
9 weakened. Again, the court's opinion.

10 The court further observed that the conduct directed
11 at other ISVs was not distinguishable in any material way
12 from the conduct directed at Novell. Your opinion in this
13 regard was affirmed by the Fourth Circuit. As the district
14 court explained, Novell's expert opinion about a
15 hypothetical market leaves ample room for a finding that
16 Microsoft's actions towards Novell were a significant
17 contributor to anticompetitive harm in the PC operating
18 system market in light of the weakened state of other
19 applications and independent software vendors. That issue,
20 the Fourth Circuit said, is appropriate for trial.

21 I would like to quote, only briefly, a very noted
22 jurist, Judge Frederick Motz, with respect to something I
23 know Your Honor doesn't really want to talk about but you
24 had occasion to address was the law of the case with respect
25 to the impact on a transferee court of the decisions that

1 both you and the Fourth Circuit would make going forward
2 after a remand from your court to a place like here in Utah.

3 Now again, Your Honor, Your Honor may have a different
4 view of the case. But I think it is important for Your
5 Honor to reflect, at least from our perspective, this is the
6 guidance we had received both from you and the Fourth
7 Circuit. And we certainly conformed our evidence and our
8 proof to meet the requirements set forth in those opinions.

9 You may recall these were the conclusions reached by
10 Professor Noll in this case as set forth on his summary
11 board. I don't think it is necessary here to go through the
12 economic analysis presented by Professor Noll in this case.
13 And frankly, I don't think it is even relevant to the motion
14 today whether the court accepts or rejects the principles
15 upon which Professor Noll spoke or its import for showing
16 liability under Section Two of the Sherman Act. The only
17 thing I would say is that both this court and the Fourth
18 Circuit concluded that the decision whether Dr. Noll was
19 right or wrong was within the province of the jury.

20 Now, I would like to address some of the -- some of
21 this court's level of analysis that the document that you
22 gave to us yesterday or the day before. I would like to
23 start with Line 1 which is the under no circumstances
24 dealing with the cooperation or lack of cooperation owed
25 from one company to another.

1 I don't think we have any general dispute here. I
2 think it is perhaps overbroad to suggest that such a right
3 applies under all circumstances. I think there is a notion
4 of anticompetitive conduct can take many forms. And I
5 certainly wouldn't want to bar the notion that a simple
6 refusal to deal might in certain circumstances raised to
7 become anticompetitive. But that clearly is not the case
8 before us. The question is not whether Microsoft has a
9 right to withhold its intellectual property. The question
10 is whether Microsoft can use its property to destroy a
11 competitor.

12 That same claim was made by Microsoft in the
13 government case. Microsoft there claimed the absolute and
14 unfettered right to use its intellectual property as it
15 pleased. The court rejected the argument as bordering on
16 frivolous. As the court stated, that it is no more correct
17 than the proposition that use of one's personal property,
18 such as a baseball bat, cannot give rise to tort liability.

19 The question here is not about Microsoft's rights, it
20 is about Microsoft's conduct. Your Honor, Novell is not
21 arguing that there is an affirmative duty for Microsoft to
22 share its innovations. And we have said time and time again
23 that if Microsoft had never published the Namespace
24 extension APIs, had not evangelized them to us and the other
25 ISVs, we certainly would not be here today. Indeed if

1 Microsoft had not deceived Novell regarding the APIs, Novell
2 would have had more than sufficient time to create a
3 compelling product to run on Windows 95 that it would have
4 been delivered to the market in a timely fashion.

5 As the District of Utah Court held in the Caldera
6 case, while there may be -- there may not be an affirmative
7 duty to disclose, monopolists are still prohibited from
8 acting in an anticompetitive manner. The argument that
9 Microsoft was protecting its innovations for its own use, of
10 course, is contradicted by Microsoft's repeated assertions
11 that it didn't utilize this functionality in Office 95. The
12 evidence shows instead, as Novell has always argued, that
13 Microsoft pulled back the Namespace extension APIs to
14 disadvantage its competitors and to give Microsoft's Office
15 96 product a real advantage.

16 THE COURT: More specifically time to catch up. More
17 specifically time to catch up. Specifically time to catch
18 up.

19 MR. JOHNSON: Well, I am sorry I am not understanding
20 your question.

21 THE COURT: I'm not sure I understood the distinction
22 you were making. But the fact of matter is, I understand
23 your theory to be that, in fact, Microsoft strongly in the
24 93 memos or e-mail would reflect that the reason that it did
25 what it did according to you was because it wanted to give

1 an advantage to its own applications programs. As I
2 understand the state of the evidence, there is no evidence
3 that in fact the APIs were used in Office productivity
4 software, but I understand your position to be at least
5 initially the idea was to give Microsoft's applications
6 people time to catch up. So that even though it wasn't in
7 the 95 release, it was going to be in the Windows 96 release
8 and that -- and that the problem was that Mr. Gates said
9 look Lotus and Novell are ahead of us and we can't -- we
10 don't want to get behind. That is my understanding.

11 MR. JOHNSON: That is not the way Mr. Gates put it, of
12 course. He put it -- he put it let's do this so that we can
13 achieve a level of integration not merely to catch up but it
14 will be a level of integration which Word, WordPerfect and
15 Notes will not be able to achieve. I mean the purpose was
16 to prevent us from doing what we were planning to do. To
17 prevent us from doing what we told Mr. Cole we were going to
18 do when he came to WordPerfect. Let's turn to your --

19 THE COURT: The second one is assuming one is wrong.

20 MR. JOHNSON: Here it is, analysis two, level analysis
21 two. I think that you correctly identify here that this
22 issue is factual. And you do so in the first instance.
23 There is overwhelming evidence that Microsoft's actions
24 resulted in the destruction of a preexisting profitable
25 relationship and that it engaged in a deceptive practice or

1 at least there is enough evidence on the record that that is
2 a -- that is a factual issue for the jury to determine. As
3 you know in this motion, Your Honor, and I don't -- I don't
4 need to tell you this, but obviously all evidence has to be
5 drawn in the light most favorable to Novell. And
6 credibility determinations, the weighing of the evidence,
7 and even the drawing of inferences from the facts are all
8 jury functions, not that for a judge on this motion. And I
9 cite, of course, to the Supreme Court's decision in Rees
10 versus Sanderson Plumbing Products, Inc. That standard,
11 interestingly enough, is exactly the same standard that we
12 use -- was used on the motion for summary judgment which of
13 course resulted in the decision in our favor both by you and
14 the Fourth Circuit.

15 THE COURT: That has been true ever since the 1985
16 trilogy. That has been true and correct.

17 MR. JOHNSON: Absolutely, Your Honor, and I knew you
18 knew that, but I certainly wanted to state it for the
19 record.

20 THE COURT: Good thing that the trilogy was decided
21 because I came on the bench in '85 and made a lot of summary
22 judgment rulings.

23 MR. JOHNSON: And so the evidence of this voluntarily
24 mutually profitable relationship, and the deception engaged
25 in by Microsoft, is only stronger today than it was on the

1 record in 2010. Your Honor, I -- I now turn to your fourth
2 level of analysis.

3 THE COURT: What was the third?

4 MR. JOHNSON: The third I don't think was -- I think
5 you said it was factual.

6 THE COURT: It was factual, yeah.

7 MR. JOHNSON: I believe.

8 THE COURT: This is the substantial justification
9 issue.

10 MR. JOHNSON: Yes. Yes, which is plainly --

11 THE COURT: This one we have been through a lot.

12 MR. JOHNSON: We have been through this a lot so I'm
13 not going to spend a lot on it, but you characterized this
14 as potentially a legal issue and I think you are wrong on
15 that score. If this is an issue at all, and I don't think
16 it is an issue, I think it is factual, I think that the
17 first thing to reflect upon is that Microsoft already had
18 monopoly power in the relevant market at the time and that
19 is the power to unilaterally raise prices or exclude
20 competition. The question to be answered here by the jury
21 is whether in Dr. Noll's words Microsoft's maintenance of
22 that monopoly, however, was the result of superior
23 efficiency or anticompetitive conduct. I don't think it can
24 be the case, Your Honor, the way you started this level of
25 analysis four off, that if Microsoft had anticompetitive

1 intent, and lacked legitimate justification, that you could
2 decide, as a matter of law, that Microsoft's superior
3 products trumps Microsoft's anticompetitive conduct. And
4 that is the way you phrased it that --

5 THE COURT: I think it is there. And I think it is a
6 good question.

7 MR. JOHNSON: Well, I think that if there was any
8 balancing to be done, Your Honor, and frankly I don't even
9 think it is a legitimate balancing question with respect to
10 this case. It is surely an issue for the jury.

11 THE COURT: But this is a very tough issue for me. I
12 mean you've got the worst intent in the world, the law is
13 clear, bad intent is not enough for antitrust violation.
14 What happens is you have got an operating system and you
15 come out with a new product that according to Novell itself
16 is a great technological advantage, is a big new thing, it
17 is cool, has got lots of bells and whistles and it is
18 wonderful. I think it is a difficult question to say that
19 even though Microsoft may have had bad intent if it is its
20 product and it comes out and according to your own witnesses
21 its monopoly share would have been increased and there is no
22 alternative product then on the market or in development,
23 I'm not at all sure what the answer to the question is,
24 isn't it. By definition, you maintain your monopoly by
25 virtue of having the superior product.

1 MR. JOHNSON: I think, Your Honor, if there is a
2 finding of anticompetitive intent and lack of legitimate
3 justification you have set forth above, I do not think it is
4 possible, as a matter of law, to say that Microsoft's
5 superior product trumps that finding.

6 THE COURT: I think it is a very fair question and I
7 just don't know the answer.

8 MR. JOHNSON: In fact, Your Honor, I would like to see
9 that case.

10 THE COURT: I think you may see it right here.

11 MR. JOHNSON: Well, Your Honor, I would like to see it
12 in some other court other than this one. I would like to
13 see it in some other court other than this one. That would
14 be a finding by a court that someone had engaged in
15 anticompetitive conduct and had no legitimate justification
16 for that conduct and then decided that oh, well, they
17 produced good products and therefore it is okay. And I mean
18 if that was the law, there would never be a Section Two case
19 that could be brought against Microsoft with respect to
20 Windows 95. That doesn't -- that doesn't ring true to me,
21 Your Honor. I think that there is a problem with that
22 logic.

23 THE COURT: Well, I agree with you, it is a very
24 troublesome issue. But ever since I heard your people say
25 what a great product it was and that they would have -- they

1 would have bought -- they would have written to it and the
2 share would have been increased, and there is no evidence
3 and there is history of cross-platform, that weighs in your
4 favor, but there is no evidence that then or at any time
5 within the reasonably foreseeable future there was going to
6 be any other operating system. That, to me, is a very, very
7 difficult issue. Maybe it is obvious. It's not obvious to
8 me. Because it seems to me everything that happened was due
9 to the fact that Windows 95 was a better product.

10 MR. JOHNSON: But let's talk about a little bit of
11 that evidence that you say you don't see and we discussed
12 this a little bit so it I won't spend a lot of time with
13 this. WordPerfect was cross-platformed on viable
14 alternative operating systems during the relevant time
15 period 1994 to 1996. And the evidence is undisputed that
16 PerfectOffice was planned to be cross-platform for the
17 foreseeable future. Moreover there is undisputed evidence
18 from Professor Noll that Microsoft's market power would have
19 been constrained had PerfectOffice released at or near the
20 time of the release of Windows 95. Barriers to entry would
21 have been lowered, and the consumer would have been the
22 ultimate beneficiary. That was one of the conclusions that
23 Professor Noll reached.

24 THE COURT: But that is, you know, whatever he said
25 isn't the fact.

1 MR. JOHNSON: Your Honor, you may not agree with
2 Dr. Noll --

3 THE COURT: No, no, no. I'm talking about evidence.
4 I have got to evaluate the evidence. That would, you know,
5 maybe in the long run, maybe in terms of a prophylactic
6 ruling that kind given in the government case factually, I
7 have a real -- just because -- and I have a lot of respect
8 for Dr. Noll, don't get me wrong, but the mere fact that he
9 says that it was going to somehow effect the monopoly,
10 that's not the evidence. The evidence is, comes from your
11 own witness who says we are sure the market word have
12 increased. I mean whatever the doctor did say I mean he is
13 not a lawyer, he's not a judge. The evidence is the
14 evidence.

15 MR. JOHNSON: He is an antitrust economics expert.

16 THE COURT: And in his area of expertise I'm going to
17 listen to him. I just don't see how he can say that -- that
18 Microsoft's monopoly position, or dominant position,
19 monopoly position, in the operating system would have
20 declined when in fact all of the evidence in the case is
21 absolutely contrary. That is the problem. That is the
22 problem.

23 MR. JOHNSON: Your Honor, I think we already looked at
24 this slide which shows, of course, that WordPerfect was
25 cross-platform during the relevant time period. And that

1 Novell shipped multiple versions of WordPerfect that ran on
2 other Intel based PC operating systems. They were all
3 viable alternative operating systems.

4 THE COURT: If they were alternative, why did
5 Mr. Harral testify to the contrary? If they were really
6 comparable, if they really were alternative?

7 MR. JOHNSON: Why do you say Mr. Harral testified to
8 the contrary?

9 THE COURT: Because he testified, all of your
10 witnesses, fact witnesses, and let me maybe I -- maybe I got
11 a misimpression from the testimony, they talked about
12 technological break through. It is the one product that we
13 want to write to. It is the one that we want to be
14 associated with. It is the one that -- that is the -- it is
15 the new kid in town and it is really cool, and he didn't say
16 that, I think that Gibb used the word cool. But in any
17 event, the impression that I got, and maybe it was wrong,
18 that look this is the wave of the future. We have got to
19 hitch our wagon to the star.

20 MR. JOHNSON: But just because we liked Windows 95
21 doesn't mean that we weren't also interested in writing to
22 other operating systems. You need to disconnect that. Of
23 course Windows 95 was a great innovation. Of course the
24 developers were excited about it and they needed to be
25 frankly, they needed to be on the monopolist operating

1 system at the time, of course. But that doesn't mean that
2 they weren't also still interested in writing to other
3 operating systems. In fact, Mr. Frankenberg testified that
4 the other reason for doing that was to provide some real
5 competition in the operating systems environment.

6 THE COURT: But your clients testified, Mr. Harral
7 expressly testified, I think Mr. Frankenberg testified,
8 that, you know, whatever they did on this outdated outmoded
9 operating systems wasn't really going to matter because
10 Microsoft's share of the market was going to increase. That
11 is an inescapable inference that they thought it was a new
12 product and better product and whatever they were writing
13 for any other operating system, maybe they had to keep doing
14 it, but it wasn't going to have any effect upon the market
15 and indeed the market was going to bring these out first.
16 They testified that Microsoft's share was going to increase,
17 which they did.

18 MR. JOHNSON: Your Honor, I don't know where you got
19 the notion that these other Intel-based operating systems
20 were outmoded or out of date. In fact, Linux, which came
21 into existence during this time period, was quite well
22 received in the market, and as Dr. Noll has testified,
23 actually picked up a fairly significant marketshare during
24 this time period.

25 THE COURT: I'll tell you where I got that impression

1 and tell me where I'm wrong. Because your clients testified
2 that during this timeframe Microsoft -- because of Windows
3 95 its share of the market was going to increase. I mean it
4 seems to me that the inference from that is that
5 WordPerfect, together with Windows 95, was better than
6 WordPerfect together with Linux or WordPerfect together with
7 DOS, WordPerfect together with anything else. That is where
8 I got that impression.

9 MR. JOHNSON: Okay, Your Honor. Here is further
10 testimony from Adam Harral regarding the fact that they were
11 planning to move all of the features of PerfectOffice back
12 into DOS over to OS/2, into Macintosh, and with respect to
13 Unix and Linux. All of these were plans that they had after
14 the Windows 95 release.

15 There is also overwhelming evidence that WordPerfect's
16 PerfectFit technologies, AppWare and OpenDoc constituted
17 MiddleWare. Most of this evidence, of course, comes
18 directly from the mouths of Microsoft's executives during
19 the relevant period. Here we have Mr. Silverberg's
20 testimony that AppWare was, in fact, an operating system.
21 We have, Your Honor, you may remember, and by the way this
22 testimony was given during the relevant period, June 23,
23 1994. We have Mr. Maritz's testimony that AppWare was an
24 explicit attempt by Novell to develop a layer that will
25 provide all of the services required by applications. We

1 have Mr. Silverberg's testimony again with respect to
2 OpenDoc. I regard OpenDoc as an essential operating systems
3 component. We also have overwhelming evidence that
4 PerfectFit was MiddleWare. And all of these MiddleWare
5 technologies being offered by Novell during this time period
6 were cross-platform. They operated on multiple platforms
7 within the time period we are talking about. Now, you have
8 suggested, you suggested in your level analysis four that we
9 looked at earlier, that an alternative operating system
10 would have had to have provided functionality comparable to
11 that provided by Windows 95.

12 Your Honor, with all respect, that is wholly
13 irrelevant to the issue of harm to competition and the issue
14 of whether Microsoft's conduct led to widening the moat
15 protecting Microsoft's operating systems monopoly. The
16 whole point of cross-platform MiddleWare is that
17 applications would no longer have need for the functionality
18 present in Windows 95. And in turn, would not care which
19 operating system was at a bottom of the layer cake. Nor is
20 it necessary for us to present evidence that such
21 cross-platform MiddleWare eliminated the applications
22 barrier to entry. The question is whether Microsoft's
23 conduct raised those barriers which is what we have in this
24 case.

25 THE COURT: The one thing that bothers me and we are

1 not going to finish today, and maybe I do have a
2 misimpression, and I got the impression from Adam Harral's
3 testimony and Richardson that the reason that they were
4 excited about writing for Windows 95 was the technological
5 break through. I did not get the impression, and maybe it
6 is wrong, I did not get the impression that they thought it
7 was sort of like any other operating system and they had to
8 write to it because Microsoft had a monopoly position and
9 because it had such a high share that they had to write in
10 order to maintain its credibility with the marketplace and
11 that it would -- and that it could simultaneously write to
12 the other operating systems and have it just -- that is not
13 the impression I got. The impression I got and maybe so and
14 maybe it is not important, but it somehow has affected my
15 thinking that it is precisely because they saw Windows 95 as
16 a superior product that they wanted to be hitched to. That
17 to me -- and so that therefore the other platforms to which
18 they had been writing, they may continue to write to them,
19 weren't providing the same level of functionality. That to
20 me is an important point. Now maybe I have a
21 misapprehension of what they said. But I must say that I
22 came away from that and that is why I asked Mr. Harral out
23 of the presence of the jury some questions that it just
24 struck me that he was basically saying that Windows 95 is a
25 superior product to which we wanted to be married. And if

1 I'm wrong on that, I want to be -- I want to -- I don't want
2 to have any misimpression.

3 MR. JOHNSON: Your Honor, you're not wrong about that.
4 That was the correct impression to take from that testimony.
5 Novell would have written to Windows 95 if it was a pile of
6 junk.

7 THE COURT: That is not what they said.

8 MR. JOHNSON: No, but they were a monopolist. They
9 controlled the market. It was absolutely essential for
10 WordPerfect to be on Windows 95 just like it was absolutely
11 essential for NetScape to be on Windows 95. Just like it
12 was absolutely essential for Sun to be on Windows 95. What
13 you're confusing is the fact that they loved this new
14 operating system and they thought it was great. You need to
15 separate that out from the question of harm to competition
16 in the operating system market. It is just not relevant to
17 that question. The question is would WordPerfect existing
18 on Windows 95, would that have given the opportunity for
19 another viable operating system, many which existed at the
20 time, to get on the playing field and make a play. And in
21 fact the evidence is, and Dr. Noll so testified, that in
22 fact Linux did become a successful operating system during
23 the time period that we're talking about and shortly
24 thereafter, if we go into the later 1990s, that picked up a
25 fairly substantial, not substantial, a small marketshare,

1 but it is at least some competition for the monopolist who
2 has 95 percent plus of the market.

3 In other words, by our very existence, by the fact
4 that if we had survived we would have presented the ability
5 for someone to buy another operating system with
6 PerfectOffice sitting on top of it or somebody or
7 applications to write to our MiddleWare rather than
8 depending on Windows and then enable another operating
9 system to say you don't really need Windows 95, look at me
10 over here. Come buy me now because all your applications
11 are running on top of MiddleWare. That was the threat.
12 That was the fear Microsoft had repeated over and over and
13 over again in the documents in this case that the actions of
14 these MiddleWare providers like Novell would commoditize
15 Windows and would make it so the applications people
16 wouldn't care.

17 THE COURT: I think I understand. I think we actually
18 may agree with one another except for the fact that I think,
19 I am not sure I do think, I think that it may be that there
20 has to be evidence of that. And I don't --

21 MR. JOHNSON: Yeah, I -- I recognize Your Honor --

22 THE COURT: I don't think and maybe -- maybe Harral's
23 testimony is enough. I don't think that there is enough
24 evidence and -- and that is frankly what I was looking for
25 is something that there was some other operating system that

1 existed or was under development or would have been
2 developed perhaps more expression by a technical man or
3 market man about what Linux could have done. I didn't hear
4 it.

5 MR. JOHNSON: And Your Honor that is -- I don't think
6 that is necessary. What the record does say, what the
7 record does say, is that during this time period there were
8 viable cross-platforms to which PerfectOffice and
9 WordPerfect could have been written and were written in the
10 relevant time period. There were many such different
11 Intel-compatible operating systems in existence at the time.
12 Even Mr. Holley agreed with me on that point when I made it
13 in court the other day. WordPerfect was written to them
14 all. Many of those systems exist today and have, in fact,
15 developed a following. But the point is by knocking off
16 WordPerfect, those systems were never able to gain the
17 foothold that they might have been able to gain had a
18 popular set of applications like the PerfectOffice Suite
19 been available to those operating systems to run on top of
20 them as well as on top of windows.

21 THE COURT: I understand. That is a perfectly valid
22 argument.

23 MR. JOHNSON: And certainly it may have not been
24 sufficient to topple the monopolist, but that is not the
25 standard for judging anticompetitive harm caused by

1 Microsoft's conduct.

2 THE COURT: I understand your position. And there's
3 no sense in -- the question I have to grapple with is do you
4 have to prove it.

5 MR. JOHNSON: And the fact that in this time period
6 Microsoft quashed virtually all of the cross-platform
7 MiddleWare threats that could have resulted in lowering the
8 barriers to entry does not mean the monopolist gets a free
9 pass. And I would -- I would return you to your own opinion
10 back in 2010. Under this contributed significantly
11 standard, plaintiffs need not present direct proof that
12 defendants continued monopoly power is precisely
13 attributable to its anticompetitive conduct. To require
14 such proof would require the Section Two liability turn on
15 the plaintiff's ability or inability to reconstruct the
16 hypothetical marketplace absent a defendant's
17 anticompetitive conduct which would only encourage
18 monopolists to take more and earlier anticompetitive action.

19 Your Honor, you answered the question right here. It
20 is not fair to ask the plaintiff to submit evidence that
21 would require us to reconstruct the hypothetical marketplace
22 that might have existed absent the defendant's
23 anticompetitive conduct. Why? Because that would only
24 encourage people like Microsoft to kill the child earlier.

25 THE COURT: I think that is fair and I'll take a look

1 at that. But I have not yet had before me the testimony of
2 your clients that the reason that the operating system and
3 monopoly was going to increase is because it was a better
4 product which they said.

5 MR. JOHNSON: Your Honor, do you have a few more
6 minutes?

7 THE COURT: Let's go a little bit further and then
8 we'll break. And I'll reserve ruling on this and simply for
9 the interest of time we'll pick up with the defendant's case
10 on Monday morning. But by presenting evidence, they're not
11 waiving their right to the Rule 50 motion and we'll finish
12 the argument on Monday afternoon, if that is okay with you
13 all.

14 MR. JOHNSON: That is fine.

15 THE COURT: And I can go -- if you want to stop, I'll
16 stop. If you want to go another 15 minutes, I'll go another
17 15 minutes.

18 MR. JOHNSON: I think we have had a pretty full day
19 and Your Honor has a plane to catch. Why don't I pick up on
20 Monday afternoon.

21 THE COURT: Thank you, very much.

22 MR. JOHNSON: Thank you.

23 THE COURT: And you wanted to go --

24 MR. TULCHIN: Would it be all right, Your Honor, to
25 say two things right now?

1 THE COURT: Sure.

2 MR. TULCHIN: And I have many, many things that, of
3 course, I would like to say on Monday afternoon. But I
4 think there are actually two things that Mr. Johnson said
5 that are dispositive and compel the entry of judgment for
6 Microsoft now. One is he said it is okay not to give the
7 APIs to us, but once you give them, you can't take them
8 back, you can't change. It is exactly what I predicted this
9 morning. That the position that Novell has is it is okay
10 not to cooperate. He doesn't quarrel with the law which is
11 black letter law that a company including monopolists has no
12 duty of any kind to provide technical information to a
13 competitor. He says once you give them to us, you cannot
14 take them back.

15 Now the law about the beta contract, and
16 Mr. Frankenberg's testimony about the industry understanding
17 absolutely makes that an untenable position. The beta
18 contract is not a defense, it doesn't immunize us, Your
19 Honor. But according to the Tenth Circuit in Telex against
20 IBM, in evaluating whether conduct is anticompetitive a
21 monopolist you look at the type of competition prevalent
22 throughout the industry. And the Tenth Circuit said, a
23 monopolist is free to engage in ordinary business practices
24 typical of those used in the market. So that is one.

25 And two, Your Honor, is this. Mr. Johnson said it is

1 a very closely related point. We're not complaining that
2 Microsoft had -- we don't say that Microsoft had some
3 obligations to supply us with these APIs. The case is a
4 case about deception. Deception cannot be an antitrust
5 claim. The law on this is clear here, too, Your Honor. It
6 is from the Tenth Circuit. Among other things it is Midwest
7 Underground against Porter, 717 F2d 493 at Page 497. There
8 is a Supreme Court case, of course, which says the same
9 thing, that not every nasty piece of business behavior
10 constitutes a violation of the antitrust laws. Of course I
11 have forgotten the name of it but I will give it to you.

12 THE COURT: You can tell me on Monday.

13 MR. TULCHIN: I will give it to you in a moment. And
14 what is most astounding about this argument about the
15 deception, Your Honor asked the question where is the
16 deception? The deception has to have been that in June when
17 the M6 beta was provided to Novell, along with the
18 documentation, that Microsoft then intended to yank it back.
19 There is absolutely no evidence of any such thing. The Hood
20 Canal Retreat was about shell extensions, not the Namespace.
21 And there is no evidence that there was any such intent to
22 deceive.

23 THE COURT: I'll hear from you all, Mr. Johnson, on
24 Monday. If you want to respond. There are two things
25 actually that came up that caused me some concern while the

1 trial was going on and they have their own rules. But I am
2 a little concerned that if, in fact, there is evidence in
3 the e-mail or memo that I have excluded, I forget the guy's
4 name, but the senior executive of the head of the division.

5 MR. HOLLEY: Brereton, Your Honor.

6 THE COURT: Brereton, in fact, knew about this delay
7 issue, that causes me concern. That I -- and I am
8 comfortable that I properly left out the exhibit, but if in
9 fact that exhibit reflects that he was aware of this issue
10 that we may have to fix that.

11 Likewise if there and I now understand -- I
12 understand why it is that you didn't introduce the letters,
13 I don't fault you for it, about written communications with
14 Microsoft complaining about the withdrawal of the Namespace
15 extensions APIs, if they exist, show them to me because
16 again, if there is attorney/client, all kinds of issues that
17 I wouldn't want the letter in, but now I see from
18 Microsoft's side they don't think there are such letters,
19 but if there are any such letters, that causes me concern
20 because right now for me and for the jury, would be the
21 apparent contradiction between Mr. Frankenberg saying there
22 was such written communications and the absence of such. So
23 just --

24 MR. JOHNSON: We'll get those to you, Your Honor.

25 THE COURT: But I understand from Microsoft --

1 MR. TULCHIN: That was a tactical choice Novell made.
2 They had Frankenberg here, they chose to do whatever they
3 wanted to do with those letters.

4 THE COURT: Be that as it may, I don't want the jury
5 to be under a factual misapprehension. In fact, either the
6 senior executive knew, and I left it out, I think, for valid
7 reasons, the memo which shows that he knew, that causes me
8 concern. Likewise, if there were written communications,
9 that causes me concern, too.

10 MR. JOHNSON: Thank you, Your Honor. Have a safe
11 flight home.

12 THE COURT: Thank you. See you all Monday morning.

13 MR. TULCHIN: Thank you, Your Honor.

14 (Whereupon, the trial adjourned for the day
15 at 3:06 p.m. The trial will resume on Monday,
16 November 21, 2011 at 8:00 a.m.)

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