

1 THE COURT: Get the jury.

2 (Whereupon, the jury returned to the court
3 proceedings.)

4 THE COURT: Yes, Mr. Johnson.

5 MR. JOHNSON: Thank you, Your Honor.

6 Q. BY MR. JOHNSON: Mr. Nakajima, were you aware that
7 people at Microsoft that were working on the replacement
8 Explorer for Office 96 were planning on using your NameSpace
9 extensions?

10 A. No, I was not aware.

11 Q. I'd like to show you what has been marked PX379.
12 If you'll look up in the upper left-hand corner you'll see
13 that it says Office 96 spec. Do you see that, sir?

14 A. Yes.

15 Q. And there's a program manager by the name of
16 Mr. Vinod. Did you know Mr. Vinod?

17 A. I think so.

18 Q. His first name is so long that I can't even begin
19 to pronounce it, but Vinod I can handle. Do you remember him?

20 A. I think so. He's India; right?

21 Q. Yes.

22 A. I believe so.

23 Q. So he's somebody that you're familiar with and that
24 worked in the Office group?

25 A. Not exactly in the context, but I do remember his

1 name.

2 Q. And drawing your attention to the summary there,
3 he's talking about the Office Explorer.

4 Superset and replace the Chicago Explorer to
5 become the single place where users can find and
6 manipulate all their information irrespective of its
7 type, including all documents and files, in addition
8 to personal information such as appointment, task
9 lists and mail. By allowing office users to browse
10 rich views on documents without requiring them to
11 be connected to a groupware store Office 96 undercuts
12 Lotus Notes giving away a large part of the notes
13 functionality for free.

14 The first part that I read there where it says, the
15 Office Explorer will become the single place where users can
16 find and manipulate all their information irrespective of its
17 type, that sounds like the purpose of the NameSpace
18 extensions, doesn't it, Mr. Nakajima?

19 A. Yes. Yeah.

20 Q. And then if we turn into the document on the third
21 page, the Bates number ending in 6800, and highlighted on the
22 screen for you, it states:

23 The Office Explorer implementation strategy is
24 to leverage the Chicago shell team's work as much
25 as possible. And it says, Chicago provides some

1 of the crucial interfaces that will simplify our
2 work. These include --

3 And then if you look below that, you'll see
4 iShellFolder. And down a little bit below that you'll see
5 iShellView. Now those are two of the NameSpace extension
6 APIs; correct?

7 A. Yes.

8 Q. You can take that down, Mr. Goldberg.

9 I believe when we talked earlier about the fact
10 that you used the NameSpace extension APIs to integrate
11 Internet Explorer into Windows; right?

12 A. Yes.

13 Q. And you started this work at the time Windows 95
14 shipped?

15 A. Right after Windows 95 shipped.

16 Q. Do you recall offering documents and giving
17 presentations regarding the integration of Internet Explorer
18 using the NameSpace extensions?

19 A. Yes. I wrote some document, I think it's called
20 Weblike Shell Architecture document, which actually I don't
21 have a copy. That was a good piece of work I did, and I don't
22 have a copy.

23 Q. You don't have a copy?

24 A. Yeah.

25 Q. I'm about to give you one.

1 A. Great. Thank you. That's not confidential
2 anymore? I can post it in my blog?

3 Q. You'll have to ask them.

4 A. Thank you.

5 Q. So I take it it's been a while since you've seen
6 this?

7 A. Uh-huh (affirmative).

8 Q. And at the top, weblike shell, just as you said,
9 architecture. Internet Explorer integration, in-place
10 navigation and Page View. And this was authored by you in
11 November of 1995; correct?

12 A. Yes.

13 Q. And that would be just a couple months, two and a
14 half months after Windows 95 shipped; correct?

15 A. Yes. Right. Correct.

16 Q. I'd like to direct your attention to the second
17 page of this document. It states:

18 Windows 95 shell NameSpace extension.

19 And why don't you just read that to yourself. The
20 jury has seen this before.

21 (Time lapse.)

22 THE WITNESS: Yes, I read it.

23 Q. BY MR. JOHNSON: So you would agree that it's quite
24 natural to integrate an Internet browser into the Windows
25 Explorer; correct?

1 A. Yes.

2 Q. And that's exactly what you did here?

3 A. Yes.

4 Q. And a third-party developer who wanted to integrate
5 an Internet browser into their application could have done the
6 same thing with the NameSpace extension; right?

7 A. Yes. Yes. Interesting. But you're talking about
8 a different thing; right? The third party creating the
9 NameSpace extension plugging into Explorer is one thing. But
10 the third party creating another Explorer which used NameSpace
11 extension mechanism to show others, they're two different
12 mechanism.

13 Q. What I'm saying is, let's say a developer wanted to
14 integrate, say, Netscape Navigator rather than Internet
15 Explorer, they could have done that with the NameSpace
16 extensions; right?

17 A. Yes.

18 Q. Let's take a look at the figure down below, if we
19 could bring that up, please.

20 We see the Explorer here, and underneath it we see
21 the shell and NameSpace extension. And then we see these
22 other shell views. And we see Athena and MSN.

23 A. Uh-huh (affirmative).

24 Q. Now, Marvel was the code name for MSN; correct?

25 A. Yes.

1 Q. So as of November 1995 when you wrote this article,
2 Marvel was still using the NameSpace extension APIs to
3 integrate into the Explorer; right?

4 A. It seems so, yes.

5 Q. And Athena was this personal information manager
6 application for Internet mail and news; correct?

7 A. Yes.

8 Q. And it was also using the NameSpace extension APIs
9 to integrate into the Windows Explorer; correct?

10 A. Uh-huh (affirmative). Yes.

11 Q. And you have personal knowledge that that is true;
12 correct?

13 A. No. Actually based on this document, yes. But I
14 don't recall.

15 Q. But certainly when you wrote this article at the
16 time, you included --

17 A. Yes.

18 Q. -- Athena and MSN as using the NameSpace
19 extensions; right?

20 A. Right. Yes.

21 Q. And you have no reason to believe that that's not
22 true; correct?

23 A. Uh-huh (affirmative). I have no reason to. Yes, I
24 agree.

25 Q. I'd liked to show you what's been marked for

1 identification only, Mr. Goldberg, PX, Plaintiff's
2 Exhibit 597. And this is a PowerPoint presentation entitled,
3 I.E. Internet Explorer 4.0 Shell Architecture. And it's got
4 your name on the cover.

5 A. Yes.

6 Q. Do you recall this PowerPoint presentation?

7 A. Yes, actually I do really well.

8 Q. And this is something you prepared?

9 A. Yes.

10 Q. And this something you prepared during the time
11 period you were working for Microsoft; right?

12 A. Yes.

13 MR. JOHNSON: Your Honor, I move for the admission
14 of Plaintiff's Exhibit 597.

15 MR. HOLLEY: No objection, Your Honor.

16 (Whereupon, Plaintiff's Exhibit 597 was received.)

17 Q. BY MR. JOHNSON: If you would go to the page, and I
18 put little tabs, green tabs, so you get to it easily because
19 these slides are not numbered, but go to the second green tab
20 entitled, Layout Negotiation.

21 Can we go to that tab, please?

22 A. The first tab?

23 Q. The second tab.

24 A. Second tab. Sure.

25 Q. And can you explain to us what this is showing?

1 A. Yeah. This displays -- yeah, it looks like a Excel
2 spreadsheet is displayed inside Explorer. Yeah. Yes.

3 Q. So you've actually used here the NameSpace
4 extensions to bring up an Excel spreadsheet --

5 A. Uh-huh (affirmative).

6 Q. -- that is running in the right-hand pane of the
7 Explorer; is that correct?

8 A. Yes. Yeah. But yes and no. I can go a little bit
9 into detail. But in the big scale, yes.

10 Q. So what you've done here is gone to a Microsoft
11 expense report on the Internet and have opened up this Excel
12 spreadsheet within the Windows Explorer; right?

13 A. Yes. But more precisely speaking, the browser, the
14 Internet Explorer is running inside, inside Windows Explorer
15 as one of NameSpace extension and then Internet Explorer is
16 able to display more document and Excel spreadsheet as well as
17 HTML pages. So browser can browse HTML pages, web pages or
18 document Excel. Browser have that capability. Therefore,
19 because the browser is an extension, the NameSpace extension,
20 the Excel is displayed here.

21 Q. And so this is something that could have been done
22 with the NameSpace extensions back in 1995; right?

23 A. As I said, you can do anything you want to do on
24 the right-hand side pane, but in order to achieve exactly what
25 this does actually I need, ISV needed to support the

1 DOC Objects extensions, not the NameSpace extension.

2 Q. So if you look at the left pane there, that's got a
3 whole bunch of custom NameSpaces that you've added to the
4 left-hand pane; right?

5 A. Yeah. These -- not bunch of, actually just say
6 mail and news.

7 Q. And Internet Mail and Internet News, that would be
8 Athena; right?

9 A. Yes.

10 Q. And you've used the NameSpace extensions to have
11 Athena show in that left-hand pane to bring up Internet Mail
12 and Internet News; right?

13 A. Yes. According to this picture, yes.

14 Q. Okay. You can put that aside, Mr. Nakajima.

15 You may have answered this earlier, so I don't want
16 to belabor it. But are you aware that your invention was
17 continued to be used in later versions of Windows, the
18 NameSpace extensions?

19 A. Yes. I was, mostly I was using by myself to a
20 degree in Internet Explorer and Windows Explorer, yes.

21 Q. But that was with respect to Windows 95; right?

22 A. It was after Windows 95.

23 Q. So that would have been Windows 98?

24 A. Yes.

25 Q. And were you aware that the NameSpace extensions

1 continued to be present and usable by ISVs in XP?

2 A. No, I was not aware.

3 Q. So you're not aware that they continue to be used
4 today?

5 A. No.

6 Q. Thank you, Mr. Nakajima.

7 A. Okay.

8 THE COURT: Any questions, Mr. Holley?

9 MR. HOLLEY: Yes, Your Honor.

10 REDIRECT EXAMINATION

11 BY MR. HOLLEY:

12 Q. Mr. Nakajima, let's start where you finished.

13 Looking at what's Plaintiff's Exhibit 597 and going
14 to the tab that Mr. Johnson was showing you, did the web
15 browser control that is being used here posted inside the
16 Windows Explorer exist in 1994 or 1995?

17 A. The Internet plug-in? The Internet Explorer
18 plug-in?

19 Q. Yes.

20 A. It didn't exist at the time we released Windows 95.
21 It was done after.

22 Q. So in 1994 and 1995, the ability to use Doc Objects
23 to display Microsoft word documents and Excel spreadsheets
24 inside Windows Explorer, was that possible in 1994 and 1995?

25 A. No. No. You mean Windows 95. No.

1 Q. Now, you were shown Plaintiff's Exhibit 379, which
2 was represented to you to be a design document for an Office
3 Explorer. Have you ever seen that document before today?

4 A. No. No. I don't recall at all.

5 Q. To your knowledge, did Microsoft ever create a
6 superset of the Chicago Explorer, the Windows Explorer that
7 you designed that existed in Microsoft Office?

8 A. No, as far as I know. I don't know such a product
9 from Office -- you mean some kind of Explorer?

10 Q. Yes.

11 A. From Office group? No, I'm not aware of any.

12 Q. You've never heard of such a product?

13 A. No.

14 Q. Now, going back to the Google wave example that you
15 discussed with Mr. Johnson on cross-examination, from your
16 perspective as an ISV, does it matter whether an API is ripped
17 out of a shipping operating system as opposed to being ripped
18 out of a beta version of an operating system?

19 MR. JOHNSON: Objection, Your Honor. He's not an
20 ISV.

21 MR. HOLLEY: He most certainly is, Your Honor. He
22 testified that he has two ISVs.

23 THE COURT: Of course, he is. Overruled.

24 THE WITNESS: Okay. So, yeah. The damage,
25 actually the implication or impact to the third-party business

1 is bigger to remove from the released product than the beta
2 product because when somebody, let's say Apple provided the
3 beta version of their OS, I know that there's some risk
4 involved, whether they make changes, they may take away. But
5 once they release it in official version, that is more
6 concrete. So I can rely on that heavier.

7 Q. Mr. Nakajima, based on your more than 25 years of
8 experience in the software industry, what is your
9 understanding about the nature of beta version of products?

10 MR. JOHNSON: Beyond the scope, Your Honor.

11 THE COURT: I find that hard -- it seems to be
12 right in the scope. But in any event, overruled.

13 THE WITNESS: Am I --

14 THE COURT: You can answer it.

15 THE WITNESS: Okay. So, yes. A beta version is
16 something half cooked. So if you don't like it, you can make
17 a request, you make changes. But at the same time there's a
18 little bit of a risk because they make change for whatever the
19 reason. So whatever I give up based on beta version might
20 break. So everybody should be aware of that.

21 Q. BY MR. HOLLEY: Now, Mr. Nakajima, I'd like to ask
22 you to take a look at what I think is up there as Plaintiff's
23 Exhibit 181, which is the shellobject.H header file for the
24 Namespace extension APIs.

25 A. Uh-huh (affirmative).

1 Q. Now, Mr. Johnson referred to this as a machine
2 language, I believe. Is this document only readable by
3 machines?

4 A. No. People can still read it. The developer
5 especially, they can read it.

6 Q. I'd like you to take a look, if you would, sir, at
7 the page number 10 at the bottom. It says Page 10?

8 A. Uh-huh (affirmative).

9 Q. And starting with the little dotted line going
10 across --

11 A. Yeah.

12 Q. -- there's a description of the iShellBrowser
13 interface. And can you explain what it means when each of
14 these lines starts with two slash marks, what that means in a
15 header file?

16 A. It means it's a comment, meaning it's actually
17 written for people, not for the machine. So actually machine
18 skips those lines, and they don't read them. It's meant to be
19 for the people to read it. It's a comment, so it's like --
20 yeah, some kind of a simple description, or you can even call
21 it a short version of document.

22 Q. Now, as a software developer who created APIs, why
23 did you include comment fields like this?

24 A. It's a good question. Actually two reasons. The
25 one is, of course, I want to communicate. So no matter what,

1 even though I don't like to spend my time documenting
2 something, I have to communicate with somebody to write. So I
3 need to write something anywhere. It could be just a response
4 to e-mail. And this header file is really a convenient place
5 for me to write because it's right there, unlike e-mail.
6 E-mail we tend to lose, but this is always there.

7 And also the API had to change. So if the API
8 changes, then I need to change the documentation as we go. So
9 it makes sense to put them in the same place.

10 Q. Now, you said in response to a question from
11 Mr. Johnson that a smart developer could use the header file
12 to write an application that called the APIs. How could they
13 do that?

14 A. So the worst cases, if there's no comments, then
15 they need to read those machine languages and interpret, which
16 is still possible, but there are a lot of guess they need to
17 do. But with this kind of a comment, sometimes it's enough.

18 Q. Now, I'd like to change topics a little bit and ask
19 you to take a look at one of the demonstratives we had, which
20 was the Windows 95 desktop, I think 200 with the Explorer.
21 Demonstrative Exhibit 200.

22 Now, Mr. Johnson asked you on cross-examination
23 about certain virtual folders that appear in the Windows
24 Explorer like My Computer, Network Neighborhood, Recycle Bin
25 and My Briefcase. Is it more or less risky for components of

1 the Windows shell itself to call the NameSpace extension APIs
2 than it is to have random third-party ISVs do that?

3 A. Oh, obviously less risky because we can test. We
4 can -- we trust. So the risk of the third-party application
5 actually has a two side. One is the third party might not
6 test application well, so as a result the system crashes by
7 accident. That's one possibility, which we can completely --
8 it's impossible to completely eliminate, but we can reduce
9 that risk by testing it well. So having extension developed
10 inside of Microsoft we have a procedure to do a certain test.
11 So that risk is really, really small. Not zero, but really
12 small.

13 The other risk is a third-party intentionally does
14 something, for instance, trying to steal data from users. And
15 that risk is -- unfortunately exists, right? If the third
16 party has some bad intent, right, some developer develops some
17 game which looks like a game and acts like a game, but the
18 main purpose is stealing the bank account. That is possible.
19 If that extension is developed by Microsoft, we know that we
20 don't do that.

21 Q. Now, Mr. Nakajima, you were asked some questions on
22 cross-examination about the light weight Ole mechanism that
23 you designed for the shell extensions in Windows 95. Do you
24 recall that, sir?

25 A. Yes.

1 Q. Did the fact that the Chicago or Windows 95 shell
2 extensions relied on that lightweight Ole mechanism mean by
3 definition that they would be compatible with shell extension
4 mechanisms designed by the Cairo team?

5 A. No.

6 Q. Why not?

7 A. So Ole mechanisms is simply very low level
8 integration protocol. But somebody needs to define how to
9 integrate like NameSpace, which is not defined in Ole, but the
10 shell team defines it. I defined it. So if the Cairo team
11 come up with different types of NameSpace mechanism, NameSpace
12 extension mechanism, it will not be compatible even though
13 they use Ole.

14 Q. Now, Mr. Nakajima, I'd like you to look at --
15 excuse me -- look at the patent that Mr. Johnson showed you on
16 cross-examination and direct your attention, sir, to the same
17 page that he showed you, which is Number 54 at the top. It's
18 the section called, When to Create a NameSpace Extension. Do
19 you see that? I'll let you get -- it's right after -- it's
20 about two-thirds of the way through. It starts being numbered
21 at the top. And this is Page 54. Just let me know when
22 you're on that page.

23 A. Oh, Page 54. Okay. I am on that page.

24 Q. Okay. Now, Mr. Johnson showed you the first
25 paragraph under the heading, When to Create a NameSpace

1 Extension. I'd like to show you the next paragraph which
2 carries on to the next page. It says:

3 In Chicago, there are some limitations on
4 NameSpace extensions. NameSpace extensions should
5 not be used on arbitrary files found in the file
6 system. This means you should not implement a
7 NameSpace extension to expose a hierarchy for a
8 file class where files of the class can be found
9 in many places of the file system. For example, a
10 NameSpace extension should not be used -- and I'm
11 now looking at Page 55 -- to expose the contents
12 of a compressed file, such as a file compressed
13 with PKZIP. Another example would be using a
14 NameSpace to expose the contents of a spreadsheet
15 or word processing document in the shell.

16 Can you explain what this means, Mr. Nakajima,
17 about the limitations of the use of NameSpace extensions?

18 A. So this says -- okay. So this says the individual
19 file in the file system like word document or zip file --

20 Q. Uh-huh (affirmative).

21 A. -- cannot behave like a custom folder in the
22 NameSpace, yes.

23 Q. Now, Mr. Johnson asked you various questions about
24 things that the NameSpace extensions could be sensibly used
25 for like e-mail clients and applications that contain their

1 own internal database. Does that usage in your view as the
2 person who invented this mechanism extend to the use of the
3 NameSpace extensions for word processing applications and
4 spreadsheet applications?

5 A. No. So it does -- so it does make sense to use for
6 e-mail client or document management software, which is
7 different from word processor or spreadsheet. So, yeah, I
8 said that it doesn't make sense to use that for word
9 processing application or spreadsheet application.

10 Q. And can you explain to the jury why you're drawing
11 that distinction between e-mail clients and document
12 management systems where you say it does make sense to you and
13 word processing and spreadsheet applications where you say the
14 opposite?

15 A. Okay. So that the NameSpace extension was designed
16 for essentially the custom folder, the folder meaning
17 something contains multiple items. So e-mail messages makes
18 sense because it contains messages. Document management
19 system makes sense because it's collection of documents.

20 But the word processor -- now you can still argue
21 that it's a collection of words. But it doesn't make sense to
22 display the number of words on the list. It should be a word,
23 the document. So the NameSpace extension mechanism was meant
24 to be used by something, something manages a collection of
25 objects, and it really presents the list to the user.

1 Q. Now, Mr. Nakajima, you were asked some questions
2 about NameSpace extensions running rooted.

3 A. Uh-huh (affirmative).

4 Q. Once that happens, once a NameSpace extension opens
5 in a new window and is rooted within the NameSpace extension,
6 what happens to the integration goal that motivated the
7 NameSpace extension mechanism in the first place?

8 A. It loses some, meaning the original intent was
9 having a single Explorer window open you can browse between
10 file systems and printers and e-mails and write freely from a
11 single window. The rooted meaning, once you've crossed that
12 boundary from third-party extension, then a different window
13 pops up. So the integration is no longer seamless. It looks,
14 behaved like a -- less integrated.

15 Q. Now, I'd like to ask you about Plaintiff's
16 Exhibit 1 and the meeting that you testified about that
17 preceded Plaintiff's Exhibit 1 with Mr. Gates and others in
18 the boardroom. Is it your testimony that at that meeting the
19 Cairo team stated concerns that it had about the robustness
20 and reliability issues with the NameSpace extension APIs?

21 A. Your question was, did they mention that in the
22 meeting?

23 Q. Yeah. Did they talk about that in the meeting?

24 A. I don't recall.

25 Q. Okay. And at the meeting, did the Cairo team talk

1 about architectural issues that they had in terms of the model
2 view separation that you talked about earlier?

3 A. I don't recall, either.

4 Q. Okay. Do you recall whether there was any
5 discussion, either at that meeting or any time after that
6 meeting, about any ISV that was developing a word processor or
7 spreadsheet needing the NameSpace extension APIs?

8 A. No, I don't recall.

9 MR. JOHNSON: I have no further questions, Your
10 Honor.

11 THE COURT: Anything further, Mr. Johnson?

12 MR. JOHNSON: Just a couple, Your Honor.

13 RE-CROSS-EXAMINATION

14 BY MR. JOHNSON:

15 Q. So, Mr. Nakajima, as I understand, the document
16 management systems would be a good use of the NameSpace
17 extensions; right?

18 A. Uh-huh (affirmative). Yes.

19 Q. And something like, for instance, Clip Art,
20 somebody had a collection of clips, artwork from all around
21 the world, that would be a good use of the NameSpace
22 extension; right?

23 A. Yes.

24 Q. And you, of course, know that bringing in the
25 Internet would be a good use of the NameSpace extensions, as

1 well; right?

2 A. Yes.

3 Q. And so those are all things that could be included
4 with, for instance, a word processor; right?

5 A. Also the WordPerfect application is bundled with
6 document management system. Yes, it's possible.

7 Q. And that would be a good use of the NameSpace
8 extensions; right?

9 A. Yes.

10 Q. Now, the risk rewards or risk benefits I guess that
11 you were talking about with respect to what you did, those
12 risks and rewards were present when Microsoft decided to
13 document the NameSpace APIs to tens of thousands of ISVs;
14 right?

15 A. Yes.

16 MR. JOHNSON: Nothing further, Your Honor.

17 THE COURT: Thank you very much, Mr. Nakajima.
18 That's it. Thank you.

19 THE WITNESS: Thank you.

20 THE COURT: Next witness?

21 MR. TULCHIN: Microsoft calls Dave Acheson. He's
22 out in the hall, and he'll be in a moment.

23 THE COURT: Sure. And we should stop around 1:30;
24 is that right? My guess is Mr. Acheson is going to run
25 longer, so we may have to sit longer more than I expected.

1 We'll stop at 1:30.

2 MR. HOLLEY: Your Honor, may I be excused?

3 THE COURT: Of course.

4 THE CLERK: Raise your right hand, please.

5 DAVID JAMES ACHESON,

6 called as a witness at the request of Defendant,

7 having been first duly sworn, was examined

8 and testified as follows:

9 THE WITNESS: I do.

10 THE CLERK: Please be seated.

11 Please state your full name and spell it for the
12 record.

13 THE WITNESS: David James Acheson. D-A-V-I-D,
14 J-A-M-E-S, A-C-H-E-S-O-N.

15 DIRECT EXAMINATION

16 BY MS. NELLIS:

17 Q. Good afternoon. Thank you for being here,
18 Mr. Acheson.

19 Do you live in Utah?

20 A. I do. I live in Provo.

21 Q. What do you do?

22 A. I am a training programs director for the payment
23 card industry.

24 Q. Can you tell the jury a little bit about your
25 education background? And you can begin with college.

1 A. Okay.

2 Q. Unless you went to East High, by any chance.

3 A. I did not. I went to Stadium High School in
4 Tacoma, Washington.

5 I graduated from Brigham Young University in Provo
6 with a bachelor's degree in English. After that I went to
7 Seattle University School of Law in Seattle. Actually at the
8 time it was located in Tacoma. And then from there I passed
9 the bar and went to -- but then went and got a post-graduate
10 law degree from the University of Edinburgh in the United
11 Kingdom.

12 Q. All right. Can you give the jury a brief
13 description of your professional experience?

14 A. I practiced law when I passed the Bar. I was a
15 public defender, and I was also a lawyer for the Washington
16 State Senate. From there I made the transition into the
17 business world and went to work for an international marketing
18 company.

19 Q. And how long did you do that for?

20 A. I did that for about a year.

21 Q. All right.

22 A. And then I married. That became my profession.

23 Q. All right. And if you could just briefly tell the
24 jury your professional experience through today. Just
25 briefly.

1 A. Right. So when I married, I moved to Provo and
2 went to work for WordPerfect Corporation. There I was an
3 enterprise account director, and then I went to -- then I made
4 the transition when Novell acquired WordPerfect. I was laid
5 off from Novell -- I actually took a year away from Novell,
6 went to a startup here in Salt Lake, got hired back at Novell
7 and went to work there in a completely different capacity, in
8 the training program, and I've been in that training program
9 industry ever since. I was laid off from Novell and moved up
10 to Redmond and was hired by Microsoft. That's where I worked
11 for a couple years. Then because of family, we moved back
12 down to Provo to be near my wife's family, and we've lived in
13 Provo since 2000 where I worked as a training programs
14 director ever since that time in 2000.

15 Q. Are you currently involved in community activities?

16 A. I am. I am the chair for the Utah County
17 Republican Party.

18 Q. And you're appearing here today pursuant to a
19 subpoena?

20 A. I am.

21 Q. Are you still a member of the Bar?

22 A. I still am a member of the Bar. I'm a member of
23 the Washington State Bar Association only, and I'm on inactive
24 status, which means I don't practice.

25 Q. But you understand that appearing pursuant to

1 subpoena meant you had to show up today?

2 A. Absolutely.

3 Q. But you've met with Microsoft's lawyers prior to
4 your testimony; correct?

5 A. That's correct.

6 Q. And you also met with lawyers for Novell?

7 A. Yes. I've sat down with them, also.

8 Q. And we've asked you to come and testify today;
9 correct? Microsoft's lawyers?

10 A. That's correct.

11 Q. And if Novell's lawyers would have asked you to
12 come, would you have come?

13 A. Certainly.

14 Q. Did they ask you to come?

15 A. No.

16 Q. I want to focus today and I think a little bit
17 tomorrow morning, it appears, on your time at WordPerfect and
18 then Novell -- and the first time at WordPerfect and then it
19 became Novell.

20 You may have said this, but let me make sure I have
21 it right. When did you first join WordPerfect?

22 A. In I think about March of 1993.

23 Q. And when did you leave WordPerfect?

24 A. I left WordPerfect after Novell acquired
25 WordPerfect, and that would have been around June of 1995.

1 Q. And how is it that you came to work at WordPerfect?

2 A. My wife was known as a voice of WordPerfect. She
3 was actually the -- they called it a hold jockey, so that when
4 people called in, there was a little radio station. She'd
5 give updates on what line you were in, what cue you were in,
6 how long you were going to have to wait. So it was live
7 update. And part of her job was that she would read the job
8 hotline.

9 So she came home from work one day, and she said, I
10 think I found the perfect job for you. It's called enterprise
11 account director position at WordPerfect, and it's somebody
12 who sells and markets to WordPerfect's legal market. And she
13 was right. It was a great fit. And I interviewed and went
14 through a pretty rigorous process and got the job.

15 Q. All right. When you first joined in March of 1993,
16 what was WordPerfect's corporate culture like?

17 A. It was a very warm culture. It was a tight-knit
18 family culture.

19 Q. Did the company take any efforts to keep morale
20 high?

21 A. Yes, they did.

22 MR. WHEELER: Your Honor, I object if he's speaking
23 for the company. He ought to be talking about his own
24 experience.

25 THE COURT: Again, I think this is a premise of his

1 observations as an employee.

2 MS. NELLIS: Absolutely.

3 Q. BY MS. NELLIS: And we just want to hear from your
4 observations. Did you observe the company undertake efforts
5 to keep morale high?

6 A. Absolutely. For me they had the refrigerator
7 stocked with soda pop and ice cream bars. So it was a great
8 morale boost for me and I'm sure for many others. And
9 parties, you know, get-togethers and gatherings, those kinds
10 of things.

11 Q. Did you like working for WordPerfect?

12 A. Loved working at WordPerfect. Again, it was a
13 family feeling. I was working with six or seven other
14 enterprise account directors, really considered them my
15 family, my brothers almost.

16 Q. And again, keeping focused on when you joined in
17 1993, what was the job as an enterprise account director?

18 A. The job of the enterprise account director was to
19 focus on a vertical market. So as opposed to a horizontal
20 where you're taking all comers or bringing on all kinds of
21 customers, as an enterprise account director, you were
22 responsible for a vertical market, something that was really
23 specific, like a legal market. I had another peer that was an
24 enterprise account director, he was responsible for
25 manufacturing, and another one was responsible for finance.

1 So an enterprise account director would be responsible for
2 selling specifically into that vertical market.

3 Q. And you said your vertical market was the legal
4 profession?

5 A. That's correct.

6 Q. Was it just the law firms?

7 A. It was law firms. We called it professions, the
8 professions, which would have been -- which was accounting,
9 legal, and those were really the two big ones, engineering,
10 also. But the vast majority of my time was spent on law
11 firms.

12 Q. About how many enterprise account directors were
13 there at WordPerfect in 1993?

14 A. I think there were eight of us.

15 Q. And did you interact with your fellow enterprise
16 account directors?

17 A. Yes. We all had our offices clustered together.
18 We had an open door policy with our boss and with ourselves,
19 so we would meet both informally, impromptu, and also formally
20 several times within a week.

21 Q. Did you also have opportunity to meet with
22 WordPerfect's developers?

23 A. Yes. So there's a cluster of buildings on the
24 WordPerfect campus, so I would go and I would meet -- it was
25 an easy thing to do. You'd walk across the parking lot and go

1 meet with either developers in the developer building,
2 executives in Building A, support, customer support, technical
3 support people in Buildings G and G-plus. Sales was in
4 Building K, I think that's where we were.

5 Q. What about senior management, did you have access
6 to senior management at WordPerfect?

7 A. I did. And the senior management that I had access
8 to was my immediate line of bosses, so a guy name Brent
9 Jackman; his boss, Greg Butterfield; his boss, Greg's boss,
10 Clyde Wynn, who was the VP for the sales for the entire
11 company, they all sat in our building in our cluster. And
12 then I also had access to the executives in Building A, the
13 people running the company.

14 Q. Through the vertical market, the professions'
15 market, was that an important market for WordPerfect?

16 A. In my opinion it was. And in the opinion of our
17 executive staff, also. It was -- it was a real feather in our
18 cap to own the legal market. To have law firms as your
19 flagship customers and to have them using your flagship
20 product was really a feather in our cap and something that
21 everybody from the top down wanted to assure that we kept.

22 Q. Did you have a particular geography?

23 A. No. I was responsible for worldwide.

24 Q. Okay. And what products did you sell to law firms?

25 A. I mostly sold WordPerfect.

1 Q. WordPerfect the word processor?

2 A. WordPerfect the word processor.

3 Q. Could you briefly describe to the jury how you
4 would go about selling WordPerfect product to your law firm
5 clients and other clients in the professions' market?

6 A. As an enterprise account director, it was important
7 it have face-to-face contact with our customers, and so I was
8 on planes a lot and in the major cities where you'd find major
9 law firms. So I was in New York on a constant -- or at least
10 consistent basis, Chicago, Los Angeles, San Francisco. So it
11 was direct. It was face-to-face contact.

12 Q. Did you have opportunity to compare your products
13 to competitor products?

14 A. Yes. We used -- we did something that was fun.
15 It's always fun when you win. But we did something called a
16 shootout. And a shootout was when you would go to a law firm,
17 and you would get set up usually in the law firm's cafeteria.
18 And Word, Microsoft, somebody would be there for Microsoft
19 doing the Microsoft Word bit. We'd be there doing
20 WordPerfect, the word processor, and then somebody would be
21 there from a company called AMI Pro or Lotus, which was
22 another -- which was another word processing product. And
23 then from there, they would have, the law firm, and usually
24 the lead secretaries would set up a contest. And so you'd
25 have three different computers, three different screens

1 projecting what the secretary was doing, and they'd get these
2 tasks. And with these tasks it would be something like create
3 a document, make this bold, turn this italics on or off, put
4 numbers down the page. And then we'd have to go through and
5 show how fast we could do that.

6 Q. You mentioned before that you owned the law firms.
7 When you joined in 1993, was WordPerfect successful in the
8 professions market?

9 A. Absolutely. And I always -- I always said that we
10 had 99.9 percent of the market. I think in reality, if you
11 looked at surveys, it would say something in the 70s, 75,
12 76 percent of the market, meaning that of all law firms, of
13 100 law firms, 75 or 76 of them were using WordPerfect as
14 their word processor.

15 Q. Why did law firms like WordPerfect the word
16 processor? What was the secret to your success?

17 A. The secret to our success --

18 MR. WHEELER: He's talking about his opinion here.

19 THE COURT: Just his opinion.

20 Q. BY MS. NELLIS: Just from your observations.

21 A. My observation was, and it was repeated on a daily
22 basis, was that there were two great things about WordPerfect
23 the word processor, and especially WordPerfect for DOS,
24 WordPerfect 5.1 for DOS, and that was that it had reveal
25 codes. And the reveal codes was a feature that allowed -- it

1 allowed the user to ask themselves a question, why is that
2 word bolded? And how do I take bold off? You could in a way
3 lift the skirts of the product, and then you could say, oh, I
4 see. That's where bold starts, that's where bold stops. I'm
5 going to remove those codes. And then it would correct it so
6 that the words were no longer bolded.

7 The nice thing about that was that especially in
8 the legal profession, WordPerfect -- I can't stress enough how
9 perfect WordPerfect was for the legal profession. And that
10 the reason was that when you think about, when you think about
11 what the stock and trade is for the law firm it's words. As
12 an attorney you're either talking or you're writing. And so
13 the talking part can happen in the courtroom, it can happen in
14 a deposition.

15 But when it comes to word part, it's all about the
16 words on paper. So -- and lots of words. And so how far do
17 you process those words? How do you get them onto a piece of
18 paper? And that is where a word processor comes in. And it's
19 almost magical for a secretary to be able to process words by
20 typing them and being able to manipulate the words that are on
21 the paper.

22 So reveal codes was very important because
23 secretaries were passing documents back and forth. And how
24 did she get that bolded? And I need to take that off. So
25 reveal codes, marvelous, marvelous feature.

1 The other thing is you want to process your words
2 quickly. And so WordPerfect, the way in which it was built
3 made it so that you never had a -- WordPerfect 5.1 for DOS,
4 for example, made it so you never had to take your fingers off
5 the keyboard. And so you didn't have to lift your hands and
6 use a mouse or anything like that. Everything was done right
7 here. And if you were -- and there was -- usually in every
8 law firm, there was like the WordPerfect queen, they would
9 call her, right, she knew how to use every feature.

10 Can you tell I liked WordPerfect?

11 Q. I can. I can.

12 Focusing you a little bit forward in time as you
13 move into, later into 1993 and heading into, towards 1994, did
14 you continue to have similar success selling the WordPerfect
15 word processor for, you said 5.0 for DOS?

16 A. 5.1 for DOS.

17 Q. 5.1 for DOS to your client?

18 A. No. Sales started to drop off for a couple of
19 reasons. One, that firms were starting to move to Windows
20 platform, and 5.1 for DOS, didn't work upon Windows; and the
21 other was even if they weren't moving to a Windows platform,
22 that there were -- they already had 5.1 for DOS, and there was
23 no reason to buy anything else. It was working. It was
24 working well, and so there was no reason to make an additional
25 purchase. And as a sales guy, I needed to get people -- I

1 needed new sources or I needed new sales.

2 Q. From your observations, what was driving your
3 customers to Windows?

4 A. I was -- I was different than my fellow enterprise
5 account directors. The reason in the legal market that people
6 were going to Windows and to a Windows word processor was
7 because the clients of my law firms were demanding that
8 documentation was done in a Windows word processor and in the
9 one that worked the best at the time, which was Microsoft Word
10 for Windows.

11 Q. Didn't WordPerfect have a Windows compatible word
12 processor available at this time?

13 A. We did, and it was inferior. It was buggy.

14 Q. Did your -- did any competitors other than
15 Microsoft have strong Windows compatible products when they
16 started to demand it?

17 A. Ami Pro. Lotus' AMI Pro was one of the others.
18 They had a very small market share, though.

19 Q. And what impact -- did you continue to do shootouts
20 with law firms?

21 A. We did. And so even when we were switching to the
22 Windows platform and it was no longer on DOS, I still went out
23 with my team, my technicians, and we would do shootouts about
24 word processing on the Windows platform.

25 Q. And how did those go?

1 A. They didn't go well. The reason that they didn't
2 go well was that we would tie. Previously we had always won.
3 It had always been a clean win, an obvious win for
4 WordPerfect. But we started coming in just kind of dead even
5 or maybe even not performing as well in the shootouts. And
6 what my customers were telling me was, we need WordPerfect to
7 come in like it came in before, at the top, the clear winner,
8 and you're not coming in at that space. Now you're coming in
9 on a par with Microsoft Word for Windows, and that's not good
10 enough for us to make a business case to stay with
11 WordPerfect. We're going to switch to Microsoft.

12 Q. What impact did this have on sales to the legal
13 market specifically?

14 A. It had a tremendous negative impact on sales.

15 Q. In your meetings with other enterprise account
16 directors, did you learn that -- whether this movement towards
17 the Window platform was unique to the legal professions
18 market?

19 A. It was not unique to me. I was having problems,
20 and my peers, the other enterprise account directors were
21 having even bigger problems. They were losing accounts much
22 faster than I was.

23 Q. Why was that?

24 MR. WHEELER: Objection, Your Honor; unless we have
25 foundation as to how he knows this.

1 Q. BY MS. NELLIS: Can you tell us why you were having
2 less problems than your peers?

3 A. I was having less trouble because law firms are
4 conservative and hate to change. And so they wanted to stick
5 with what they knew. They went to -- my law firms went to
6 Windows and Microsoft Word for Windows kicking and screaming.
7 But they went, nonetheless, because, again their clients were
8 asking them to go. As I met with my fellow enterprise account
9 directors, they were confirming that they were having the same
10 problems, even more.

11 Q. Let's just very briefly -- let me show you
12 Defendant's Exhibit 285.

13 MR. WHEELER: Before you put that up, could we look
14 at this?

15 THE COURT: Yeah. Do you want to look at it first
16 or approach the bench?

17 (Discussion off record between the attorneys.)

18 MS. NELLIS: We have an agreement on the document,
19 Your Honor.

20 THE COURT: Good.

21 MS. NELLIS: We can put it up.

22 THE COURT: Thank you, Mr. Wheeler.

23 Q. BY MS. NELLIS: And I'd like to direct your
24 attention to the second page of this document. And the
25 very -- the third bullet in the first paragraph.

1 First of all, I'm sorry. Let me go to the first
2 page of the document. I'm trying to go quickly here, but I
3 need to do this. Can you identify this document?

4 A. The document that I have in my hand is labeled 255,
5 and I'm seeing 285 on the screen.

6 Q. Yes. You should be seeing 285. I apologize. Let
7 me trade that with you.

8 A. Thank you.

9 Q. How about this document? Can you identify
10 Defendant's Exhibit 285?

11 A. Yes, I can. This is the document that I wrote.

12 Q. Okay. And when did you write this document?

13 A. In July of 1993.

14 Q. All right. And how do you know that?

15 A. From the notation at the bottom of the page.

16 Q. Let's just go to the second page of the document.
17 The third bullet of the first -- in the first set,
18 it says:

19 Our general, paren, perceived position in
20 Fortune 500 markets is weaker and under more
21 severe attack by traditional Windows base word
22 processer AMI Pro and Winword. This puts pressure
23 from the larger corporations general counsel onto
24 law firms not using similar GUI word processor.

25 What did you mean when you wrote this in July of

1 1993.

2 A. What I meant was these law firms were getting
3 pressure from their clients to make sure that word -- or
4 documents were being created in a GUI environment and that
5 they could then process them on their own site in a Windows
6 application.

7 Q. Okay. And underneath there's a section, Microsoft.
8 Do you see the first bullet there?

9 A. Yes.

10 Q. Microsoft started their legal marketing
11 program about 18 months ago. In a structure very
12 similar to the proposed WordPerfect market solution
13 structure, Microsoft's vertical marketing group
14 targets financial services, pharmaceutical
15 manufacturing, health care and insurance, as well
16 as professional disciplines including accounting,
17 engineering and legal.

18 In July of 1993, were you observing that
19 Microsoft was marketing its word processor to your market in a
20 similar fashion as WordPerfect?

21 A. Yes, absolutely.

22 Q. And finally, under the last section, we'll go down
23 to trends, do you see that?

24 A. Yes.

25 Q. One of the first trends is, increasing use of

1 graphical user interface.

2 Was this a trend that you saw in the legal market
3 as early as July of 1993?

4 A. Yes. The GUI interface became something that was
5 very, not just trendy, but something that started to be
6 required by not just my industry but especially the other
7 industries that the enterprise account directors were
8 pursuing.

9 Q. Were all of these items that we just highlighted
10 issues of concern for you?

11 A. Yes. And that's why I put this into this document,
12 because I needed to memorialize what was going on so that it
13 could be taken up the proper channels and changes could be
14 made.

15 Q. Who was the intended audience for this document?

16 A. The intended audience at a general level was
17 management. So I wanted this to go up to the office of the
18 president, for example. And I wanted -- I wanted developers
19 to see this so that they could know what the needs were. The
20 developers were also hearing it from me personally.

21 Q. Did you ever have an opportunity to discuss your
22 concerns about the loss of sales in the legal market with any
23 of your bosses or WordPerfect senior executives?

24 A. Yes. My management was very good about listening
25 to the needs we had within our markets as enterprise account

1 directors, and they were keenly aware of the need that we had
2 to keep law firms as our flagship accounts. And in addition
3 to that, I know this document made it up to the office of the
4 president, and I had opportunities to have face-to-face
5 meetings with some of the executives with those members of the
6 office of the president.

7 Q. Do you recall which executives you had face-to-face
8 meetings with?

9 A. Yeah. I met with Ad Rietveld at least once. I
10 think he was the president. And I met with John Lewis at
11 least once. He was in the office of the president. And I met
12 with Duff Thompson who was in that office of the president and
13 was also an attorney. So it was nice to be able to talk to
14 Duff because he understood, he keenly understood what was
15 going on.

16 Q. What was the response you received at those
17 meetings? Do you recall any of the meetings specifically?

18 A. Yes. Yeah. I recall the meeting with John Lewis,
19 for example, where I sat in his office and had my laptop with
20 me and showed him a PowerPoint -- or actually WordPerfect
21 presentations presentation.

22 Q. And did you ask Mr. Lewis for anything at that
23 meeting?

24 A. I did. I asked him for support, for ground cover
25 support, and for a shift in the way we were developing

1 WordPerfect for Windows so that we could be more competitive
2 from -- yeah, that we could be more competitive with Word for
3 Windows. And a suite. We needed a solid suite.

4 Q. We'll come back to that. Was there any -- did you
5 receive any follow-up from Mr. Lewis, or was there a response
6 from Mr. Lewis about your concerns?

7 A. No, not directly.

8 Q. Mr. Acheson, during this period in time, the
9 post-July 1993 heading into 1994 prior to the Novell
10 acquisition of WordPerfect, were you ever able to persuade a
11 customer who was using Microsoft Word for Windows to switch to
12 WordPerfect for Windows?

13 A. No.

14 Q. Any idea why not?

15 MR. WHEELER: Objection; calls for speculation.

16 Q. BY MS. NELLIS: If you know. If anybody had direct
17 knowledge.

18 THE COURT: Based on what you were told is hearsay.
19 But what you assimilated as a WordPerfect manager, I think
20 that can come in, go ahead. If you were told. It's obviously
21 hearsay. But the purpose isn't for the truth of what they
22 told you but how you reacted as an account executive.

23 THE WITNESS: Would you repeat the question?

24 Q. BY MS. NELLIS: I will. I asked you whether or not
25 you had ever been able to persuade a customer who was using

1 Microsoft Word for Windows to switch to WordPerfect for
2 Windows, and you said no. And I asked you, do you have any
3 idea why not?

4 MR. WHEELER: And to repeat, that calls for
5 speculation, Your Honor.

6 THE COURT: That's fine. And if he knows. And
7 what you did in response, if anything.

8 THE WITNESS: I do know because I was meeting with
9 customers on a regular basis. And tens, if not hundreds of
10 customers that were giving me the same message repeatedly, and
11 that message was --

12 MR. WHEELER: Your Honor, then it's hearsay, if
13 that's where it comes from.

14 THE COURT: And I said before that clearly is
15 hearsay, but he's hearing it as a WordPerfect employee. And
16 the question is it's his knowledge of what's being said. It's
17 not for the truth of what's being said is important.

18 Go ahead.

19 THE WITNESS: So what I gathered from all of their
20 information back to me was that once they had gone to a
21 different word processor and to a different environment such
22 as the GUI environment, in effect gone to Word for Windows or
23 to the Microsoft Office suite was that they made the
24 investment and that they couldn't go back to WordPerfect
25 because they now had made that investment and planned on

1 staying with that investment.

2 Q. BY MS. NELLIS: And during this period, again,
3 prior to the acquisition by Novell, did your ability to sell
4 WordPerfect applications on the Windows platform ever get
5 better?

6 A. No, it never got better.

7 Q. Did it got worse?

8 A. It got worse. It got dramatically worse.

9 Q. You mentioned suites, talking to Mr. Lewis about
10 suites?

11 A. (Witness indicates by nodding head up and down.)

12 Q. When you first joined WordPerfect in March of 1993,
13 did you sell WordPerfect as part of an Office productivity
14 suite?

15 A. No.

16 Q. Why not?

17 A. It wasn't available.

18 Q. Were any of your competitors selling an Office
19 productivity suite at that time?

20 A. Yeah. I believe Microsoft was selling Microsoft
21 Office suite at that time.

22 Q. How if at all did the introduction of suites by
23 Microsoft affect your ability to sell WordPerfect to law
24 firms?

25 A. It affected it, and it affected it in a negative

1 way because the introduction of suites was -- there was a lot
2 of buzz around it. It was a cool thing to get as a customer.
3 It was the new thing, and it showed integration between the --
4 it created integration between disparate applications, brought
5 them together and made it so that you could use
6 cross-functionality. And it was a great thing. It's -- and
7 it's something that, as evidenced by the fact that we use it
8 all today. All of it, everything we use, the applications are
9 interoperable.

10 Q. How about with the other parts of your professions'
11 market such as accounting firms?

12 A. The accounting firms especially left WordPerfect as
13 a word processor because they loved the spreadsheet capability
14 that they found in the Microsoft Office suite.

15 Q. And based on the information that you gained
16 through your meetings with other enterprise account directors,
17 how did the shift to suites impact their ability to sell
18 WordPerfect to large account clients?

19 A. It affected their ability dramatically and even
20 more than mine because their industries were even more prone
21 to want to use the spreadsheet capabilities that they found in
22 the Microsoft suite, and they weren't as married to
23 WordPerfect as my market was married to WordPerfect. So
24 reveal codes was nice to have for them. For my legal
25 secretaries, it was a must have.

1 Q. Do you recall WordPerfect's first office
2 productivity suite offer?

3 A. I think it was Borland 1.0.

4 Q. Do you recall when that was released?

5 A. I don't. 199- -- end of '93.

6 Q. If I say May '93, does that sound reasonable to
7 you?

8 A. It sounds good to me, yes.

9 Q. How did your customers react to Borland Office?

10 A. Not well. The reaction was that, and I agreed,
11 that it was separate applications that were put together in a
12 cardboard box.

13 THE COURT: Okay. Let's stop for the day.

14 See you all at 8 o'clock in the morning.

15 Mr. Acheson, see you at 8 o'clock. I'll stay here with
16 counsel. There are a lot of things to go over.

17 (Whereupon, the jury left the court proceedings.)

18 THE COURT: Okay. We'll take up, unless somebody
19 sees a reason not to, let's take up Mr. Middleton's deposition
20 first. Ms. Gao, I think you're here. Tell me why I should
21 admit these.

22 MS. GAO: Okay, Your Honor. I think there are two
23 categories of designations that Novell has objected to in the
24 Middleton deposition. One of them is on the basis of
25 inadmissible hearsay, and the other categories are improper

1 opinions, speculation and lack of personal knowledge
2 objections. I'll take up the lack of personal knowledge and
3 improper opinion and speculation objections first.

4 So I think one of those comes on Page 59. First of
5 all, I wanted to note that Mr. Middleton during the relevant
6 times in 1988 and 1992 was a director for WordPerfect 5.1 for
7 Windows. He was -- I think he led, supervised 150 people. He
8 also testified that he reported directly to Alan Ashton who
9 was one of the cofounders of WordPerfect Corporation and also
10 a director on the board. Mr. Middleton was responsible for
11 the entire development process of WordPerfect 5.1, which was
12 the first product for Windows.

13 And so Novell's lack of personal knowledge and
14 speculation objections are meritless because most of his
15 testimony is about whether or not why WordPerfect was not
16 moving to the Windows platform, why he viewed that to be a
17 mistake. We can go through it line by line, if you'd like.

18 THE COURT: Actually I misplaced -- can I have a
19 copy of what you all gave me on the Novell side? It may be
20 easier to get through this.

21 MS. BURNS: You're asking for the deposition?

22 THE COURT: I'm sorry. I may have left it the
23 hotel. I looked for it and can't find it. Thank you.

24 Okay. Go ahead.

25 MS. GAO: I'm looking at Page 59 through 60 first.

1 And this is about how after they released WordPerfect for
2 Windows 5.1, there was still a lot of -- their group really
3 felt that Windows was the platform that they had to be on. It
4 was the most important platform. And others in other
5 departments didn't share that view, and they wanted to be on
6 DOS. They wanted to be on OS/2. So clearly Mr. Middleton has
7 the knowledge necessary to be able to comment on this.

8 As for the improper opinion objection, Rule 701
9 allows opinion -- or lay witnesses to testify to their
10 opinions if they're rationally based on their perception
11 and --

12 THE COURT: Is he still head of the division at
13 this point?

14 MS. GAO: Yes. He was the head of the division
15 from 1988 to 1998. WordPerfect 5.1 for Windows was released
16 in 1991, and so he would clearly have personal knowledge.

17 THE COURT: Okay.

18 MS. GAO: I also want to note they had an
19 nonresponsive objection. Just because Mr. Middleton likes to
20 talk doesn't mean that his testimony should be struck as an
21 initial matter. I think that a nonresponsive objection under
22 Rule 32 says that you have to make them at the time of the
23 deposition. Otherwise, they're waived. Also I think the
24 general rule is that nonresponsive objections have to be made
25 by the questioner.

1 THE COURT: We ought to make him and Mr. Muglia go
2 to dinner sometime.

3 MS. GAO: If you want me to also talk about the
4 hearsay objections.

5 THE COURT: Sure.

6 MS. GAO: Okay. On Page -- on Page 52 there's a
7 hearsay objection to a PC Week magazine article, which is
8 DX598, and also the testimony that is relating to that.
9 Novell had filed a motion in limine to preclude the admission
10 of Newspaper articles, and one of the categories of documents
11 that Microsoft identified in its opposition to Novell's motion
12 in limine were articles that put WordPerfect on notice that it
13 should develop for Windows.

14 And as we argue that the motion hearing on the in
15 limine, part of Microsoft's defense in this matter is that
16 WordPerfect had been behind Novell in developing for Windows.
17 It was developing for DOS. It was developing for OS/2. And
18 whether or not it's true in this article that Mr. Gates said,
19 hey, the first thing you should do is write for Microsoft
20 Windows, that's not the relevant point here. The relevant
21 point is it's being offered to show that WordPerfect is on
22 notice that it should have been developing for Windows, which
23 is a valid non-hearsay purpose.

24 I'll also point you to Page 1 -- one second. I've
25 got the wrong deposition.

1 Okay. It's on Page 113. And here he's testifying
2 about an article that came out which showed that WordPerfect
3 for Windows at the time was rated as a superior product for
4 Word for Windows. Obviously Microsoft is not offering the
5 document for the truth of the matter asserted. In fact,
6 according to Mr. Middleton's testimony, the article here says
7 what he's saying is he's trying to talk about the reaction of
8 the group to this particular article and how they were
9 surprised to see that there was pressure to get the next
10 version of the product out, even though Word was outselling
11 Windows -- I'm sorry -- word was outselling WordPerfect by
12 10 to 1. So they were surprised that they were being asked to
13 work overtime in trying to get the product out when their
14 sales group was not doing the work necessary.

15 THE COURT: Okay. Let me hear from the other side.

16 MS. BURNS: Good afternoon, Your Honor. My name is
17 Erin Burns. I haven't had a chance to formally introduce
18 myself. But it's a pleasure to do so now.

19 THE COURT: Good to see you or hear you.

20 MS. BURNS: Say again?

21 THE COURT: I guess it's good to see you, but it's
22 really more to hear from you because I've seen you.

23 MS. BURNS: I think that Microsoft overstates
24 Mr. Middleton's involvement with the WordPerfect product. He
25 was the program manager up until 1992, but he testified after

1 1992 he was watching WordPerfect from a distance. He was not
2 involved at all in the development of marketing of WordPerfect
3 6.0 for Windows 3.1. He was not involved at all in
4 WordPerfect 6.0A or 6.1. And I think a lot of the -- and I
5 can go -- I'll go through them individually. But our
6 objections deal with his lack of personal knowledge regarding
7 Novell's business decisions with respect to the sales force.
8 He was not involved at all in the sales force.

9 THE COURT: What was he doing after he -- during
10 the period of time in question?

11 MS. BURNS: From 1992 to 1994, he was working on a
12 document in viewer application that was separate from
13 WordPerfect. After November of 1994, he was at the company
14 for another year working in the extended -- extended services
15 group that was part of the shared code group. But I'd like to
16 note that he was not in a group with Mr. Harral or
17 Mr. Richardson who was involved -- their group was involved
18 with implementing shared code at the end of the July
19 application that were part of the suite. And Mr. Middleton
20 testified that he did not have -- he was not involved in
21 implementation shared code and individual application.

22 THE COURT: Let me ask Ms. Gao. The biggest, one
23 of the issues that seem to me to cut across is how much he
24 knew about during the time frame, because if he testifies at
25 one point that he's looking at it at a distance, it seems to

1 me that there was something he had been involved with, and
2 then to some extent, I don't know how much he really knew
3 thereafter.

4 MS. GAO: Yeah. The majority of Mr. Middleton's
5 deposition is really about the late 1980s to the early 1990s
6 time frame, which was when he was in charge of WordPerfect
7 5.1. There are times when he's asked questions about
8 WordPerfect 6.0, 6.0A, and I don't think he ever comments
9 about -- in detail about them. He talks about his -- based on
10 his knowledge and his perception of having worked on the 5.1
11 team.

12 THE COURT: I mean, don't we -- I forget who it
13 was. He thought he had that bag over his head. Who was the
14 fellow who had that -- who went to the party with a bag over
15 his head? What was --

16 MR. TULCHIN: Nolan Larsen.

17 THE COURT: Was that Larsen? Isn't this somewhat
18 redundant to what Mr. Larsen said? I mean, to the extent -- I
19 think we already know that, at least according to Mr. Larsen,
20 and I don't really think there's any real dispute. I mean,
21 this was DOS-cultured company, and it was brought into GUI at
22 some appropriate time. I don't know how much this adds.

23 MS. GAO: Well, I mean, with Mr. Middleton, he was
24 the person who was the lead director in charge of WordPerfect
25 5.1, so you're hearing the testimony directly from the horse's

1 mouth, so to speak.

2 THE COURT: No. No. I know at that point. But
3 later when we're talking about 6.0 and things of that nature.
4 It seems to me if he's looking at a distance, clearly he was
5 interested. He remained interested. But I don't know -- it
6 seemed to me one cutoff could be testimony about the times
7 that he was in charge of the product or at least related or
8 director or program manager as opposed to the times that he
9 was looking at, quote, it from a distance, unquote.

10 MS. GAO: There's really just one section where he
11 talks about looking at it at a distance, and maybe we could
12 look at that more closely and pars that out where he talks
13 about when he's no longer involved with the development
14 process.

15 THE COURT: And which part is that? Do you
16 remember?

17 MS. GAO: I think looking at a distance is on
18 Page 121.

19 THE COURT: Who sang that song, From a Distance?

20 MS. BRADLEY: Bette Midler.

21 THE COURT: Bette Midler. Thank you very much.

22 MS. BRADLEY: It popped into my head.

23 MS. GAO: Yes. It's Paragraph 121 starting at
24 Line 8. And all he said he was watching at a distance and
25 seeing the effects of it. He ends this section talking about

1 how his salary was going down, how it looked like there was
2 being -- there were a lot of poor vision decisions that were
3 being made after the one that should have been the wake-up
4 call. And he's comparing those poor decisions to the poor
5 decision not to develop for Windows in time.

6 MS. BURNS: Your Honor, if I could respond.

7 THE COURT: Sure.

8 MS. BURNS: I would agree that most of this
9 testimony is similar testimony that we've already heard. And
10 just taking this section of his testimony and our objections
11 to it, we're objecting to his opinion about what was going on
12 with the product after he left the WordPerfect product group.
13 He's talking about on Line 20:

14 Then all of this stuff happened with -- you
15 know, I was transferred to another group. The
16 DOS group was taking over and doing the next
17 version.

18 It's clearly about a time period to which he has no
19 personal knowledge.

20 And I think also if we move to the next objection
21 which starts on Page 122, Lines 2 through 123 and Line 2, he's
22 talking about what was happening when Novell acquired
23 WordPerfect. He was not in the shared code group. He was not
24 involved with WordPerfect at the time. And he admits that he
25 was not involved in the discussions. I think both sides have

1 tried to narrow down these objections as much as they possibly
2 can. And if you've had the chance to read his deposition, you
3 know there's a lot of stuff in there that could have been
4 objected to. And I think Novell has tried to pare down as
5 much as they possibly can their objections to sections of his
6 testimony to which he's testifying about, period of time after
7 he left the 5.1 product group.

8 THE COURT: Where is it when he says -- I'm just
9 having a hard time following -- when he goes to the other
10 group? Which line? Which page and line? I'm sorry.

11 MS. BURNS: I'm on Page 120.

12 THE COURT: 120. Line --

13 MS. BURNS: Line 12.

14 THE COURT: Line 12.

15 MS. BURNS: And he's testifying about all this
16 stuff that happened after he was transferred to another group.

17 THE COURT: How about cutting off there?

18 Then all this stuff happened with, you know,
19 period. I transferred to another group.

20 MS. BURNS: Right. And he talks about --

21 THE COURT: No. No. How about cutting off the
22 testimony there and then not having anything after that?

23 MS. BURNS: I think we would be amenable to that if
24 it was cut off on Page 120 Line 12.

25 THE COURT: 12. I don't know. You may have to

1 cut -- I don't know how, of course, videotape-wise, either the
2 previous sentence, or if you can turn the comma into a
3 sentence or finish it.

4 MS. BURNS: We felt good about that. That would be
5 fine.

6 THE COURT: It probably helps to say, transfer to
7 another group. The DOS group was taking over. And during the
8 next version, and not regarding Windows as a primary target
9 platform here. We know that already.

10 MS. BURNS: Say again?

11 THE COURT: Don't we know that already from
12 Mister --

13 MS. BURNS: No. What he's talking about here is
14 the DOS developers joining the WordPerfect for Windows group.
15 So he's still talking about WordPerfect for Windows. And he's
16 talking about --

17 THE COURT: I know that, but don't we -- simply as
18 a practical matter, don't we know from Mr. Larsen that the DOS
19 group comes in, that people all of a sudden -- Windows comes
20 out, is recognized as a success in the market, that although
21 it had been DOS oriented, WordPerfect was going to have to
22 enter the GUI world, that -- and then the first product they
23 produce, which I don't want to get into. I think we need to
24 stop it here. But the DOS group comes in and begins working
25 on it. And my recollection is that they we know -- I think we

1 know already, at least according to Mr. Larsen, that I'm not
2 sure if it's disputed, that the first Windows product isn't so
3 hot because it's deemed to be DOS-like.

4 MS. BURNS: I think you're confusing the time
5 periods. The first Windows -- excuse me -- the first
6 WordPerfect for Windows product was the one that Mr. Middleton
7 was involved in. That was released in November of 1991. And
8 Novell has no further objections regarding Mr. Middleton's
9 testimony with respect to that time period. What he's talking
10 about here is post-spring of 1992 when he's left the group.
11 And he is referring to later in his deposition --

12 THE COURT: And I agree with you. I think that
13 should be cut. But the question is cut it either on Line 12
14 at or about that, or possible if you can cut --

15 MS. BURNS: Your Honor, I have no objection.

16 THE COURT: And cut it off if possible after, with,
17 you know, I transferred to another group. And it's a comma.
18 If you can cut it off on Line 14, do it. If not, do it --

19 MS. BURNS: That's fine.

20 THE COURT: So that one takes care of that. Any
21 others? There are a lot more.

22 MS. BURNS: Yes, Your Honor. If you don't mind we
23 could just -- there's only six. We've just --

24 THE COURT: No. No. Let's go through them. Let's
25 go through them.

1 MS. BURNS: If we start at the beginning. So our
2 first objection in the deposition is with respect to PX598.
3 It occurs on Page 53 Line 2 through 18 and Page 54 Lines 12
4 through 15. And we object to the testimony and the
5 introduction of the exhibit on the basis of hearsay.

6 THE COURT: Yeah. I think that is covered by my
7 prior ruling. I understand. But it's the fact that, the fact
8 that ISVs including WordPerfect were on notice to write to
9 both, whether or not it is true that they were --

10 MS. BURNS: I think in oral argument you indicated
11 that there would be circumstances where it would be
12 permissible to introduce exhibits on that basis. I would
13 argue, though, that this is not one of those circumstances,
14 because Middleton, Mr. Middleton has never seen this article
15 and has not testified that he's seen articles like this.

16 THE COURT: No. No. I agree with that. But the
17 next question is, and this was in 1989, is it consistent with
18 your recollection of Microsoft's message to developers? When
19 I read this, until I frankly just read this just now I was
20 with you. But it seems to me you have to have the article in
21 to have that question make any sense. And he's basically
22 confirming, yeah, that's when I was here.

23 MS. BURNS: But, Your Honor, Lines 12 through 15 I
24 think Microsoft's question underscores Novell's objection
25 because they're assuming the truth of what is in the article

1 when they ask the question, so I understand your testimony --
2 excuse me -- so do I understand your testimony that
3 WordPerfect did not follow Mr. Gates' recommendation?

4 They're assuming that Mr. Gates did make that
5 recommendation. So I would argue that they're actually trying
6 to introduce the article for the truth of the matter asserted.
7 They can't say --

8 THE COURT: Oh, I'm sorry.

9 MS. BURNS: -- that they made the recommendation
10 and pretend that's not assuming the truth.

11 THE COURT: That's a nice point.

12 Ms. Gao?

13 MS. GAO: Once again I think it just follows the
14 prior testimony. We're not introducing this because we want
15 the jury to understand that Mr. Gates was --

16 THE COURT: I know, but the question is based on
17 the fact that Mr. Gates did make that recommendation.

18 MS. GAO: I'm sorry?

19 THE COURT: I'm looking now on Line 12 on Page 54.
20 I think -- maybe I'll strike 12 through 15.

21 MS. GAO: So the reaction was that the WordPerfect
22 group -- I'm sorry. I'm not sure I understand you.

23 THE COURT: I'm just talking about -- it seems to
24 me the question is premised upon the truth of what Mr. Gates
25 said. If I'd been there, I would have asked the question

1 exactly the same way. I'm certainly not faulting the
2 questioner. But now -- I think that's a good point that that
3 question, it's not being introduced for the truth, the article
4 is not, I'm letting the article in. But it seems to me that
5 the question on Lines 12 to 14, it says to be -- did not
6 follow Mr. Gates' recommendation, that assumes the truth that
7 that was Mr. Gates' recommendation.

8 MS. GAO: Okay. I don't think we have any
9 objection to striking that part of the testimony.

10 THE COURT: So 12 to 15 is out, but the prior part
11 is in.

12 MS. GAO: Okay.

13 THE CLERK: The exhibit is out, too?

14 THE COURT: Exhibit is in.

15 THE CLERK: Exhibit 598 is in?

16 THE COURT: I don't care about the exhibit. I
17 think the testimony speaks for the purpose of -- all we need
18 is the testimony because the exhibit is quoted in part.

19 MS. BURNS: Thank you. Our next objection is on
20 Page 59 Line 3 through Page 60 Line 3. And here Novell argued
21 that Mr. Middleton is testifying to what other divisions in
22 WordPerfect felt and the division of the board of director and
23 how they --

24 THE COURT: Yeah, that goes in. He doesn't say how
25 he knew what the board is thinking.

1 MS. BURNS: Right.

2 THE COURT: Ms. Gao, there's no indication how he
3 knows that.

4 MS. GAO: I think it's reflected in the fact that
5 he testified on another page that he worked directly -- he
6 reported directly to Alan Ashton who sat on the board of
7 directors. The fact that their development team was told not
8 to develop -- or was not encouraged to develop Windows is a
9 basis for his knowledge that the people outside of his
10 department in the board were not -- did not feel like Windows
11 was an operating system of the future.

12 THE COURT: Where is it that you say he reported
13 directly to Mr. Ashton?

14 MS. GAO: Hold on one second.

15 It says it on Page 65 to 66 of his deposition. He
16 said: I had about 150 people in teams.

17 THE COURT: Excuse me. 65 to -- I'm sorry. 65
18 to --

19 MS. GAO: Oh, it's not in the disputed portion. So
20 do you have the entire transcript?

21 THE COURT: I've got the whole thing.

22 MS. GAO: Okay.

23 THE COURT: I think. I see.

24 MS. GAO: And on Page 66 Line 15 he says that he
25 reported to Alan Ashton. And the fact is that the board's

1 views would have been conveyed to Mr. Middleton through the
2 direction that they were asked to take with their development.

3 THE COURT: Let me reread the portion.

4 (Time lapse.)

5 THE COURT: Okay. I'm going to let that in.

6 Again, I think they know it already, but I understand the
7 point. I'm going to overrule the objection. So that stays
8 in, Lines 59 Lines 3 to 25 through Lines 3 of 60.

9 Okay. Next issue?

10 MS. BURNS: I don't want to take a step back. But
11 regarding the article, we just --

12 THE COURT: The article is not coming in.

13 MS. BURNS: Right. But can we just ask for an
14 instruction that when the deposition is played that it's not
15 offered for the truth of the matter asserted?

16 THE COURT: Sure. If you can stop -- I need
17 Mr. Goldberg's help on that.

18 MS. BURNS: And also, Your Honor --

19 THE COURT: And your help to remind me to do it.

20 MS. BURNS: The next objection is on Page 113
21 Line 9 through Page 115 Line 9.

22 THE COURT: Page 113.

23 MS. BURNS: And Novell objects to this piece of
24 testimony on the basis of hearsay, speculation, personal
25 knowledge, lack of foundation and improper opinion.

1 Your Honor, the question was asked on the previous
2 page of Mr. Middleton, quote:

3 What do you think when you testified that you
4 didn't know how much Novell understood of what
5 they were getting into?

6 And the question is with respect to the acquisition
7 of WordPerfect. Notwithstanding the impropriety of
8 Mr. Middleton's testimony with respect to what Novell
9 understood, his answer spans multiple pages, and it's
10 completely nonresponsive. Mr. Middleton refers to an article
11 that he can't specifically remember, which was not introduced
12 at his deposition. The article rated WordPerfect as superior
13 to Word. And Mr. Middleton assumes the article is true, but
14 he uses it as a springboard to speculate about Novell's
15 business decisions with respect to WordPerfect sales force.

16 THE COURT: Ms. Gao?

17 MS. GAO: Once again, we're not introducing that
18 particular testimony for the truth of the matter asserted, but
19 rather for the facts that he and others in development were
20 surprised to see the article, and they were reacting to the
21 fact that they were getting a lot of pressure more senior to
22 them to get the next version out even though their sales
23 people were not doing the job.

24 And I guess I'll move on to line -- Page 114, but I
25 can just quickly move on to that, as well. He talks then

1 about how he sent an e-mail asking about why we weren't, why
2 they weren't selling more of those products that they already
3 have. And on the note he says he may have that e-mail
4 somewhere, it could refresh my memory on it, and we don't have
5 that e-mail. But he says that in these e-mails they were
6 doing group discussions where everybody in the group were
7 talking about this product and why they were getting outsold.
8 So clearly this testimony is being offered in order to show
9 the reaction that they were having and not to show that
10 WordPerfect was rated superior to Word.

11 THE COURT: I'm going to sustain the objection on
12 the grounds the answer is too long. He made his point to the
13 extent that -- to the extent he had a point by Line 8.

14 MS. GAO: By Line --

15 THE COURT: Which isn't objected to. And also I'm
16 giving Novell credit for the fact that it's not moving to --
17 not making my job even harder. I think he made his point.
18 I'm somewhat serious. That's an awful long answer to a simple
19 question.

20 MS. BURNS: So it's sustained.

21 MS. GAO: It's sustained.

22 THE COURT: So for the record, from Page 113 Line 9
23 through Page 115, I think, that proves my point, to Line 9,
24 the objection is sustained.

25 MS. GAO: We don't dispute that he's a chatty guy,

1 Your Honor.

2 THE COURT: I know.

3 MS. BURNS: On that basis --

4 THE COURT: A long time ago there's nothing like a
5 witness -- there's nothing like an opponent or a witness who
6 talks too much. Clearly when their timeframes are completely
7 messed up as my friend did apparently in his deposition. I
8 say my friend, but I alluded to him before, Mr. Muglia.

9 Okay. What's next?

10 MS. BURNS: Your Honor, did we -- I think we talked
11 about 122 Lines 2, 123 Lines 2. But I'm --

12 THE COURT: Did I make any ruling?

13 MS. BURNS: Okay.

14 THE COURT: Where are we?

15 MS. BURNS: Pages 122 Line 2 through 123 Line 2
16 where he's talking about the merger at a time when he was not
17 involved with the WordPerfect product. And he also admits on
18 Lines 21 through 25 that he was not involved in any of the
19 discussions or due diligence.

20 THE COURT: The objection is sustained.

21 MS. BURNS: Okay. And then moving --

22 THE COURT: Go ahead.

23 Ms. Gao, do you have a point to make?

24 MS. GAO: I was just going to note that on
25 Lines 122 Lines 1 through 20 he's talking about the 1992

1 period, and he was talking about how they were struggling
2 a lot two years prior to the acquisition.

3 THE COURT: No. I'm not going to -- it just
4 wouldn't work.

5 MS. GAO: Okay.

6 MS. BURNS: The last objection is with respect to
7 Page 150 Line 4 through 151 Line 21. Novell objects to this
8 testimony on the basis of improper opinion, speculation and
9 personal knowledge. Mr. Middleton did not work on
10 WordPerfect 6.0. He testified he was not involved at all in
11 the development or the marketing of that product, and that he
12 was watching from a distance.

13 THE COURT: I think I've already sustained that.

14 MS. BURNS: Okay. Thank you very much, Your Honor.

15 THE COURT: Thank you all. Next issue is
16 Mr. Blount. I don't see any reason why he shouldn't be
17 called. I don't see how Microsoft could name him if they
18 didn't know about him.

19 MR. TULCHIN: Yes, sir.

20 THE COURT: Let me hear from Mr. Johnson.

21 THE CLERK: What's the name of the witness?

22 MR. TULCHIN: It's B-L-O-U-N-T.

23 THE COURT: Blount, B-L-O-U-N-T.

24 MR. JOHNSON: Your Honor, we obviously had a
25 pretrial procedure and pretrial order in this case.

1 THE COURT: But Microsoft didn't know the guy
2 existed. He gets an e-mail, Mr. Gates gets an e-mail out of
3 the blue.

4 MR. JOHNSON: Well, I mean, that's what discovery
5 is for. And if this guy was relevant to the case, that's what
6 you're supposed to do.

7 THE COURT: The question is, then why wasn't he
8 named with somebody with knowledge? I don't fault you. But I
9 don't think that a witness about whom a party had no knowledge
10 and no reason to have knowledge, you've got a lot of ways
11 here. You can depose him, you can do it by telephone.
12 Actually I think the e-mail speaks for itself. I mean,
13 there's a basis for cross-examination in the e-mail. But if
14 Microsoft wants to call him, they can call him. And you can
15 certainly depose them.

16 But, you know, if somebody reads about a case and
17 then e-mails and then has relevant information, you know, I'm
18 not going to fault you all for not naming him, but I'm
19 certainly not going to fault Microsoft for not knowing about
20 him. And, you know, that's what trials are all about.

21 MR. JOHNSON: Well, Your Honor, we certainly -- one
22 of the problems is, of course, we're bearing down into this
23 trial. We certainly would need to have the opportunity to
24 take the man's deposition.

25 THE COURT: Of course.

1 MR. JOHNSON: Prior to his testimony.

2 THE COURT: As I say, I'm looking out here, and I
3 don't see any paucity of people.

4 MR. JOHNSON: We do have plenty of people, Your
5 Honor; although some of us --

6 THE COURT: I see no paucity of skilled people.

7 MR. JOHNSON: Thank you, Your Honor. Well, then
8 we'll have to arrange for a deposition.

9 THE COURT: As far as -- I think you can do it
10 probably by telephone. When he's -- where he's from?

11 MR. JOHNSON: He's from here.

12 THE COURT: He's from here.

13 MR. TULCHIN: He lives I think near Park City, Your
14 Honor.

15 THE COURT: Arrange for him to be deposed in
16 person.

17 MR. JOHNSON: Thank you, Your Honor.

18 MR. TULCHIN: Can we have a time limit that is sort
19 of around the same amount of time that we expect he'll testify
20 on direct?

21 MR. JOHNSON: Your Honor, that's completely
22 uncalled for. I don't know this guy from Adam. I looked at
23 his resumé on line. It's about all I've done. And I don't
24 even frankly know what relevant evidence he's going to have in
25 the matter. They want to limit me to, you know, to --

1 THE COURT: I think it's relevant that your client
2 twice chose not to purchase WordPerfect. That's relevant. I
3 mean, how much it cuts is a good question. But the limit, a
4 reasonable period of time. And I'll be around here or in
5 Baltimore calling -- are you going to take the deposition over
6 the weekend? Do you need a number that I can be reached?

7 MR. JOHNSON: Yeah, it would be over the weekend,
8 Your Honor, I'm sure. Certainly the federal rules provide us,
9 I don't think, I certainly would hope I don't need seven hours
10 to depose this man, but I could see it taking several hours.

11 THE COURT: Two hours. But if you go to two hours
12 and 15 minutes, I'm not -- take two hours and 15 minutes. If
13 you're done by an hour and a half, good for you.

14 MR. JOHNSON: All right. Thank you.

15 THE COURT: Work within the realm of two hours, one
16 way or the other. And if you reach a point where -- where you
17 really think you need more, you can give me a call and I'll
18 give Theresa a telephone number.

19 MR. JOHNSON: Okay, Your Honor.

20 THE COURT: If you dare.

21 MR. JOHNSON: I assume you've got better things to
22 do on the weekend than deal with us.

23 THE COURT: No, not really. Catch up with all my
24 other cases.

25 All right. Okay. That's Mr. Blount. What comes

1 next?

2 MR. TULCHIN: Your Honor, I think there's only one
3 other issue, at least as far as I remember, and that is the
4 issue that arose because of the new documents from
5 Mr. Bushman, one in particular that we attached in the letter
6 to the Court. And this --

7 THE COURT: Let me ask as a possible compromise.

8 MR. TULCHIN: Yes, sir.

9 THE COURT: I mean, frankly, I've got questions
10 about this spoliation instruction. I think what was before me
11 when I made the ruling before was the letter concerning player
12 of the year, you know, employee of the year, which frankly was
13 kind -- I was not prepared to springboard that into a
14 spoliation instruction.

15 I am concerned about the fact that if you believe
16 Mr. Bushman, and I understand Novell says you shouldn't
17 believe Mr. Bushman because he's got an ax to grind with
18 Novell because they cost him a lot of money when he was
19 working for somebody else, and they sued Novell and Novell won
20 by summary judgment and he lost all this money.

21 But if you agree -- if you believe Mr. Bushman that
22 these documents which are at the heart of Novell's case, I
23 mean -- I mean, I understand that Novell takes the position,
24 well, they should have been search terms, for the life of me,
25 if you're claiming that the cause of your damage, and clearly

1 there were three other, two other claims, but it's come down
2 at trial the big one is the withdrawal of the NameSpace
3 extension APIs and you don't keep records of the meetings that
4 you're having about this? I mean, I must tell you,
5 Mr. Johnson, it boggles my imagination. I don't think it
6 should be on -- and you were all plenty litigious and were --
7 thought about suing Novell -- I mean, Microsoft a long time
8 ago. But if this really was your claim, I don't for the life
9 of me, forget backup tapes, why those documents weren't
10 preserved. Now, they may not exist. I mean, you've got a
11 perfectly good argument. But frankly, it appalls me that I
12 hear from a witness that there are notes and a witness who
13 frankly I understand the objective reasons that you have to
14 say he's not credible, I thought he was credible, not that
15 that matters.

16 But how can you bring a case saying, contrary to
17 the documentary evidence which makes it clear that Quattro Pro
18 wasn't going to be ready until January on the basis of
19 Mr. Gibbs' theory, well, we really don't care about the
20 barbarians in Scotts Valley because Adam Blount and his cohort
21 weren't able to write this code, and that became the critical
22 factor, and we just sort of didn't pay attention to Quattro
23 Pro and felt things would catch up. And that's his theory,
24 which seems to me frankly contradicted by the evidence, but
25 that's for the jury, why don't you keep records of the notes

1 of the minutes? It just astounds me.

2 MR. JOHNSON: Your Honor, your answer, of course,
3 assumes that there was such things. And, you know, I would
4 like to point out to Your Honor, because I think Your Honor
5 needs to look at this from both sides. We heard --

6 THE COURT: I have looked at this case. I'm
7 sitting here as an impartial observer. And I have reached the
8 conclusions I have as I hope every trial lawyer in this
9 courtroom has listened to, and if you listen to the evidence,
10 it is unbelievable. I mean, I don't think you've ever focused
11 upon the core. One of the core things that you've got to
12 prove is causation, that if they did all -- basically you want
13 to dirty up Microsoft and come in and say, we lost money and
14 therefore we win. And it doesn't work that way.

15 MR. JOHNSON: May I respond, Your Honor? We did
16 have a witness here today, Mr. Nakajima, who testified that
17 there was a large dark document, he describes it as hundreds
18 of pages --

19 THE COURT: How is that document going to help you?

20 MR. JOHNSON: It could help us very much. It could
21 prove that, in fact, the reasons that they're giving today are
22 not the real reasons. That document, I don't know what it
23 says. It has never been produced. Mr. Nakajima clearly says
24 it existed. It supposedly lays out Cairo's position with
25 respect to these NameSpace extensions. That's a pretty

1 critical document.

2 Now, it may hurt me. It may help me. I don't
3 know. But I'm not standing up here suggesting that Microsoft
4 in bad faith destroyed that document in order to keep relevant
5 evidence from them. And that's what they're doing here,
6 because the standard -- if I could, Your Honor. The standard
7 for spoliation is not simply some negligence that resulted --

8 THE COURT: This isn't negligence. This is the
9 heart of your case, what happened during with shared code and
10 what caused the delay. That is an element of your case, which
11 frankly, I'm questioning whether you're really focused upon,
12 but it sure is there.

13 And the fact of the matter is, I don't see how you
14 don't keep -- if you're going to sue somebody, why you don't
15 keep notes of the meetings where upon which -- the whole
16 series of events. I just don't understand it. One document
17 is one document. And frankly, I think we pretty much know
18 what Cairo's position is because Mr. Muglia and Mr. Nakajima
19 basically testified the same thing.

20 But be that as it may, I mean, I understand that
21 that document, unlike the notes of Premier Support, but that
22 was silly. This was not silly. This was a document that
23 should have been -- I wish it were here. But it's not a whole
24 series of meetings, maybe there aren't such notes, I mean, but
25 series of the meetings which relate to a critical element of

1 your proof which is, what caused the delay.

2 MR. JOHNSON: And the other thing, Your Honor, and
3 this goes back to the original argument that we had on this
4 issue. Again, the time to bring this up when we could have
5 dealt with it was back during the time period of discovery
6 because those --

7 THE COURT: I did not know that at the time there
8 allegedly were notes, allegedly of those meetings, nor did I
9 have produced a document which, understandably you say isn't
10 as relevant as Microsoft does, but that document from the disk
11 which we talked about from Mr. Bushman that was produced, it
12 sure surprises me, and what surprises me it went to
13 Mr. Frankenberg who disclaims knowledge about all of these
14 things, anyway. But --

15 MR. JOHNSON: Here's the thing, Your Honor. Those
16 documents may very well exist --

17 THE COURT: That one could.

18 MR. JOHNSON: And we may well have them, all right,
19 on the tapes that we recreated in order to advance this case.
20 Now --

21 THE COURT: That's true.

22 MR. JOHNSON: Okay. So, you know, there's no
23 evidence that any documents at all have been lost or
24 destroyed. There's none. And as a matter of fact --

25 THE COURT: I mean, the question is why didn't you

1 preserve them independently when the heart of your case is
2 that they damaged you because -- by causing you delay? And
3 you have a series of notes allegedly of the meetings where the
4 cause was happening.

5 Yesterday Mr. Jardine made a point, which you all
6 might have all known, but frankly I didn't realize before, and
7 I suspect maybe Mr. Jardine was just acting like a good trial
8 lawyer picking up something on cross-examination. He looked
9 at the date of that memo and suggested that Novell didn't even
10 begin working on the shared code until the end of February.

11 MR. JOHNSON: Your Honor, if I may, I mean, in
12 fairness, WordPerfect and Novell actually had a methodology
13 that did save all of these documents. They backed up their
14 servers every single day. We literally have -- we literally
15 have hundreds and hundreds of these backup tapes.

16 THE COURT: Okay. I'm still not inclined --
17 frankly, let me suggest this as a compromise. Instead of me
18 giving a spoliation instruction, you all can argue that as
19 much as you want, and I'm not going to stop you. And if the
20 response is, we've got them, they're on the backup taping, you
21 know, let the jury decide the relative merits of that. So I
22 won't give the instruction.

23 And in terms of, do you really have to recall
24 Mr. Frankenberg? Or just stipulate the document in and say he
25 was given exactly where you got it from, Mr. Bushman that day,

1 on the disk.

2 MR. TULCHIN: I'm very open to that compromise,
3 Your Honor. It sounds reasonable to me.

4 THE COURT: So I don't give the instruction. They
5 can argue if they want. Mr. Frankenberg is not recalled, and
6 simply put in the document with a stipulation. This was
7 produced by Mr. Bushman on the morning of when he came into
8 trial on a disk which was copied, and just leave it there.
9 Fair enough?

10 MR. JOHNSON: Fine.

11 MR. TULCHIN: Yes.

12 THE COURT: And I won't give the instruction. I
13 understand there's ambiguities. I do think -- I don't --
14 based upon what I now know, the request for spoliation
15 instruction or spoliation or whatever it is, is more
16 reasonable than it was before, but I'm not going to give it.
17 Okay?

18 MR. JOHNSON: Thank you.

19 THE COURT: And you're all still looking through
20 those documents, Mr. Paris?

21 MR. PARIS: We've been through them, Your Honor.
22 Maybe we can take them up tomorrow afternoon. We've
23 eliminated some. We can do it now if you're prepared to do it
24 now or if you want to do it tomorrow.

25 THE COURT: Let's do some now.

1 All right. What's left?

2 MR. PARIS: I'll just give you a quick overview,
3 Your Honor.

4 THE COURT: Is this a Los Angeles issue?

5 MR. PARIS: West team obviously. Team evidence.

6 MR. HASSID: Only from Salt Lake, Your Honor.

7 MR. PARIS: West Coast to East Coast.

8 So there were a lot of documents that are a subject
9 of this motion, just to refresh your recollection. We took up
10 all the documents that were under item Roman II before the
11 break, you'll remember I argued that with Mr. Johnson, and you
12 admitted I think all of those so those are off the table. So
13 we'll start with the -- I would proceed in any order in which
14 they were raised in the motion. Ms. Bradley will take the
15 OS/2 (unintelligible) documents.

16 THE COURT: And that is a category. What category?

17 MR. PARIS: That's category I, Roman I.

18 THE COURT: Let me hear Novell from that. I must
19 say it seems to me that these are tangential evidence of a
20 tangential issue with 403 issues.

21 MR. HASSID: Your Honor, Alex Hassid for plaintiff
22 Novell.

23 THE COURT: Good to hear from you.

24 MR. HASSID: We haven't had the pleasure yet.

25 Hopefully it will be a pleasure for you. But I think we will

1 argue that, in fact, these are relevant and don't run afoul of
2 403. Microsoft has essentially injected into the case a
3 question of WordPerfect lateness for Windows. And what this
4 evidence tends to show is why WordPerfect was late for
5 Windows, and it has a lot to do with Microsoft's deception.
6 So you see a lot of similarity in what happened. Again we're
7 not pushing it on 404(b) grounds, but it does make the
8 question relevant, especially on the OS/2.

9 THE COURT: But isn't there plenty of evidence
10 already about the OS/2? It seems to me -- I agree with you
11 generally. Frankly, Microsoft's got a lot of evidence on the
12 other side. And I guess, I'm still -- if I hear from Pete
13 Peterson, I'm going to hear that he hated Bill Gates so I'm
14 going to write to Windows -- but be that as it may, I mean, I
15 agree with you that it's of tangential evidence. But it seems
16 to me that these, I think there are four documents --

17 MR. HASSID: I think it's only three at this point.
18 One has actually already been admitted.

19 THE COURT: Okay. That's good.

20 MR. HASSID: So there are interesting sound bites
21 obviously which tell the story a little better. But I would
22 disagree that it's too much, and for at least one reason,
23 which is that Microsoft has called several witnesses, and I
24 believe Mr. Ashton will talk about it tomorrow, the lateness
25 for Windows. Mr. Larsen has talked about it. And I think

1 Ms. Gao actually spoke about the lateness to Windows with
2 respect to Mr. Middleton. So it's not piling on, but, you
3 know --

4 THE COURT: I've also heard from Mr. Larsen, I
5 think. Didn't I hear from Mr. Larsen? Am I making it up? I
6 mean, I obviously had the impression, if it's wrong, but the
7 OS/2 issue aside, and you can. I don't fault him. It was
8 and my judgment is it still is, but can't use it anymore, that
9 it's a great word processor. It was DOS oriented, and
10 actually somebody, whoever talked about the secretaries
11 looking --

12 MR. HASSID: Mr. Ashton did --

13 THE COURT: But it did -- actually now I do sort of
14 remember, that was my concern. How do you go from the
15 keyboard to the mouse and back and forth? It seems to me it's
16 a great product and one -- and I can understand saying GUI is
17 for the birds, but it turned out not to be for the birds. But
18 the fact -- I mean, I really do have the impression and
19 unrelated to the DOS, I understand now the head fake. This
20 was a character -- it was a DOS-oriented company for very
21 goods reasons that Pete Peterson believed in until Windows
22 took off, and then they realized they had to respond to the
23 market. They probably were late. I think somebody testified
24 yesterday that there was a -- and he couldn't quite explain
25 what it meant, but he said it was a DOS, the first critical

1 reviews of the first WordPerfect for Windows, it's a little
2 DOS-oriented. I think that was Mr. Larsen, that -- I mean, I
3 don't think, frankly, I don't think it's that big of deal. I
4 think by the time we're coming along to '85, whatever lateness
5 there had been coming to the market before has been cured
6 because by that time, by that time I think it's pretty clear
7 that WordPerfect realized that to live, to continue to write
8 to what was then the biggest operating system, and that's a
9 whole other issue, but clearly we were then living in a GUI
10 world.

11 I know it's been raised. And I do understand the
12 head fake. But I just don't see it's that big of deal, to
13 tell you the truth.

14 MR. HASSID: Ultimately, Your Honor, I think we
15 tend to agree that the latter part in terms of recovery and
16 getting on Windows. But I think that actually your impression
17 is precisely the reason we need this kind of evidence, because
18 we would argue the impression is sort of mistaken. And that
19 is, we were coaxed to go elsewhere, yet there was an initial
20 reticence to go to GUI. But OS/2 was GUI. And we were to do
21 that. And I think to even out the jury's perspective to
22 understand this was not -- you know, this was not a religious
23 objection to working on GUI. This was -- there was some
24 deceit on Microsoft's part. This evidence is highly relevant.

25 THE COURT: But I thought the purpose of the

1 documents that concern me, and we can -- is it's dirty on
2 Microsoft vis-à-vis IBM, not vis-à-vis Novell. I mean, that's
3 what it seems to me to be a 403 issue.

4 MR. HASSID: But that's the point. That IBM and
5 Microsoft teamed up and gave the industry the impression that
6 OS/2 was the operating system of the future. And that
7 impact --

8 THE COURT: Go ahead.

9 MR. HASSID: The point, Your Honor, is that IBM and
10 Microsoft partnered to push OS/2 as the operating system of
11 the future. Windows on the other hand was sort of relegated
12 as a low end machine that was their agreement. And these
13 documents tend to show that Microsoft was on board with that.

14 And there is a particular Microsoft document, I
15 believe it is Exhibit 2 to our motion, which is an e-mail from
16 a Microsoft employee, which talks about lulling IBM to sleep
17 for another year so they can deal more oil wells with Windows.
18 I mean, you can see how this -- from Microsoft you can see how
19 this perspective was geared towards pushing ISVs in the wrong
20 direction. To jump in and take market share.

21 Now that's relevant we would argue because
22 Microsoft has made a huge deal on why we weren't on GUI. And
23 to the extent that Microsoft had a hand on that, I think it's
24 very difficult for Microsoft to argue that is not relevant and
25 moreover that it's prejudicial.

1 THE COURT: Ms. Bradley?

2 MS. BRADLEY: I think the Court is exactly right,
3 that these documents go to a relatively tangential issue, one
4 on which there is already evidence in the record including
5 Plaintiff's Exhibit 6A which was used with Mr. Gates, and
6 Mr. Gates was questioned about it. There's evidence in the
7 record on this. The remainder of it is cumulative, and there
8 are real issues about confusion with the jury on this.

9 THE COURT: I agree with you, to the extent -- to
10 the extent that WordPerfect or Novell wants to argue, we
11 didn't enter the world because of the head fake, there's
12 evidence there. This is 403.

13 What's the next category?

14 MR. HASSID: Actually, Your Honor, if I just may
15 one point?

16 THE COURT: Sure.

17 MR. HASSID: If the test, then, is that this is
18 sort of cumulative and we've done it to death, I think the
19 same should go to Microsoft talking about late to Windows.
20 Frankly I think if they're going to continue to do that, we've
21 heard plenty of evidence as Your Honor has said, and there is
22 really no reason to revisit that issue continuously.

23 THE COURT: I don't have any motion before me.

24 MR. HASSID: What?

25 THE COURT: I have no motion before me.

1 THE CLERK: Could I get numbers, please?

2 MS. BRADLEY: Yes. Let me give you numbers.

3 PX6A is in evidence already. PX10, PX 386 and PX463,

4 Microsoft's objections to those have been sustained.

5 THE COURT: Can we do it by exhibit number, too?

6 MS. BRADLEY: Yes. So those are plaintiff's

7 exhibits.

8 THE COURT: I know they are. But they are exhibit

9 numbers to the motion. I think it would be easier.

10 Okay. What's next?

11 MS. BRADLEY: Next up, the Court has already dealt

12 with the exhibits that were in Section 2 of plaintiff's

13 motion. Do you need to hear those exhibits number?

14 THE COURT: No. Are they in or out? I'm just

15 curious. Are they in or out?

16 MS. BRADLEY: They're in.

17 Next up are our documents containing embedded

18 hearsay. Take those up.

19 MR. HASSID: Your Honor, this is an interesting set

20 of documents that Microsoft is objecting to on embedded

21 hearsay grounds. But frankly, the majority of them contain

22 adopted admissions by Microsoft's executives. So I think it's

23 difficult to argue that hearsay, which we're not offering for

24 the truth of the matter in any event --

25 THE COURT: Which exhibit are we talking about?

1 MR. HASSID: We're talking about Exhibit 17, which
2 is PX95. If PX is easier, I can certainly do that.

3 THE COURT: And PX95.

4 MR. HASSID: PX95; correct. So PX95 is a document
5 by Brad Silverberg, which is the head of Windows 95
6 developing. And he's responding to Andrew Schulman about
7 competition in the operating systems market. Frankly, it's
8 unclear what Microsoft finds or objects to as embedded
9 hearsay. But in any event, Mr. Silverberg's commentary is
10 clearly adopting what he's seen and parroting it back to
11 Mr. Schulman to the defendant's point that there is
12 competition in the operating systems market.

13 THE COURT: Mr. Schulman was not at Microsoft. I'm
14 just curious.

15 MR. HASSID: No, he wasn't.

16 THE COURT: No. I'm just curious. He was the one
17 who wrote the --

18 MR. HASSID: He's sort of the guy that looked into
19 undocumented APIs.

20 THE COURT: Ms. Bradley? Excuse me?

21 MS. BRADLEY: One at a time?

22 MR. HASSID: Do you want --

23 MS. BRADLEY: I think one at a time makes sense on
24 these. I think it's as an initial matter just to address the
25 embedded hearsay issue generally. What Novell is asking the

1 Court to do here is to admit documents, exhibits into evidence
2 to go into the juryroom with the jury to do with them what
3 they will, and we expect what that means is that they'll read
4 them closely and consider them, without any witness having
5 testified about it and without any limiting instruction from
6 the Court on these.

7 THE COURT: Well, that is a whole different
8 question. I frankly don't remember -- I mean, I know I've
9 overruled business records objections. On an awful lot of
10 these it looked to me like document dumps, and I would like to
11 have a witness, like Mr. Silverberg was deposed at least.

12 MR. HASSID: He's outside the jurisdiction.

13 MS. BRADLEY: That's exactly right. I think --

14 THE COURT: And I don't know whether this document
15 was produced before or after he was deposed. But he was -- we
16 had a videotaped deposition.

17 MS. BRADLEY: The document was produced before he
18 was deposed. Well before.

19 THE COURT: Okay.

20 MS. BRADLEY: And so in any event, that's exactly
21 the point on something like PX95. Mr. Silverberg was deposed
22 in this case, wasn't asked about this document, to my
23 knowledge, or at least Novell didn't seek to show that portion
24 to the jury.

25 THE COURT: Well, the part that concerns me, and

1 for having being deposed, and I'm just a little worried that
2 it would end without some context is, check out the APP Ware
3 stories. Novell wants to displace Windows as the APIs
4 developers right to.

5 Now, in fact, it's pretty clear that that refers to
6 APP Ware, but, I mean, I don't know what would be done in
7 argument, or if the jury looked at that, they'd say, well,
8 here is evidence that Microsoft was concerned that WordPerfect
9 and PerfectOffice would possibly be a middleware that caused
10 them concern in their operating system when, in fact, in
11 context it clearly is APP Ware.

12 So that is -- what worries me about what I would
13 call a document dump, when you have something like that,
14 Mr. Silverberg perhaps would have been questioned about that
15 and explained it.

16 MS. BRADLEY: And I think that's exactly right.
17 The Court's inclination on this is exactly what we're
18 concerned about, which is without any testimony from
19 Mr. Silverberg, and I was going to tell you that had
20 Mr. Silverberg been on the stand, this may very well be the
21 appropriate type of document to use in cross-examination.
22 It's not the type of document that a jury can look at in a
23 vacuum and understand what's going on here. It's impossible
24 to tell whether when he's talking about APP Ware is PC Week,
25 is that who's talking here? Info World? Is Info World saying

1 that Novell wants to displace Windows? Is that
2 Mr. Silverberg's conclusion from having read it? Very hard to
3 tell. But all that we do know is that these are all items
4 that he's reporting from a week's issue of Info World.

5 So it's too confusing to the jury. It's embedded
6 hearsay. Without a limiting instruction or anyone to testify
7 about it, it shouldn't come in.

8 MR. HASSID: Your Honor, if I may?

9 THE COURT: Of course.

10 MR. HASSID: It's -- I think all of the concerns
11 that Ms. Bradley raised go to weight and not admissibility.
12 And, in fact, this is clearly an adoption by Mr. Silverberg.
13 He's telling Mr. Schulman, there's competition in the
14 operating systems market. You can see from the title. And
15 he's telling Mr. Schulman about all of these things. I don't
16 know that there's any instance of confusion.

17 And let's also not forget that APP Ware is a part
18 of this case. We pleaded it. It was part of the
19 PerfectOffice suite. And I acknowledge that this was before
20 the acquisition. But nonetheless, the goal with APP Ware
21 remained the same.

22 So Mr. Silverberg's concern over APP Ware is highly
23 relevant, and it seems very difficult -- it seems strange to
24 me that Microsoft could argue that this is somehow hearsay
25 when he's adopted it as an admission. I would say FRE801D2 by

1 party.

2 THE COURT: Okay. What's next? I'll reserve on
3 that.

4 18? Excuse me. Let me hear from -- I'm sorry. I
5 don't remember your name.

6 MR. HASSID: Alex. Alex Hassid. You can call me
7 Alex. That's fine. So this is PX190. I'm sorry. I picked
8 up the wrong one. Pardon me, Your Honor. I flipped over the
9 wrong documents.

10 Now, this PX190 is --

11 THE COURT: PX 190.

12 MR. HASSID: Yes.

13 THE COURT: Which exhibit number?

14 MR. HASSID: Exhibit 15. So this is a statement by
15 Bill Gates about WordPerfect's announcement, announcement of
16 PerfectOffice 3.0 for Windows. I don't think anyone would
17 argue that PerfectOffice 3.0 is not relevant to the case.
18 Microsoft's objection clearly deals with the newswire mailing
19 below. I think this is an easy case. Essentially all we're
20 asking for is the admission of this portion for context so
21 that the jury can read the document and see Mr. Gates,
22 understand Mr. Gates' statement in the context of Novell's
23 press release. It's not being offered for the truth of the
24 matter asserted, but instead only with respect to what
25 Mr. Gates' impression was. In other words, the effect on the

1 listener.

2 THE COURT: Why don't I hear you on all. I jumped
3 the gun before.

4 MR. HASSID: That's fine.

5 The next is Exhibit 16, which is PX210. This -- so
6 this is another instance where we have a Microsoft, a
7 Microsoft employee making an admission based on an embedded
8 article. Again, we're not offering the article for the truth
9 of the matter asserted. But this Microsoft executive actually
10 knows Mark Calkins. Mark Calkins is the person quoted in the
11 press release, and he's commenting based on his own
12 understanding of Mr. Calkins and what Mr. Calkins might plan
13 to do. So it's an admission --

14 THE COURT: Please tell me, I've gone through this
15 quickly, and I didn't -- let's see. Mark Calkins, the VP of
16 marketing of Novell for many years.

17 MR. HASSID: It's prior before leaving and going to
18 WordPerfect. The point of this is -- and this is post-merger,
19 obviously. This is Bob Ingerson, a Microsoft employee. And
20 what he's saying here is that Microsoft ought to take
21 seriously how Novell's intention to integrate NetWare with
22 WordPerfect, which is part of Mr. Frankenberg's pervasive
23 computing and network applications vision.

24 So again, I think the objection is to the embedded
25 hearsay of the article. But it's not for the truth of the

1 matter asserted, but simply Microsoft's --

2 THE COURT: And the next one is 18?

3 MR. HASSID: Correct.

4 THE COURT: Exhibit 18, which is Plaintiff's
5 Exhibit 211.

6 MR. HASSID: That's correct. Now, this sort of --
7 flatly on the first page of the document, we see, Ms. Van Dam,
8 another Microsoft employee, who attended I believe it was the
9 agenda conference -- I'm sorry -- NetWorld and InterOp. And
10 it was a speech given by Mr. Frankenberg, one of his many in
11 September of '94. And again he went through his -- he went
12 through strategically. And so Ms. Van Dam here is recounting
13 her impression of Mr. Frankenberg's strategy. And she
14 acknowledges that these are her impressions.

15 And so really what we have is just Microsoft's
16 opinion on Mr. Frankenberg's speech. I don't really see that
17 as embedded hearsay. It's again affect on the listener, and
18 it was sort of transmitted forward through Microsoft. That's
19 the last one.

20 THE COURT: While you're here, let me -- and again,
21 I don't want to be unfair, and I realize that I have
22 essentially said a business record is a business record. What
23 concerns me about all four of these documents isn't so much
24 the embedded hearsay, but the fact I'm just sort of putting
25 them in without any testimony.

1 I mean, I think you're right about the embedded
2 hearsay. But on all four of these, I would be more
3 comfortable if they had been produced during the course of
4 examination of witnesses so we could hear what the witnesses
5 said about them. And as I say, I don't want to be unfair. I
6 don't know -- I do know that I generally said business records
7 come in. But when I was reviewing all of these documents,
8 that was a continuing concern that I had that this was a
9 document dump that without testimony of people --

10 Mr. Johnson, you can help me out.

11 MR. JOHNSON: Just you may recall that we came in
12 with a lot of foundation objections, and Your Honor just
13 basically said, sorry, they're business records, and you lose
14 all of your foundation objections, which we did. We removed
15 them all. And --

16 THE COURT: Well, that's what I recall. And the
17 question is has Microsoft done the same thing, just putting
18 documents in without having witnesses --

19 MR. PARIS: The answer, Your Honor --

20 MR. JOHNSON: Of course they have.

21 MR. HASSID: Yes.

22 MR. PARIS: The answer, of course, is we have not.
23 We have been actually incredibly clear in terms of what we've
24 been introducing into evidence in this case. It's all been
25 relevant pertinent testimony that you've been hearing from

1 witnesses by deposition or by on the stand. We haven't done
2 any sort of document dump where we just want to send things to
3 the jury and have them read it in a vacuum, and we think
4 that's the concern. Of course, it is the case that a business
5 record is a business record. That doesn't mean, though, that
6 everything that is found in anybody's file in this case
7 qualifies either under our stipulation or under 803.6
8 independently.

9 And I think Your Honor has discretion to sort of,
10 you know, understand that and to judge it on a case-by-case
11 basis. That's what we've done. And I think that's what you
12 should do, as well.

13 MR. HASSID: Your Honor, if I may, I'm surprised to
14 hear Microsoft's counsel say that because as I think both
15 parties have done, several hundred exhibits have been moved in
16 without being showed to witnesses. Now, I doubt that
17 Microsoft has shown even 50 percent of those exhibits to
18 witnesses. So the document dump issue applies equally to both
19 sides.

20 But I would argue that's not relevant here because
21 these documents provide context of other things. For example,
22 PX211 talks about Mr. Frankenberg's strategy which he
23 testified about, so the jury does have some context for that.
24 We did not use that particular document. Obviously
25 Ms. Van Dam hasn't appeared here. But to see the effect on

1 Microsoft, the impression of Mr. Frankenberg's testimony of
2 his vision is highly relevant to the jury regardless. So this
3 is not a document without context.

4 If you look at the other document, Brad
5 Silverberg's document, he's talking about APP Ware. We've
6 heard testimony in deposition and elsewhere about APP Ware and
7 Microsoft's fear of APP Ware. This is again not a document
8 without context. It is simply more evidence of the same.

9 I do understand Your Honor's concern, but I think
10 that both parties have approached it in the same way and to
11 streamline the trial, as I think both parties are trying to do
12 by not calling every witness out there --

13 THE COURT: Well, some of these people, it's
14 not -- the question would be because some of them, certainly
15 Silverberg, van Dam, I assume is not -- Gates was, in fact,
16 here --

17 MR. HASSID: Correct.

18 THE COURT: -- and wasn't asked about 190.

19 MR. HASSID: No.

20 MR. PARIS: I'm sorry.

21 MR. HASSID: Go ahead.

22 MR. PARIS: This is a point I was driving at a
23 moment ago. I mean, these don't exist in a vacuum. We now
24 have a trial. We're going through a trial. Witnesses are
25 coming and attending. If they have questions for

1 Mr. Frankenberg -- there were documents pertinent for the
2 examination of Mr. Frankenberg, and Novell wanted to produce.
3 And this is something that runs through all the documents, not
4 just these four that we're going to talk about in the next few
5 minutes. They should have asked him and introduced them
6 through Mr. Frankenberg about them and introduced them then.
7 If they had documents which they felt were relevant to
8 Mr. Gates' testimony, they should have crossed him on it.

9 I mean, it's one thing to take these issues up
10 pre-trial in Baltimore when everyone's getting ready for
11 trial, it's another thing to take it up now when we're in the
12 midst of trial when people are appearing live. That's all.

13 THE COURT: I'm inclined to think that the --
14 Novell's right on the embedded hearsay issue. The other issue
15 continues to concern me.

16 Ms. Bradley?

17 MS. BRADLEY: If I may respond on the embedded
18 hearsay issue more narrowly. I think the problem here is that
19 there certainly, and I don't think Novell disputes that there
20 is hearsay in these documents. And the trouble is when they
21 come in without a witness, that means they're also coming in
22 without a limiting instruction that says that the hearsay is
23 not to be considered for the truth of the matter asserted but
24 rather to provide context for such and such and so on.

25 I think, you know, Novell chose not to raise

1 PX190 with Mr. Gates. Novell chose not to raise PX211 with
2 Mr. Frankenberg despite the fact that those documents pertain
3 to those witnesses. Instead what it hopes to do is send it
4 into the juryroom with the hope that, you know, they can cause
5 confusion or get the jury to believe what it says in the
6 embedded hearsay for some, you know, actual truthful purpose.
7 And it's not an appropriate purpose.

8 I will say, the Court is correct, there have been
9 hundreds and hundreds of exhibits that have been admitted into
10 evidence without any witness talking about them. The
11 documents we're talking about here today are where the rubber
12 meets the road. These are the ones where Microsoft has a real
13 concern that without anyone testifying about them, without,
14 you know, any clarifying or narrowing instructions that
15 they're confusing to the jury, that they're just plain old
16 hearsay with no way -- no limiting principle at all, and they
17 shouldn't come in in that way. And that's true for all four
18 of these embedded hearsay documents. I'm happy to talk about
19 them individually if you'd like to hear it.

20 THE COURT: Mr. Hassid?

21 MR. HASSID: I think the first and sort of most
22 obvious point is that, let's take PX211, for example, it would
23 have been I think absurd again to examine Mr. Frankenberg on a
24 document written by a Microsoft person that he's never seen
25 before.

1 THE COURT: But it would not have been absurd to
2 take Ms. Van Dam's testimony -- deposition.

3 MR. HASSID: Well, there was a limited amount of
4 time to take depositions, and we tried to earmark the most
5 important folks. But that is a good point, Your Honor. I
6 think ultimately if Ms. Bradley and Microsoft's concern is
7 that the jury will be confused, I don't see -- I don't think
8 Novell has any aversion to identifying the specific documents
9 with the embedded hearsay that they're concerned about and
10 offer a limiting instruction specifically to those documents.
11 I think something can be written and associated with them in
12 particular, and I think that probably takes care of their
13 concerns.

14 THE COURT: How many more documents do we have to
15 talk about?

16 MR. HASSID: Plenty.

17 MR. PARIS: A lot, Your Honor. I think maybe the
18 technical number is around 36.

19 THE COURT: You've heard my concerns. And I -- as
20 I say, I got in the middle of these, and the specific
21 objections aside, although I understand that they coincide
22 with the witness not being here, is what I've expressed.

23 I need -- again, Mr. Johnson is right, I did,
24 there's no question on a lot of foundational grounds I said,
25 no, they're business records. These seem to me to be

1 containing statements and impressions that should have had a
2 witness. What I need to know, and I think it would be unfair
3 to proceed today, I think give Novell a chance to show me the
4 kinds of documents that Microsoft has introduced under my, you
5 know, foundational thing. If they, too, hit the road, then
6 you know, out of fairness, you know, I'm going to let, you
7 know, let them in.

8 On the other hand, if, in fact, under a rubric that
9 you don't have to show a foundation, you're getting into
10 things that you should have testimony for, I just don't get.

11 MR. PARIS: Let's just be clear, Your Honor, just
12 because we had our business records stipulation, and you're
13 absolutely right, we thought their foundation objections were
14 ridiculous. That's just foundation. That doesn't mean we
15 waived any of the other objections we have. Half of these
16 documents that are in plaintiff's brief we have 403 or some
17 sort of a combined 403 relevance objections. Those are the
18 types of things that I think really Ms. Bradley was referring
19 to about the rubber hitting the road.

20 THE COURT: No. No. No. No. I understand.
21 These documents, a lot of them go to issues which are very
22 much here. And frankly, I doubt very seriously if I would
23 sustain objections if Mr. Gates had been -- if this one
24 document had been shown to him. On the other hand, it seems
25 to me that without his testimony, it becomes more problematic.

1 MR. PARIS: Absolutely, Your Honor. I mean, there
2 were documents in here, even, for example, that
3 Mr. Frankenberg, drafts of Mr. Frankenberg speeches to various
4 conferences that they want to put into the jury. What's the
5 jury supposed to do with that? Mr. Frankenberg was here.
6 What's the jury supposed to do? They're going to read some
7 draft speech by Frankenberg they found in his file that talks
8 about how great APP Ware is? I mean, I don't know. What do
9 they do with that? The man was here. We would have been able
10 to cross-examine him on it had they wanted to speak to this
11 material. But, you know, he was here. They didn't introduce
12 it, and it didn't happen. So to do it now is silly.

13 MR. HASSID: Your Honor, it wouldn't have been
14 economical to show Mr. Frankenberg every document that he
15 offered. The speeches are actually similar to the ones that
16 were admitted into evidence when he was here. And ultimately,
17 if the foundation objections are gone, and your point is very
18 fair, and we will go back and look to see what Microsoft has
19 admitted. But sort of a peripheral point, the foundation
20 objections are no longer the issue, and the objections left
21 are the issue, well, those are easily disposed of under the
22 law, and that's just something we would like you to keep in
23 mind.

24 MR. PARIS: Two very quick points, Your Honor.
25 First of all, the foundation objections were one piece of it.

1 There are elements -- the way our stipulation worked, just to
2 back up, was these materials were presumptively admitted under
3 803.6 subject to or showing by the other side that they really
4 shouldn't be. So, for example, just using this Frankenberg
5 draft speech as an example, my contention is that simply that
6 doesn't qualify as a business record within the meaning of
7 803.6 or our stipulation. Some draft speech, some draft press
8 release, these aren't types of materials that we have
9 contemplated were going to go to the jury for the truth of the
10 matter with absence of witnesses to sponsor them and without
11 us being able to cross-examine the witness on. So that's
12 point number one.

13 The other point is fair enough. If they want to
14 brief it, again, it doesn't resolve the remaining objections
15 we have on these things whether they're 403 or --

16 THE COURT: Mr. Johnson?

17 MR. JOHNSON: I would just say, Your Honor
18 appropriately recognizes this could be a goose-gander
19 situation, and we'd like to show you that.

20 THE COURT: Absolutely. So I'm not going to rule
21 on this. And I think above all of this, I guess what I'm
22 saying is whatever the objection is, and I want to see what
23 they did, some of this 403, it seems to me that a business
24 record is a business record. But if it comes in on either
25 side, maybe we ought to revisit. I don't want things to go

1 back to the jury and have them available for the jury's review
2 and for use in closing argument when they really are close to
3 the real issues in this case and there hasn't been
4 examination. I think if there had been examination, what I'm
5 saying 403 would have gone away because the person, if they
6 could have, could have explained it away.

7 But you all take a look at it. I'm certainly not
8 going to have Microsoft be able to make a document dump and
9 use the things I'm worried about. And then maybe you all can
10 look at your documents. That is my major concern, is that
11 some of these documents, it seems to me, the drafts are one of
12 them, you know, why if they're really relevant, why wasn't
13 Frankenberg asked about them if there really is something
14 there?

15 So you all take a look at it, and you know my
16 concern. And we'll take up, take a look at it later. And it
17 could come out two ways. It could come out that some of
18 Microsoft should be withdrawn even though that we agreed upon,
19 or that I ought to look at these in light of the fact that
20 Microsoft has gotten these in.

21 I'll take a look at them. But you all talk some
22 more. And it's not -- the issue I've raised today is really
23 not the one that was briefed. Thank you.

24 (Whereupon, the court proceedings were concluded.)

25 * * * * *

1 STATE OF UTAH)

2) ss.

3 COUNTY OF SALT LAKE)

4 I, KELLY BROWN HICKEN, do hereby certify that I am
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of
7 the foregoing matter on December 1, 2011, and thereat reported
8 in Stenotype all of the testimony and proceedings had, and
9 caused said notes to be transcribed into typewriting; and the
10 foregoing pages number from 3848 through 3946 constitute a
11 full, true and correct report of the same.

12 That I am not of kin to any of the parties and have
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this ____ day of
15 _____ 2011.

16

17

18

19

20

KELLY BROWN HICKEN, CSR, RPR, RMR

21

22

23

24

25