

1 THE COURT: Good afternoon. Let's get the jury. Do
2 we have -- what do we have next, videos?

3 MR. TULCHIN: Yes, Your Honor. We have a video of
4 Mr. Middleton which, in total, is 2 hours and 20 minutes. I
5 don't know if you want to keep the jury beyond 1:30.

6 THE COURT: We'll talk to them about it.

7 MR. TULCHIN: Whenever Mr. LeFevre is done, we're
8 ready to start Middleton, or not, as the Court chooses.

9 THE COURT: I suspect that, having read portions of
10 that depositions, I'd like to split Mr. Middleton up. We'll
11 see how it goes.

12 MR. JARDINE: Your Honor, I may have to leave at
13 2:00 o'clock.

14 THE COURT: Of course.

15 Let's get the jury.

16 THE CLERK: It seems to me they said they could stay
17 until four.

18 THE COURT: They could stay 'til four. I told them
19 originally four and then I said two. And who knows?

20 MR. TULCHIN: Your Honor, I think there is still one
21 disputed passage that is about 50 minutes in. Maybe you just
22 want to stop there.

23 THE COURT: We'll see how long Mr. Schmidlein is.

24 MR. TULCHIN: Sure.

25 (Jury brought into the courtroom.)

1 THE COURT: Mr. LeFevre, I bet you there are a lot
2 of sports announcers who wish that Brett Favre changed the
3 way -- he pronounced his name the way you do.

4 THE WITNESS: He spells it differently, but I can
5 never figure out why he says it the way he does because the R
6 is after the V, and he says Favre, so it doesn't make sense.
7 We say it right.

8 THE COURT: I'm not sure that you do, but you
9 certainly say it easier.

10 THE WITNESS: I lived in France for two years and I
11 learned the correct way to say my name in france, LeFevre.

12 THE COURT: A little localization.

13 We'll see how long this examination is, and we'll
14 talk to you about what you want to do.

15 Mr. Schmidtlein.

16 MR. JOHNSON: Thank you, Your Honor.

17 Q. BY MR. JOHNSON: Before our break, we were talking
18 about some of those sales and revenue trends that I showed
19 you on that demonstrative. Do you recall that?

20 A. Yes, sir.

21 Q. And so I think we established that, by the end of 1994,
22 we had sales -- wordPerfect sales on DOS went into decline
23 because the DOS operating system went into decline, right?

24 A. That's what the IDC data shows, yes.

25 Q. And that WordPerfect sales for Windows were climbing

1 during that time period, right?

2 A. Correct.

3 Q. WordPerfect was selling hundreds of millions of dollars
4 of WordPerfect software that ran on Windows during that time
5 period, right?

6 A. That's correct.

7 Q. Okay. And I think we also talked about how, during
8 that sort of '93, '94 time period, maybe late '93 and into
9 '94, WordPerfect was working hard to get out numerous
10 different versions of WordPerfect and then PerfectOffice
11 for the Windows platform. Correct?

12 A. That's correct.

13 Q. And so, by early 1995, sort of to set, you know, kind
14 of where we are, is sort of revenues rising, people waiting
15 for Windows 95 to come out, correct?

16 A. Yes.

17 Q. And we talked a little bit about sort of market decline
18 for '95 because people were waiting for Windows 95 to come
19 out, correct?

20 A. We did discuss that, yes.

21 Q. Now, as of the end of 1994 -- let me step back. Are
22 you familiar with the term "installed base"?

23 A. Yes.

24 Q. Okay. What does installed base mean?

25 A. Installed base is basically the number of customers

1 that are using your product.

2 Q. And, by the end of 1994, sort of that time period we
3 have been talking about, do you recall what WordPerfect's
4 installed base was, in terms of both for the Windows platform
5 and for the DOS platform?

6 A. I don't recall the numbers, no.

7 Q. Do you recall how WordPerfect's installed base, again
8 taking into account both Windows and DOS, compared to
9 Microsoft's installed base for Windows and DOS?

10 A. No. Only vaguely, just that, in the DOS platform, of
11 course, we remained dominant versus any other competitor, but
12 for the Windows, I can't recall.

13 Q. And combining these together, as we sort of looked over
14 the horizon on to '95, waiting for Windows 95 to come out, do
15 you recall, sort of relatively, did one side or the other
16 have an advantage in terms of the size of their installed
17 base?

18 A. One size or the other? You're talking about --

19 Q. One side or the other, Microsoft or WordPerfect?

20 A. Microsoft or WordPerfect? I don't recall. I'm
21 sorry.

22 Q. Let me show you what we've marked as PX-599.

23 And don't put this up yet.

24 Your Honor, this is the document we talked about
25 earlier.

1 THE COURT: Just for identification. Apparently
2 there are issues relating to it, which I don't know about,
3 but you can ask the witness about it.

4 MR. SCHMIDTLEIN: Thank you.

5 Q. BY MR. SCHMIDTLEIN: I know I had asked you some
6 questions before about IDC or International Data Corporation.
7 The document we have marked as PX-599, this is a PC and
8 Consumer Software, The Word Processing Software Market Review
9 and Forecast 1994 through 1999, DOS, Windows OS/2 and
10 Macintosh. Do you see that?

11 A. Yes, I do.

12 Q. And you were familiar with reviewing reports like this
13 while you were at WordPerfect Novell, correct?

14 A. Absolutely.

15 Q. And as a marketing person, when these came out, you
16 would have reviewed these very carefully, right?

17 A. Yes. And in many cases we would meet with the analyst.
18 Mary Contri Loffredo was someone I knew well.

19 Q. Okay. And the analyst would contact people at
20 WordPerfect to get information to input into their studies
21 and reviews, right?

22 A. They were very reliant on us to provide much of the
23 information. Some of it they got from, you know, publicly
24 available sales information, but a lot of it they got from
25 the companies themselves, so, yes.

1 Q. And they were -- you understood that the people at IDC
2 were -- they were talking to you and they were also talking
3 to Microsoft and Lotus and probably other people in the
4 industry, too, right?

5 A. Absolutely. Their job was to be as thorough as
6 possible and cover the entire industry.

7 Q. And you relied on this information in terms of, you
8 know, business decisions, marketing decisions, strategic
9 decisions, didn't you?

10 A. It was informative as we were making many decisions,
11 yes.

12 Q. I'm not staying you would agree with every last word in
13 their report, but you certainly took the information that
14 they published seriously. Is that fair?

15 A. That's fair.

16 Q. Now, if you would turn to page 26 of this. And
17 hopefully, on the page you're looking at, there's a table 13.
18 Do you see that?

19 A. Yes.

20 Q. Okay. And this table is entitled Total IBM-Compatible
21 Word Processing Shipments and Installed Base, 1993 and 1994,
22 right?

23 A. That's correct.

24 Q. And you've seen tables like this before in IDC reports,
25 right?

1 A. Many times.

2 Q. And on this report -- (Someone sneezes) bless you -- on
3 this report, they are setting forth market figures, again
4 based on the input they got, that reflect 1993 installed base
5 if you look at the far right, and then 1994 installed base if
6 you look on the left, right?

7 A. I see that, yes.

8 Q. And, again, to you, installed base meant sort of your
9 existing -- your existing customer base, right?

10 A. I guess you would describe it as the number of
11 customers that are actively using your product.

12 Q. That's much better than what I just said. And if you
13 look at the ranking, they rank a whole variety of companies,
14 and they rank products there, too, and they have some
15 multiple products for the same company. If you look at the
16 top three that are ranked there, you've got Microsoft Word
17 for Windows, right?

18 A. Yes.

19 Q. And that -- that at least in terms of a single product,
20 had the largest installed base, right?

21 A. Correct.

22 Q. And this says over 13.6 million users; is that right?

23 A. 13.6 million, right.

24 Q. And then the next two products that are listed there
25 are Novell WordPerfect for Windows. That has about 7 million

1 users?

2 A. Correct.

3 MR. TULCHIN: Your Honor, if it makes it any easier,
4 we have no objection to table 13. Our objections are to
5 other places in the document.

6 THE COURT: That's very helpful.

7 MR. TULCHIN: And it may make it easier and quicker
8 to put up the table.

9 THE COURT: That's very helpful.

10 If you could put up, Mr. Goldberg, table 13.

11 MR. TULCHIN: Great.

12 Q. BY MR. SCHMIDTLEIN: So you see there the second
13 ranking we were just talking about, WordPerfect for Windows,
14 about 7 million users; is that right?

15 A. Correct.

16 Q. And that would be the people who were using, I guess by
17 1994, WordPerfect for Windows products, some of the ones
18 you've testified to before, either 6.0, 6.0-A, 6.1, right?

19 A. Yeah. No version is specified, so it's probably all of
20 those versions.

21 Q. And also probably including -- perhaps including the
22 PerfectOffice 3.0 that shipped in December of 1994, right?

23 A. Correct. Because the WordPerfect for Windows was part
24 of that suite, so it would have been included in these
25 numbers as well.

1 Q. And that was going to be my next question. These
2 numbers here include both -- I think what they refer to as
3 stand-alone sales, which would be just buying a copy of
4 WordPerfect by itself, but also, if you happened to get a
5 copy of WordPerfect as part of PerfectOffice, or that
6 Microsoft number would include all the versions of Microsoft
7 Word that were included in Microsoft Office sales, right?

8 A. I would assume that's correct. I'd have to check the
9 numbers in the table to be absolutely sure, but generally
10 that was how they would present it, both a combination of
11 stand-alone and suite sales.

12 Q. Because they were trying to get a sense of sort of the
13 entire market, both suites and stand-alone?

14 A. Just word processing uses in general, regardless of the
15 source of purchase.

16 Q. And then the third ranked there is Novell WordPerfect
17 for DOS. And that has about 7.6 million; is that right?

18 A. Yeah. 7.7 if you round it.

19 Q. Okay. And then, actually, if you go down a little bit,
20 there is an entry for Microsoft Word for DOS. Do you see
21 that?

22 A. Yes.

23 Q. And that's got about 1.4 million; is that right?

24 A. Yes.

25 Q. So, is what IDC is sort of reporting here, if you sort

1 of added these numbers up and you added the Microsoft numbers
2 of these two platforms and you added the Novell numbers on
3 these two platforms, this would give you sort of what the
4 installed base was for DOS and Windows at the time for word
5 processing applications?

6 A. That would be accurate.

7 Q. I'm -- with my apologies to IBM, I'm excluding the OS/2
8 down there, which are sort of small at that point and sort of
9 negligible, right?

10 A. Relatively trivial numbers, yes.

11 Q. Okay. Now -- and, again, don't hold me to my math
12 here, but if you sort of add these together, doesn't this
13 sort of reflect that, as of the -- through 1994, in terms of
14 installed base, WordPerfect's installed base, as we look out
15 onto 1995, waiting for the Windows 95 operating system to
16 come, WordPerfect's installed base is essentially the same as
17 Microsoft's installed base, right?

18 A. Slightly lower. As you say, if you do the math
19 quickly, it's about 14.7 million versus 15 million for
20 Microsoft.

21 Q. And, in terms of what we were talking about earlier,
22 certainly people like yourself at WordPerfect, who are in
23 marketing, you were very, very hopeful that, when the Windows
24 95 product came out, that that would be an opportunity to
25 pick up sales of people first, I guess, from the WordPerfect

1 installed base, right?

2 A. Correct. And people from --

3 Q. Those were your most loyal customers, right?

4 A. Yes. We had -- we thought there was a lot of
5 opportunity to move people from WordPerfect for DOS to
6 WordPerfect for Windows. They liked us. They knew our
7 product, so that seems like a natural place to go first.

8 Q. Do you recall that, when PerfectOffice 3.0 came out in
9 December, 1994, that it sold very, very well in December,
10 1994?

11 A. I don't recall the sales figures for PerfectOffice 3.0
12 at that time.

13 Q. Would you turn to page 22 --

14 THE COURT: The first figures -- don't they -- I
15 thought it came out the very end of December. I just don't
16 remember. But if you've got figures for December, that's
17 great.

18 MR. JOHNSON: That's pre-sales, Your Honor.

19 THE COURT: Oh, pre-sales.

20 MR. SCHMIDTLEIN: You don't need to put this up.

21 THE COURT: I just remember this was
22 Mr. Frankenberg's Christmas gift. That's what I remember.

23 MR. JOHNSON: Exactly.

24 Q. BY MR. SCHMIDTLEIN: If you look at page 22 on your --
25 that last exhibit there. Just let me know when you get

1 there.

2 A. Okay.

3 Q. And do you see the -- sort of mid-way down there it
4 says WordPerfect for Windows Market Statistics. Do you see
5 that?

6 A. Yes, sir.

7 Q. And the second paragraph discusses the 1995 outlook for
8 Windows. Do you see that?

9 A. Yes. For WordPerfect, not for Windows.

10 Q. I'm sorry. For WordPerfect. And it says -- it talks
11 about the office suite portion, the outlook for office suites
12 for WordPerfect. Do you see that?

13 A. Yes.

14 Q. And it talks about the outlook there looks much
15 brighter for WordPerfect, right?

16 A. That's the word it uses, yes.

17 Q. And the reason it looks much brighter is that they have
18 just released PerfectOffice 3.0, and they have already sold
19 150,000 pre-sales of that, correct?

20 A. That's what it says, yes.

21 Q. And do you -- does that refresh your recollection that
22 there was significant sales of PerfectOffice 3.0 right when
23 it came out?

24 A. I can't say that it does, honestly. I don't remember
25 the numbers from that period of time.

1 Q. Okay.

2 A. But that sounds reasonable.

3 Q. Now, I want to switch topics here just for -- for a few
4 minutes. You talked about that you were one of the -- I
5 think the four decision-makers or the people who were
6 involved in making decisions about functionality for
7 PerfectOffice 95. Is that right?

8 A. That's correct.

9 Q. And you identified yourself, Mr. Gibb, Mr. Rietveld and
10 Mr. Creighton as the other three?

11 A. Correct.

12 Q. And did I understand your testimony this morning that
13 with respect to -- let me step back. At that time, this 1995
14 time period, when the Office or the PerfectOffice 95 product
15 was under development, you considered WordPerfect to be a
16 best-of-three word processor, correct?

17 A. Absolutely. My opinion was that the product was an
18 excellent product and was the best in the industry at the
19 time.

20 Q. Now, during this 1995, '94, '95 time period I think you
21 testified you had some interactions or communications with
22 Microsoft representatives about sort of the Windows 95
23 product under development that they had code named Chicago;
24 is that right?

25 A. Right. That's correct.

1 Q. And am I correct that, in terms of the interactions,
2 the people at WordPerfect who had at least some number of
3 those interactions were yourself and Mr. Creighton; is that
4 right?

5 A. Yeah. Tom Creighton and I were charged with being the
6 two primary contacts with Microsoft; myself for the marketing
7 side, Tom for the development side.

8 Q. And I think you sort of anticipated my next question,
9 which is, you were not the person who was responsible for
10 communicating with Microsoft on technical issues, right?

11 A. That's correct. That was Tom's role.

12 Q. So, in other words, if there were issues or there were
13 communications about API disclosures or other sort of really
14 technical issues that WordPerfect was having with Microsoft
15 during this time period, those communications would have gone
16 through Mr. Creighton, right?

17 A. That's correct. Tom and I were often involved in the
18 discussions together because we were both talking to the same
19 persons typically, the same people typically, and so we would
20 often meet together with the Microsoft people. So I heard
21 many of those conversations, but it is correct that Tom was
22 the primary contact for technical issues.

23 Q. And it is fair to say that, in terms of sort of getting
24 down to the technical nitty-gritty, Mr. Creighton was really
25 the person who had a better understanding of that than you

1 did?

2 A. As far as the Windows API's and things, that's
3 absolutely correct.

4 Q. And I think we asked you -- in your deposition, you
5 were asked about NameSpace extension API's, and I believe
6 your testimony was, you really didn't -- really recall what
7 those were. Is that fair?

8 MR. TULCHIN: Your Honor, objection. This is not a
9 proper use of the deposition, which is hearsay unless there
10 is something inconsistent.

11 THE COURT: That technically is correct, but that's
12 okay. And you're right, but this is an efficient way to do
13 it. Go ahead. You can answer if you want.

14 THE WITNESS: I believe I did say in the deposition
15 that NameSpace browsing was -- I didn't recall at the time
16 what that was.

17 THE COURT: And is that the same true today as well?

18 THE WITNESS: I think my recollection is improved
19 today.

20 THE COURT: What's your recollection today, because
21 it really was hearsay.

22 THE WITNESS: But I would certainly characterize my
23 recollection of all those conversations as non-technical. I
24 think that's a fair way of saying it.

25 Q. BY MR. SCHMIDTLEIN: And am I correct that it would

1 be -- the WordPerfect software developers or the people who
2 worked under Mr. Creighton, they would be the ones sort of
3 working through Mr. Creighton to get answers to technical
4 questions from Microsoft, right?

5 A. That would be fair.

6 Q. And Mr. Creighton was sort of over the PerfectFit or
7 the shared code team; is that right?

8 A. Correct.

9 Q. And do you know who the lead developer in the shared
10 code team was for 1995?

11 A. I don't recall.

12 Q. Did -- did you know a gentleman named Adam Harral?

13 A. Yes.

14 Q. And does it refresh your recollection that Mr. Harral
15 was the lead developer of the shared code team?

16 A. I don't remember Adam's position, but he was on the
17 shared code team. I do recall that.

18 Q. Now, while you were at WordPerfect, again in your --
19 sort of your marketing days at WordPerfect, which I think
20 would have been sort of the '94, '95 time period -- or
21 director of marketing?

22 A. Director of marketing in '94, '95.

23 Q. You had another marketing position just before that,
24 right?

25 A. Yeah. Technical product manager for the two years

1 prior.

2 Q. Were you involved in meetings with Microsoft, where
3 Microsoft would promote or evangelize particular API's to the
4 software developers to WordPerfect?

5 A. I only recall one meeting like that, and I believe we
6 already discussed it earlier, where Tom and I flew to Redmond
7 and met with Microsoft people in Redmond for an entire day.

8 Q. Were you aware, through your dealings with Tom and
9 others, that he and other people from WordPerfect were having
10 meetings and communications about API information and
11 evangelization by Microsoft that you weren't involved with?

12 A. Of course Tom, in his role as the Microsoft technical
13 contact, would have had other meetings that I wasn't involved
14 in, and I had meetings with the marketing people at Microsoft
15 that he wasn't involved in.

16 Q. Now -- now, I believe you testified this morning that
17 you were the lone dissenting voice among the four
18 decision-makers -- again, I'm trying to use your
19 terminology -- in terms of whether WordPerfect should
20 continue to try to develop a custom file open dialogue versus
21 just using Microsoft's common file open dialogue; is that
22 right?

23 A. That's my recollection, that the three of them were
24 determined to move forward with that, and I was fine with
25 just going to the common dialogs.

1 Q. And did that sort of three-to-one split there, did that
2 sort of persist, sort of, during the time period you were
3 there?

4 A. To the best of my recollection, it was that way until I
5 left the company in March of '96, yes.

6 Q. You testified, I think, before, that your recollection
7 was that development efforts for the PerfectOffice 95 did not
8 begin until -- and for the WordPerfect product for Windows
9 95, you didn't think those had begun until sometime in '95;
10 is that right?

11 A. They hadn't begun in earnest. I think it would be fair
12 to say that there were certainly some development efforts
13 that happened in 1994, with a small group of people. We were
14 looking at the code. We were using the beta, so there were
15 some investigative-type efforts going on, but the bulk of the
16 team didn't begin the Windows 95 development until 1995.

17 Q. And isn't it true that the shared code group had begun
18 work in 1994?

19 A. I don't recall, but that would be reasonable, given
20 Tom's position and Tom's exposure to the early betas of
21 Windows 95, that he would have started work on it.

22 Q. And the shared code group -- I know the jury has
23 probably heard more than they would care to about shared
24 code, but the shared code group was the group that actually
25 supplied a lot of the key code and functionality that sort of

1 the other individual product groups called on; isn't that
2 right?

3 A. That's correct. They built -- you know, we've talked a
4 lot about file, open, print, but the shared code team was
5 also responsible for tool bars, menus, different kinds of
6 functionality that was used by several applications. I would
7 want to clarify that the shared code team, if they had begun
8 some preliminary work on Windows 95 efforts in 1994, still
9 were very, very busy shipping WordPerfect 6.1 for Windows and
10 PerfectOffice 3 until the end of that year. So, again, they
11 may have done some preliminary work, but certainly their work
12 in earnest on Windows 95 couldn't have begun until after the
13 first of the year in 1995.

14 Q. Is it fair to say that the developers in the shared
15 code group, like Mr. Harral, would be more knowledgeable than
16 you about the detailed work that was done in that group in
17 1994 for the Windows 95 product of WordPerfect?

18 A. Yes, that would be fair. That was their job.

19 Q. Now, you -- you left Corel in March of 1996, correct?

20 A. Yes.

21 Q. And you said you went to Microsoft next; is that right?

22 A. Yeah. A month later I started working at Microsoft.

23 Q. And you had actually interviewed at Microsoft before
24 that time, right?

25 A. That's correct.

1 Q. Prior to March, '96, you had applied for a job at
2 Microsoft, right?

3 A. Well, the circumstance was that, after Novell announced
4 the acquisition -- or the sale, excuse me, of WordPerfect in
5 October, that many head hunters began calling our phones at
6 WordPerfect. They knew that it was a kind of time of turmoil
7 and so they would call and say, "Hey, would you like to come
8 here and be with another company?" So I had a particular
9 head hunter contact me. And she said, "Would you like to
10 interview? I can get you into Microsoft and Netscape," both
11 of which were interesting companies.

12 I said, "That's worth a couple of vacation days.
13 Let's go do it."

14 Q. And did you interview at Netscape as well?

15 A. I did.

16 Q. And did they offer you a job?

17 A. They did.

18 Q. You made a good choice.

19 A. Yes, I did.

20 Q. And tell me a little bit about the various jobs you had
21 at Microsoft. When you were first hired at Microsoft, you
22 were hired in to work for Office, right?

23 A. For the Excel team.

24 Q. And how long did you have that position?

25 A. I worked as a product planner on the Excel team for a

1 year. At the end of that year -- actually, during the year,
2 I was promoted to be the lead planner for Excel, but at the
3 end of the first year then I was the lead product planner for
4 all of Office.

5 Q. And, after that, you've had various jobs doing training
6 functions; is that right?

7 A. Yeah. In 1991, I left the Office team and took a
8 training position. My responsibility was to train marketers
9 throughout the company at Microsoft how to do their jobs, so
10 an internal training position. I did that for a few years,
11 and then I've had three subsequent jobs related to that.

12 Q. I think you just testified that you did that in 1991?

13 A. I believe it was January of 19 -- did I say that?
14 2001.

15 Q. 2001?

16 A. Thank you for correcting me. 2001, January of 2001, I
17 went to work for the training group. We called it MSTE,
18 technical education.

19 Q. And is it fair to say that you -- you have been
20 promoted along the way?

21 A. Well, promotion means two things at Microsoft. You can
22 either be promoted into a management position, or you can be
23 promoted just in terms of level and pay grade. They have
24 both things. So, yes, over the time I have been at
25 Microsoft, I have been promoted in pay grade. I have had

1 management opportunities in a couple of positions but have
2 pretty much been an individual contributor at Microsoft for
3 most of the 15 years I have been there.

4 Q. And am I correct that you don't have any -- you don't
5 have any present intention to leave the employ of Microsoft
6 at this point?

7 A. I certainly hope not.

8 MR. SCHMIDTLEIN: I have no further questions, Your
9 Honor.

10 MR. TULCHIN: I should be fairly short, Your
11 Honor.

12 THE COURT: And, if you did, this isn't the context
13 in which you would announce it?

14 THE WITNESS: Very true, Your Honor. Very true.

15 MR. TULCHIN: Maybe I could ask Mr. Goldberg's help
16 in putting up that table 13 which was part of Exhibit --
17 plaintiff's Exhibit 599.

18 THE WITNESS: The one on page 26?

19 MR. TULCHIN: Yes, sir. I'm just going to wait for
20 it to come up. There we go.

21 REDIRECT EXAMINATION

22 BY MR. TULCHIN:

23 Q. Now, Mr. Schmidtlein asked you about the installed base
24 numbers.

25 A. Yes.

1 Q. And you'll see 1994 installed base, Microsoft Word for
2 Windows is by far the most, right?

3 A. Yes.

4 Q. Novell's WordPerfect for Windows is a little more than
5 half of what Microsoft had?

6 A. That's correct.

7 Q. And then I want to direct your attention to new
8 shipments. What does that mean, new shipments?

9 A. I probably have to check the footnotes on the table,
10 but my assumption would be that the 1994 installed base was
11 the number of customers running it. New shipments would be
12 additional shipments of that product during that year.

13 Q. So we're talking about sales of the product?

14 A. Sales of the product.

15 Q. During 1994. That's what new shipments is, right?

16 A. That's what I would presume from this table, yes.

17 Q. And for Microsoft Word for Windows, you see 6,750,000
18 copies, correct?

19 A. That's correct.

20 Q. Because the last three zeros are omitted in every
21 column, right?

22 A. Yes, to make it millions.

23 Q. And then for Novell WordPerfect for Windows, you have a
24 number that's less than one-third of that, 2 million 240,
25 correct?

1 A. That's correct.

2 Q. And for Novell's WordPerfect for DOS it's about a half
3 a million?

4 A. That's correct.

5 Q. So, is it fair to say that, according this table 13, in
6 the year 1994 -- and 1994 is before we get into any of these
7 issues about what happened in '95 with PerfectOffice for
8 Windows 95 and so on, right?

9 A. Correct.

10 Q. Okay. So, in 1994, microsoft Word for Windows is
11 outselling Novell's WordPerfect for Windows by more than
12 three to one?

13 A. That's what this table would show. You could also
14 derive that number from the 1993 installed base on the
15 right-hand side, compared to the 1994 installed base on the
16 left-hand side. The new shipments is basically the
17 difference of those two numbers. So, you can see how the
18 installed base increased for the year 1994.

19 Q. Now, Mr. LeFevre, would you see if you can find
20 Plaintiff's Exhibit 110, which Mr. Schmidtlein showed you.
21 There you go -- nope. It's on the screen. I'm sorry.
22 That's it. That's it.

23 A. Got it.

24 Q. PC Computing. And I think he pointed you to the
25 page -- there we go. WordPerfect 6.0. And maybe we can

1 bring up the -- that box on the right there. You see it,
2 right underneath that picture, the screen shot, it says,
3 "Unlike Word or any other word processor, WordPerfect's open
4 file dialogue box includes long file names and makes file
5 maintenance functions available in a pop-up menu."

6 A. Correct.

7 Q. Now, could you just remind the jury what the date is of
8 this publication on the first page?

9 A. It was dated December of 1993.

10 Q. 1993. So this is showing a screen shot of WordPerfect
11 6.0?

12 A. 6.1.

13 Q. No, 6.0.

14 A. Oh, 6.0. Thank you.

15 Q. We're back in '93.

16 A. Yes. Thank you.

17 Q. 6.0. This is a screen shot of the WordPerfect 6.0
18 product at the end of 1993 correct?

19 A. Correct.

20 Q. That's the product written for the 16-bit Windows,
21 right?

22 A. Written for Windows 3.1.

23 Q. Written for Windows 3.1. That's the 16-bit version?

24 A. Correct.

25 Q. And it's long before Microsoft sent any beta version of

1 Windows 95 to WordPerfect or Novell, right?

2 A. That's correct. We had implemented this functionality
3 in earlier versions, and the Windows 95 attempt was to bring
4 it forward into the 32-bit environment.

5 Q. Well, at the risk of asking you an obvious question,
6 isn't it correct, Mr. LeFevre, that WordPerfect was able to
7 get this functionality, this screen shot of the open file
8 dialogue box into its product long before the NameSpace
9 extension API's were ever provided to it in the first beta,
10 the M6 beta in June of '94?

11 MR. SCHMIDTLEIN: Objection.

12 THE WITNESS: That's correct. We had this
13 technology in the product that predated anything we got from
14 Microsoft related to Windows 95.

15 Q. And this same functionality, this WordPerfect open file
16 dialog box, which was pictured on Exhibit 110 on the page
17 we're looking at, that functionality, which you testified
18 earlier on cross, was something a little bit more than what
19 Microsoft had for Word, right?

20 A. Correct.

21 Q. This was a competitive advantage for WordPerfect, this
22 file dialog box?

23 A. That's right.

24 Q. And that functionality, since it was in the earlier
25 version of Windows, was available for WordPerfect Novell to

1 use, if it chose to, in any successive version of Windows,
2 like Windows 95?

3 A. That's correct. And, as I mentioned, that's what we
4 were trying to do with WordPerfect 7, the Windows 95 version,
5 was to have similar functionality to this but with even more
6 advanced features, as a competitive advantage.

7 Q. Right. So this advanced file open dialog box, at least
8 the version that existed in WordPerfect 6.0 at the end of
9 '93, was certainly available without the NameSpace
10 extensions, and Novell WordPerfect could have used it
11 later?

12 A. That's correct.

13 MR. SCHMIDTLEIN: Your Honor, I think it's both
14 asked and answered in a way he didn't like, and leading.

15 THE COURT: I don't -- except it's both of those.
16 There is one part of your objection I don't -- I didn't hear
17 it that way. In any event, I'm just going to overrule the
18 objection, and I assume you are going to move on.

19 Q. BY MR. TULCHIN: Could you answer, sir?

20 THE COURT: He did answer.

21 MR. TULCHIN: Did he?

22 THE COURT: I thought.

23 THE WITNESS: The answer was yes.

24 MR. TULCHIN: I may not have heard it, Your Honor.

25 I beg your pardon.

1 Q. BY MR. TULCHIN: Two more quick things, if I could.
2 Exhibit 223 we looked at on direct examination, that's the
3 market requirements document.

4 A. Yes.

5 Q. Storm. And, again, if I could direct you to the third
6 page, that's the signature sheet?

7 A. Yes.

8 Q. And I think you testified on direct that, on the
9 original copy, everyone here would have signed it?

10 A. That's correct.

11 Q. And that included Mr. Gibb?

12 A. Yes.

13 Q. That's your memory?

14 A. Yes.

15 Q. Lastly, Mr. Schmidlein asked you if Windows 95 offered
16 an opportunity for ISV's, such as Novell, to make new sales.
17 Do you remember that?

18 A. Yes, sir.

19 Q. It's true, is it not, that if you can't get your
20 product out the door, let's say a suite that contains a
21 spreadsheet, because the spreadsheet isn't ready to go, you
22 can't take advantage of that opportunity?

23 A. That's correct. Your product has to be available in
24 the shipping.

25 MR. TULCHIN: Nothing else, Your Honor.

1 THE COURT: Go ahead.

2 MR. SCHMIDTLEIN: I just have one, can we put 110
3 back up because I'm sure Mr. Tulchin was trying to be clear,
4 but I think he lost me. Can you put that file box back up.

5 RE CROSS EXAMINATION

6 BY MR. SCHMIDTLEIN:

7 Q. Very quickly. This was a competitive advantage for
8 WordPerfect 6.0 to compete against the earlier version of
9 Microsoft Word and Office, correct?

10 A. That's correct.

11 Q. This is the file open dialogue that WordPerfect
12 implemented for Windows 3.1, right?

13 A. That's correct.

14 Q. And the work that you -- your group or the WordPerfect
15 group was doing for PerfectOffice 95 was to take this and
16 move it forward to get even additional functionality that
17 would allow WordPerfect to compete more effectively against
18 Microsoft, right?

19 A. That was the idea when it was proposed, yes.

20 MR. SCHMIDTLEIN: Thank you.

21 THE COURT: Thank you, Mr. Favre. Thank you very
22 much. Excuse me -- Mr. LeFevre -- I'm sorry.

23 THE WITNESS: I knew what you meant.

24 THE COURT: Thank you very much.

25 And I think -- let me ask the jury. We have -- we

1 were going to go as late as four, but we have a deposition
2 that probably we -- it's going to go long. It's about two
3 and a half -- about 2 hours and 20 minutes, but we thought we
4 would go about 50 minutes today. Is that okay with you all?

5 Okay. We'll go about a 50 minutes with the
6 deposition.

7 MR. TULCHIN: That's great, Your Honor.

8 Do you have that ready?

9 Your Honor, this was a deposition of Charles
10 Middleton, taken -- and I don't seem to see the date.

11 THE COURT: Mr. Parris when was the deposition
12 taken.

13 MR. PARIS: December 13.

14 MR. TULCHIN: Sorry, Your Honor, December 13, 2008.
15 Charles Middleton.

16 DESIGNATED PORTIONS OF THE VIDEO DEPOSITION OF CHARLES

17 MIDDLETON WERE PLAYED AS FOLLOWS:

18 Q. Good morning, Mr. Middleton. Thanks for being here
19 today. Could you state your full name for the record,
20 please.

21 A. Charles Franklin Middleton, III.

22 Q. Your current employer?

23 A. I currently work for a company named AtTask
24 Incorporated, A-t-t-a-s-k, located in Orem.

25 Q. Were you deposed previously by Microsoft, do you

1 recall?

2 A. Yes.

3 Q. Do you recall about the date of that prior
4 deposition?

5 A. It was September of 2001. I don't remember the exact
6 date. I mean, I just read the deposition again. They sent
7 it to me. Thank you. Or you did, I guess, to refresh my
8 memory on it.

9 Q. Have you spoken with any other representatives from
10 Microsoft?

11 A. Yes. There were the -- I don't remember the names, but
12 I was called by them. I think it was this summer sometime.
13 We met for lunch, and they went over kind of what my
14 participation was in WordPerfect in that particular time
15 period that I guess we're discussing, and they said I might
16 be deposed and so I said fine. So that's -- if I can be of
17 help.

18 So, anyway, yeah, so we talked, in general, about
19 just what my background was. I don't know very much about
20 the case at all.

21 Q. I'll ask the court reporter to mark as Middleton
22 Exhibit 1 the subpoena of Charles Middleton. Have you seen
23 this document before?

24 A. Yes.

25 Q. And do you understand that you are appearing pursuant

1 to this subpoena?

2 A. Yes.

3 Q. Mr. Middleton, I'd like to ask, first, a few background
4 questions. Can you describe your post-high school education,
5 please?

6 A. Yeah. I went to B.Y.U. -- excuse me -- for one
7 semester after high school. Then I was not in school for a
8 couple of years, joined the air force, after that, so I
9 didn't get back to full-time, you know, college at all. I
10 went to night school for -- after the air force, I used the
11 GI Bill to go to night school. By then, I had a family, and
12 so seven years later I got an associates degree. And,
13 at that time, I was well settled into a career as a computer
14 programmer, so I needed more education in that

15 Q. Where were you working at the time?

16 A. I was working for Hughes Aircraft in the ground systems
17 group in Fullerton, California.

18 Q. And what were your responsibilities at Hughes?

19 A. I was a programmer on various air space projects.

20 Q. And where did you go after that?

21 A. And then -- let's see, I went to JPL, Jet Propulsion
22 Laboratory in Pasadena, California. I worked there for a
23 year. I was what they call a cognizant design engineer. I
24 was basically a team leader on a team working on the Voyager
25 project.

1 Q. And after that?

2 A. And then I joined on with a startup company up here in
3 Utah. That's when I moved to Utah. It was called Arabic
4 Software Associates writing the word processor for Macintosh
5 Arabic, or an Arabic word processor, writing in Pascal. And
6 from there I went to Salt Lake County Public Works
7 Department. I worked there for I think about six months, and
8 and then I got laid off from that job and was unemployed
9 for -- it wasn't very long, I think, but anyway, that's when
10 I hired on at WordPerfect. That was in 1986, April of '86
11 that I hired on at WordPerfect. And I worked there until
12 November of 1995.

13 And, by then, it had been purchased by Novell. I
14 think that happened in '94. And do you want anymore after
15 that?

16 Q. That sounds good. We'll go on from there.

17 A. Okay.

18 Q. But to go back just for a moment, about how long did
19 you work for the startup venture doing Arabic language
20 programming?

21 A. That was -- let's see -- about a year and a half. I
22 mean, I could give you the dates if I thought about it. I
23 moved up here in July, so, yeah, it was from July of '84 to
24 the fall, sometime, of '85 that I worked there, so probably
25 less than a year and a half.

1 Q. And that was in development of a program for
2 Macintosh --

3 A. Right.

4 Q. Operating system?

5 A. That's correct.

6 Q. Is Macintosh -- was it, at the time, a graphical use
7 interface?

8 A. Yes.

9 Q. What is a graphical user interface?

10 A. It's where you basically have a mouse and you're
11 clicking on objects on the screen that can be -- they are
12 tied to graphical objects I mean like buttons and things like
13 that, that you click on. It's contrasted with the
14 character-based interface, which is what the old DOS
15 computers had, where all you could do is put up prompts,
16 like, you know, what file do you want to open? And people
17 would type in a file name.

18 There were even lists of file names that you would
19 choose from, and you arrow down with your keys and hit enter
20 on the one you wanted, but you didn't the ability to -- well,
21 I think actually you did have mice available on those
22 interfaces as well, so it didn't have to be that a mouse
23 makes it a graphical user interface, but I guess the main
24 difference, really, is, from a technical standpoint, is that
25 you have control in programming of all the pixels on the

1 screen, and on operating system that allows you to work with
2 objects a lot more easily so that you can have people go and
3 click on things, and you are bringing up -- you're being lot
4 more helpful to the user. You're not asking them to this
5 type in something in a precise way. You're giving them
6 choices and lists and things. I don't know. Does that
7 describe it very well?

8 Q. Sounds good?

9 A. Okay. Good.

10 Q. Was your experience at the Arabic language startup your
11 first experience in programming for a graphical user
12 interface?

13 A. Yes.

14 Q. And, based on that experience, what was your evaluation
15 of the graphical user interface?

16 A. Oh, I knew it was the future. I mean. The real
17 difference the things about a graphical user interface that
18 make it very usable to attract -- to be attractive to a
19 larger market segment are that it's easier to use for people
20 because you, as a programmer, are doing more work so that
21 they basically have an easier interface. One of the problems
22 with the interfaces before is that every program that came
23 out on a DOS machine, for instance, with a character-based
24 interface, the company that made it decided on how they were
25 going to present things. With a graphical user interface --

1 like Macintosh was one of the pioneers here, but there were
2 others.

3 They wrote a style guide; and the style guide was
4 something that, if you wanted to write programs for their
5 interface, then they tried to enforce the style guide. It
6 wasn't -- it was basically enforcement by: You were going to
7 get, you know, more people buying it if you follow their
8 style guide. So it was a voluntary thing in most cases and
9 then they provided lots of programming tools so that you
10 could -- so they controlled the objects and things, and you
11 would be able to get messages if a mouse was over a certain
12 button, and you could, you know -- they helped you a lot in
13 the programming so that you could create these in a way
14 that -- now everybody knows that you have a cancel and an
15 okay box, and you hit F3 for help and, you know, different
16 things like that were standardized.

17 So, in an attempt to bring the -- I'll make a few
18 more comments on this that I think may be relevant to where
19 you are going, but in an attempt to bring the personal
20 computers to the masses this was a real important step.
21 Before this, I mean, they were used in businesses and things,
22 when you had to have a computer, but the learning curve was
23 pretty high for learning how to use programs, including
24 WordPerfect. I mean WordPerfect had an interface that was
25 consistent withing itself, but didn't necessarily match up

1 with things that other people had. Lotus 123 had an
2 interface that they had created that you could -- you know,
3 it was not that hard to learn and a lot of people liked it,
4 but it was different than WordPerfect.

5 So, in order to get the computers out to the masses,
6 there were two things that had to happen. One, you had to
7 have a much easier way to do things that people didn't have
8 to learn a whole bunch of specific information about every
9 application they purchased, a specific way to navigate and
10 things. And the other was, it had to be reasonable speed.
11 Now, in DOS, with the graphical user interface things were
12 pretty fast, really, I mean, for those day. It was
13 considered a pretty fast computer program, especially when
14 compared to the early graphical user interfaces that were
15 coming out because they had to do all this graphic stuff on
16 the screen, it needed -- it took lot more power and so
17 everything was really, really slow in the early days.

18 So, people that were were excited about the
19 graphical user interface basically had a vision of these
20 speed problems will be overcome. I mean, even in those days
21 we were getting -- you know, memory prices were going down
22 and capacities were going up and everything was improving.
23 We were still a long way from having the GUI be something
24 that really was commercially viable, and Macintosh kind of
25 was a breakthrough in that because they were -- they were

1 slow by today's standards, but at that time they were quite a
2 usable machine.

3 Now, something like Arabic language for word
4 processor you couldn't do in a character-based environment.
5 It was -- the language is a scripted language. It has
6 variable width characters, and in a regular are DOS
7 environment, the width of your characters were fixed, so you
8 couldn't actually even display the character set in Arabic in
9 that. So that's why this particular person that -- that
10 founded that company that I hired on with was very excited
11 about creating something for that market. And then, anyway,
12 so, I guess I could stop there, and you probably have some
13 other, questions, and I'll go back and continue on this
14 thought.

15 Q. Indeed. You gave us a lot there, so I'd like to ask
16 you a couple things about your answer. First, you talked
17 about a style guide. Could you describe sort of exactly what
18 a style guide is?

19 A. The style guide in -- with Macintosh was produced by
20 Apple where they -- it was something that if you wanted to to
21 be a developer for Macintosh applications, you signed up with
22 Apple, and you registered as a developer with them. And they
23 provided the style guide for you, and it said things like how
24 to -- well, basically the rules for using dialog boxes and a
25 pull down menu, so, for instance, there was a menu bar at the

1 top of the screen, and there were -- you had to have a file
2 menu. You had to have an edit menu, and you had to have a
3 help menu, and you could have others if you wanted.

4 And what you put on those menus, you had some
5 guidelines as to -- you know, people, when they went to look
6 for preferences, for instance, they would look in pretty much
7 the same place. Now, that's actually changed a lot.
8 People -- I mean a style guide is a start and then, as the
9 market matures some people depart from the style guide with
10 an idea they think is better, and it turns out that a lot of
11 other people follow and then, you know, the style guide kind
12 of either gets left behind or adjusts for that.

13 It's kind of like a language, you know. The English
14 language changes. As things kind of get popular, the
15 dictionaries have to be rewritten. So then, when Windows
16 came out, they created their own style guide as well and, in
17 fact, in some of the things with Windows -- as a matter of
18 fact, before Windows became popular, there was OS/2 PM,
19 Presentation Manager, which was an attempt to get a graphical
20 user interface on a DOS-based system, basically, and your
21 character-based kind of old -- what shall we say? The Intel
22 computers, that's the way they were described.

23 This was -- there was an enormous amount of these in
24 the marketplace, and to get an operating system that was
25 graphical on that was another big breakthrough. Anyway, so

1 in starting that out, they had a two-button mouse which
2 Macintosh only had a one-button mouse. So, what do you do
3 with the right mouse button? They had lot of meetings about
4 that. I attended one of them in Texas somewhere, at one
5 point, where there were different ideas brought up as to what
6 could be done.

7 Some companies had already explored some things and
8 had their ideas of what would be appropriate to have as a
9 standard for a right mouse button, and, again, it's mainly so
10 that people -- so that users like -- without a lot of
11 training, would just have something they would expect to have
12 happen there. So now, when you click a right mouse button,
13 you expect to have a menu of context-sensitive options
14 relative to where you're at with the mouse, and that actually
15 took awhile to evolve.

16 It wasn't the first, you know, thing brought up, and
17 I don't even think it was brought up in the meeting I went
18 to. It was just too early. Everybody was saying, "This is
19 the way we do it. This is the way we do it" And none of
20 them were real great ideas. Anyway, so, again, the style
21 guide is something that is suggested by the person that -- or
22 the company that creates the operating system. So Microsoft
23 had a style guide for Windows and then they have departed
24 from it recently, as well, which they can do and try and set
25 a new standard and make, you know, basically new options

1 available to people.

2 Now, one thing that is also important about that is
3 that when they depart from it, they also should offer
4 whatever they are doing to others to make available -- excuse
5 me -- I mean -- let me word that better. If they are going
6 to create a new object type, like let's say a little bar of
7 buttons across the top of their application that you can
8 assign features to, that when you click on those buttons, you
9 do the feature, like creating a table or changing your font
10 size or something like that, you would hope that they would
11 provide these for everybody to use so that everybody could
12 follow the style guide and everybody could do similar kinds
13 of things. And so they could decide whether or not they
14 wanted to.

15 In the early days, they had a style guide that
16 didn't include these things, and when they created them, when
17 Microsoft created them for their applications, they could --
18 in fact, I think this was an actual issue that came up. Not
19 that it's real significant, but it was, you know, we were
20 creating what we call the button bar at one point, and we had
21 to create little windows as buttons, and there was a lot of
22 resource usage, and it wasn't real efficient the way we did
23 it. And Microsoft came up with one that they were able to do
24 with a lot less resources being eaten up by the system, by
25 the program, because they did it in a different way.

1 And, at the time, that was something that we
2 thought, "Dang, I wish we could access those same calls that
3 they did and utilize that." And I don't know what happened
4 afterwards, if they made those thing part of the -- well,
5 they had what's called an SDK, a software development kit,
6 which includes all the calls to all those things. And so you
7 would hope that everything that they could do, they put in
8 there that we could do as well.

9 There was a unique situation with Microsoft, in that
10 they were competing on the application level as well as
11 providing the operating system, so that was something that
12 caused lot of controversy at the time and probably still is.

13 Q. We will probably come back and talk about the button
14 bar and tool bar a little bit later. To go back and just
15 finish up on what you testified about the style guide, in
16 your experience as an applications developer, was it
17 important for an application to comply more or less with a
18 style guide in order to encourage customer adoption of the
19 application?

20 A. Yes. Yes, it was. Initially, it was very vital, but
21 you were trusting that everybody else was doing the same
22 thing, so you were -- the whole idea was that if everybody
23 followed the style guide in the same way, that all customers
24 would be benefitted. If you you were to depart from the
25 style guide, it was a gutsy thing to do. You had to feel

1 confident that your departure would actually make you a step
2 ahead of the competition because you had something that was
3 so cool that, even though it wasn't in the style guide, it
4 was intuitive enough that people were going to like it, and
5 they were going to prefer your product over others because
6 you had done that. And then others would follow suit.

7 And the button bar was an example of that. It was
8 something that wasn't in the style guide originally, but it
9 was something you could do, and it was just a way to present
10 other options. So it kind of led the way a little bit in
11 that. There were other things that people would try that
12 were so unintuitive that they ended up losing market share
13 because people didn't like them or couldn't find them or
14 thought they were a little bit going too far.

15 Q. You talked a little bit earlier about the importance of
16 an standardized or consistent interface.

17 A. Uh-huh.

18 Q. Why is that?

19 A. Okay. Well, a couple of benefits we have kind of
20 touched on already is -- one is, it's for your customers,
21 primarily. A standardized interface makes it easier for more
22 people to have access to your product. Now, there's a bell
23 curve you might have heard about here where you have your
24 early adopters on the -- I mean, this is a common thing.
25 There is a book called Crossing The Chasm that is popular

1 that talks about this bell curve of adoption of software
2 products.

3 In the first little phase, there's a lot of time
4 going by, but not a whole lot of market acceptance, so you're
5 working with early adopters. The early adopters were willing
6 to put up with really a poor user interface because they are
7 the first on the block to have this new application and
8 utilize it and maybe even have some -- be able to contribute
9 to the development of it with some ideas or suggestions that
10 is the software developer might implement. But you're not
11 making lot money on that. You are charging a higher price
12 for it, but you're not getting you know a lot of customers.
13 You want to get to the part where you're going up the curve
14 to the masses, basically.

15 How do you make this available to the masses? And
16 you do that by making it easier to use. The early adopters
17 played a role in creating a buzz about this whole thing and
18 people starting to want it, but it has to be easy enough for
19 them that they don't have to be a technician in order for
20 them to use it. And you could look at, like, I don't know, a
21 lot of appliances have gone through this similar kind of
22 cycle, like a VCR. In the early days, they were really much
23 more difficult to use, and only a few people had them, and
24 they were very expensive but, as time went on, they became
25 very inexpensive, somewhat easier to use, not a lot.

1 People still didn't record with them as much because
2 of that, but at least -- well, because of other things that
3 came along, Hollywood Video, and things, suddenly people were
4 renting movies and playing them, and I don't think that was
5 even anticipated at the time these first came out. But the
6 result was that these were lot cheaper now, you could get
7 them anywhere, and almost everybody had them, so there is an
8 enormous market there. That's where you're really making
9 your money. The early part, you know, you're charging a high
10 price because you have high development costs and things, but
11 now you've done all your development, most of it and you are
12 just getting it out to channels and selling to people.

13 And so any software company would desire to have
14 their product become commoditized like that, so that was the
15 goal of WordPerfect as a company. You know, it's kind of an
16 everybody-wins kind of thing. The other thing that does is
17 it makes computers in general more popular and all products
18 from all software developers have a bigger market now, so
19 this style guide really was a very important part of that
20 whole process because it basically gave people something to
21 say, "Okay. Here's a standard that we can follow."

22 But it wasn't a government standard. That's another
23 thing. There are government standards for, like, the
24 little -- the computer code for letters of the alphabet.
25 It's called the ascii standard that everybody follows if they

1 want to ever be able to be used by something else, but it's a
2 very strict standard that, if you say you use an ascii
3 character set, everybody knows exactly what that means. It
4 doesn't fluctuate. The style guide, because it is kind of
5 controlled by the company that made the operating system, is
6 not quite as strict.

7 Q. And I'll ask the court reporter to mark as Exhibit 2 a
8 document entitled Novell Experience/Education Survey bearing
9 production numbers NOV 00512527 through 512529.

10 Mr. Middleton, do you recognize this document?

11 A. Okay. Well, yes, it looks familiar. It looks like
12 something I would have done when Novell purchased WordPerfect
13 and wanted to -- to kind of know the skill set of people, and
14 there's my signature, so, yeah, this was the one I did.
15 Anyway...

16 Q. I thought it might help us just to walk through
17 quickly --

18 A. Okay.

19 Q. -- your various responsibilities during your time at
20 WordPerfect. From 1986 to 1988, it looks like you were
21 responsible for DOS development at WordPerfect; is that
22 correct?

23 A. Well, I was a developer in the DOS group, yeah. I
24 wasn't managing the group, I was a programmer in the group.

25 Q. And can you describe your responsibilities at that

1 time?

2 A. Yeah. I was assigned some features, like initially for
3 WordPerfect 4.2, I was assigned table of authorities feature.
4 That was a new feature. And then I was enhancing the table
5 of contents and index features. And another new feature I
6 did was master documents. And so those responsibilities
7 basically were to create -- basically design the feature.
8 You've got to do some research to figure out what needed to
9 be there -- there were some ideas already in place when I was
10 given the assignment -- and then develop the feature and
11 write the code for it and test it.

12 There was a testing department that helped with the
13 testing. There was -- I mean, there were already ways of
14 presenting, you know -- there was an interface already for
15 presenting things to the user that was in place, so we were
16 expected to follow that as much as possible and have it be a
17 similar kind of thing so people could navigate around. And
18 so I got there in April, and in November, at COMDEX, we --
19 COMDEX in Las Vegas was a big show we always went to every
20 year to show our new ideas and things. And we often released
21 products just prior to COMDEX or just after it, and 4.2 was
22 released around that time frame. I think it was just prior
23 to COMDEX. So we were down there demonstrating the new
24 features

25 Q. What did you do next?

1 A. Okay. So the next thing, we were working on 5 -- 5.0,
2 and let's see. This is where I became a project leader, so
3 we were talking about 1988 the second --

4 Q. Yes?

5 A. 1998. Excuse me. Okay. Yeah. So, what happened in
6 between here was that -- well, one of the things that
7 happened after 4.2 is I went to the Mac group, and they were
8 starting -- they were doing a WordPerfect -- a version of
9 WordPerfect for the Macintosh. One significant thing to
10 mention here that is they -- that WordPerfect management,
11 which was -- the direction for the company was basically
12 given by the WordPerfect board which was Alan Ashton, Bruce
13 Bastian and Pete Peterson.

14 They were the only three stockholders in the company
15 at the time. Alan and Bruce were the founders of the company
16 and Pete had come on very early on. He was considered by
17 most of us as one on the founders, but I believe he had, you
18 know, like each of the other two had, 49.5 percent of the
19 company, and he had 1 percent to break ties. So they
20 basically made the decisions for what was done in the
21 company. And they were doing great in DOS. They were the
22 king. So they thought DOS was really it. The GUI's didn't
23 really -- they didn't consider them to be a significant
24 platform to develop for. When Macintosh came out, they
25 thought -- I say "they" as a group, you know, they decided on

1 things and were usually unanimous.

2 Pete Peterson was probably the most influential
3 person in terms of a lot of this because he was the most
4 outspoken, and he was involved in marketing and things a lot.
5 So he was -- if he really wanted something, it seems like
6 that's the way they ended up going. He would present his
7 case, and the others would agree most of the time. Alan was
8 pretty easy going on a lot of things. Anyway, Alan's
9 responsibilities were mostly for development and Bruce's
10 responsibilities were in international, so he was traveling
11 abroad a lot and involved in basically getting the product
12 established in other places and also guiding us in
13 development if we had features -- you know, if he wanted
14 features in there, he would communicate that.

15 Anyway, so when the Macintosh came out, it had only
16 been out a couple of years at this point, was gaining some
17 ground but wasn't really a serious business tool, but was
18 starting to get into business offices. And so the board
19 decided that we needed to do a version of the WordPerfect
20 for the Macintosh. And the -- the idea here was that
21 companies would typically have a whole bunch of DOS machines,
22 and they would be using WordPerfect on those, but then there
23 would be a Macintosh maybe in the office that they were
24 using, and wouldn't it be nice if they could open a
25 WordPerfect document on the Macintosh and edit it and then,

1 you know, go back out on their network, and they could kind
2 of collaborate and share things and use the Macintosh to do
3 that. So that was their thinking.

4 And they got a group of people together. They hired
5 some Macintosh programmers and told them to create a
6 character-based version of WordPerfect for the Macintosh. So
7 it was going to run in a GUI environment but be a
8 character-based, looking like the DOS product kind of thing.

9 Now, this was an extraordinary thing for them to
10 say. It may sound fairly not extraordinary, but the
11 extraordinary thing about it was they hired Macintosh
12 programmers to do it, of course. They would know the system.
13 Apple had been had done a really good job. Steve Jobs and
14 the other people that developed Macintosh had done a great
15 job of promoting it and having a kind of a cult movement sort
16 of a thing. I'm sure the history of all that is pretty well
17 established, that you know what I mean.

18 So, people that were programming for the Macintosh
19 looked at themselves kinds of on the leading edge of the new
20 frontier, a little bit rebelling against the, you know, the
21 old way of doing things and providing something that was
22 newer and better, and they were very proud of the fact that
23 they had a really neat user interface. So people that were
24 Macintosh programmers had been there. I had been there. I
25 had developed an Arabic processor, and I'd gone to the

1 meetings with Apple and was using her style guide and
2 software development kit and developing things along those
3 lines, and it was great.

4 And so, for the management of WordPerfect to tell --
5 to hire Mac programmers and say, "Do a character-based
6 version on this GUI platform" was an embarrassment for these
7 guys. How could they go to these meetings with Apple to talk
8 about the cool things they were doing and they were doing a
9 character-based version? They couldn't do that it. I mean,
10 it was to the extent they didn't do that. They just did a
11 graphical version, but they had to do it against the orders
12 of the board because they new better, and they were right.
13 Now, you know -- but, anyway, that's the history. That's the
14 way it worked.

15 But, in the meanwhile, people like Pete would go to
16 meetings with Apple, and they would -- and they -- well, it
17 wasn't that they weren't aware that -- I think it was they
18 knew what was happening in the group to the extent that they
19 paid attention, and they didn't pay lot of attention. I
20 mean, it was something where they were quite busy with all
21 their other things, so they knew this group had gone off and
22 done things and didn't really watch real closely, but Pete
23 obviously didn't like the Macintosh, didn't like the GUI
24 interface. He thought the whole thing was kind of dumb, and
25 I think -- I don't remember if he used those words or not,

1 but, anyway, lots of articles where he talks about it, too,
2 in the press.

3 And so he didn't really have support for the
4 graphical user interface although he did have support for,
5 "Okay, we are going to do this just to hedge our bets, you
6 know, in case something comes out of this new thing."

7 So there was a couple of things that happened from
8 that. We were a pretty close knit company. Most people were
9 of the same culture. It was all this Utah culture, and
10 people tried to be cooperative and get along and do things,
11 and this was something where, you know, people were trying to
12 do the right thing for their job, do the very best job they
13 could in producing a product for this platform; but, at the
14 time, respecting the authority that, you know, of the person
15 that hired them and was telling them what to do.

16 The other thing is, Pete wasn't our boss, either,
17 Alan was, and so that caused some little problems there. But
18 what ended up happening is, they created, as much as they
19 could, a product for the Mac that was -- that had the pull
20 down menus. It had all those things that a Mac product
21 should have, that anybody in an Office that had a Mac would
22 already be familiar with if they had the style guide and the
23 other applications they would have been using, so this is
24 what that group did.

25 It still was based underneath on a DOS design, and

1 so, because of that -- and the reason I know a lot about this
2 is because after I finished 4.2, they asked me to go to work
3 in the Mac group for about six months or something. In fact
4 it was -- I was working on DOS 5.0 and on that Mac product
5 together for awhile. Maybe more than six months. I don't
6 remember exactly. But it was quite awhile. So for part of
7 the time, I was working some hours in each group and just
8 kind of sharing my time; a day here, day there.

9 Anyway, so what they ended up with was a product
10 that had a graphical user interface but still wasn't really a
11 graphical product in all the senses that the new products
12 that were created were because it had to have this -- well,
13 it had to support the WordPerfect format and have the files
14 be compatible, and the WordPerfect format was very much based
15 and oriented on a line-by-line kind of style, whereas in the
16 graphical user interface, it was more -- it made more sense
17 to have paragraphs as objects rather than a line as an
18 object.

19 So, like, for instance, centering was something that
20 you could select a paragraph and say, "I want this centered,"
21 and it would center every line in it, and as you typed text,
22 it would wrap the lines appropriately. In WordPerfect,
23 at that time, 4.2, it put a "center" code on each line. You
24 could select the whole thing, and it would put center codes
25 on each line and then if you typed in more characters,

1 it wouldn't respond to it very well. It would wrap funny
2 because you would have this code at the end of the line.

3 In 5 -- anyway, I don't want to get into lot more
4 detail on that, but that's kind of an example of the kind of
5 things that didn't look very native in the GUI environment
6 and that we tried to get the DOS programmers to change the
7 format for the next version so it would support both sides.
8 And they wouldn't do it. And we didn't get support on from
9 Alan, Bruce and Pete on that at all. They thought DOS was
10 always going to be king. So DOS basically designed things,
11 and we followed along, but really we couldn't very easily in
12 some of these areas. It would have been much better if we
13 had more design influence. It turned out in the following
14 version they did do that, and that's the way the codes are
15 now.

16 Q. We started out by talking about your work on the
17 Macintosh.

18 A. Oh, yes.

19 Q. The WordPerfect for Macintosh product.

20 A. Yes.

21 Q. Any memory about the market share it gained?

22 A. Okay. That's a good question. Let me think. I don't
23 believe it was significant. I believe that it met the --
24 well, it certainly did meet the goals that WordPerfect had
25 for it originally of making it so that people with Mac's and

1 PC's could share the files. And if you already had a bunch
2 of PC's and you were on WordPerfect then you'd get it for
3 your Mac and then you could share files with that. And it
4 did that. It was more graphical than they had originally
5 intended, but it would do that.

6 As far as gaining a lot of market share, I don't
7 recall ever -- I don't recall any striking, you know,
8 announcements that it was doing well there. Maybe it was
9 because they didn't have a high expectation of it and they
10 didn't talk about it much. I mean, certainly riding on the
11 coattails of the DOS product, it had a lot of people buying
12 it just because they already had WordPerfect for DOS. But,
13 anyway, so I don't know a lot about anymore than that as far
14 as the success of the product.

15 Q. You also mentioned, in an earlier answer, that Pete
16 Peterson had very little respect for the GUI. How did you
17 know that?

18 A. He was not bashful about stating that. From what he
19 said and what he described, the company in general felt --
20 they didn't have their freedom and because Microsoft owned
21 the environment that we were using, which was DOS at the
22 time, that was something that they put up with because there
23 was no way around it. They could have written for another
24 operating system, but people weren't buying that operating
25 system. DOS was the standard operating system that came with

1 any PC you bought in those days and so you had to write for
2 that.

3 So we had to work with Microsoft, and this really
4 bothered Pete he did mention this a lot, that he didn't like
5 the fact that we were -- we had to work with them on things,
6 and also Microsoft did have applications that they competed
7 with us on, although they weren't really competing with us
8 very well at that time, so that's the only basis that I
9 I know of that I can remember right now, anyway, that he was
10 public about.

11 Q. Mr. Middleton, you testified before we broke that you
12 perceived a lack of vision at the top of WordPerfect. What
13 did you mean by that?

14 A. Well, basically referring to the adoption of the
15 graphical user interface and realizing that we needed to go
16 in that direction and we needed to create our WordPerfect
17 mainly, that was our main product, that WordPerfect needed to
18 be on that platform. We needed to be early on that platform.
19 But he did make statements about how he didn't like graphical
20 systems in the early days.

21 I mean, they were slow and things, then, too, and
22 none of us liked that, but anybody that was in my group, we
23 all thought it was great, and we were there because we really
24 believed that these systems would be able to be faster and
25 better as time went on because of the developments in the

1 hardware side of things and that they were going to take a
2 much more important position in the future in our market
3 share and in the abilities of the company to grow.

4 So we were thinking in terms of what's best for the
5 company. And, you know, personal feelings of what kind of
6 things we preferred, that was really irrelevant. I mean,
7 case in point, when I hired on at WordPerfect, my only
8 experience in a PC environment, really -- I dabbled a little
9 bit in some other things, in some DOS, but very little. I
10 just had one contracting job that's not even on the list here
11 for a few weeks in that. So most of my experience was in the
12 Macintosh, but the Macintosh didn't have a lot of market
13 share. It was very small at the time. Everything was in PC.

14 So, I became a PC programmer. That's fine. I mean,
15 that was -- from a business standpoint, that was a good place
16 to be. And then when the PC, with its huge amount of
17 installed base of computers was going to do something that
18 was going to use a better interface, the graphical interface,
19 that became just the perfect combination. So I went to Alan
20 at that time, when OS/2 was announced, and said, "This is the
21 future. This is what you've really got to do." And he said
22 yeah. He agreed with it. I don't know if he talked to Pete
23 about it, but, anyway, that's how we started our OS/2 PM.
24 development.

25 Well, I'm sure he talked to Pete about it because

1 actually they had been involved prior to that, I found out
2 later, in evaluating OS/2 PM, and they were supportive of it
3 mainly because of the involvement of IBM there, and also
4 those things came from IBM. They were initiated by IBM, the
5 meetings about, "Here is the future open that we are looking
6 at doing." So, anyway, I guess to recap, the main things that
7 bothered me about the vision -- the lack of vision in the
8 company was the fact that they would -- they didn't do things
9 for the best business reasons.

10 And then they had this other thing in there that
11 seemed confusing and inconsistent with the way a business
12 ought to be run.

13 Q. You mentioned in your prior answer that when OS/2 was
14 announced, you talked to Alan Ashton and volunteered for that
15 project; is that correct?

16 A. Yes.

17 Q. Is that how you came to be project leader of the
18 WordPerfect 5.0 for the OS/2 development team?

19 A. Yes.

20 Q. Is that what's listed here sort of as your second
21 position on this experience survey?

22 A. Yes. That was the main next one. I was the -- yeah, I
23 was the project leader, initially. It was a small project.
24 I was -- first I was on the team. There were three or four
25 of us on the team, Kevin Crenshaw was the leader of that and

1 he left the company and then I became the lead on it. And
2 then we grew the whole effort. At that time, we were still
3 working on a character-based version for OS/2, but
4 Presentation Manager which was the graphical component,
5 graphical interface component, was also being announced at
6 the same time as the next step.

7 And so the first product we did, we were -- we knew
8 that we were go to be taking our entire user interface and
9 changing it to a graphical interface. At the time, we
10 thought it would be in the Presentation Manager in PM.

11 Q. And at the time you joined the OS/2 team, was there
12 also talk in the trade press or among developers about the
13 development of a new version of Microsoft Windows operating
14 system?

15 A. It wasn't real popular. Let's see, it would have been
16 in Windows 1.0 back then I think. There wasn't much talk
17 about the future of Windows at that time. I don't remember
18 if Windows actually was in the works before OS/2 PM. I think
19 it was, but we weren't paying a lot of attention to it.
20 Windows 1.0 was a real slow operating system, and it didn't
21 didn't really get a lot of attention.

22 But, let's see, your question was about in the trade
23 press and things, oh, if Windows had a future? Is that kind
24 of what you are getting at there, if they were planning on
25 developing a Windows path in addition to the OS/2 path, or is

1 that more than you were asking?

2 Q. That's a little more than I was asking. Let's take
3 it back a step. Did there come a point where there was talk
4 about a future for the Windows operating system?

5 A. Yes, there did. And that was after Windows 3.0 came
6 out. And the first version of Word for Windows came out at
7 the same time on that, and it was really obvious to the
8 world, and even the board at WordPerfect, that we needed do a
9 Windows version. And we were still thinking of going back
10 and doing a Presentation Manager version of that, or we
11 thought we probably would. We weren't sure. We put that
12 kind of aside and turned all our attention to Windows our
13 Windows version because we had been working, up to that
14 point, on the Presentation Manager version, at the point that
15 Windows 3.0 came out.

16 It wasn't really until 3.1 came out, I think, that,
17 as I recall, it became evident that -- or was announced by
18 Microsoft that Windows was a path -- was a future.
19 Developing more Windows versions was something they were
20 going to do, and they were leaving OS/2 PM behind. And so
21 that was a good, I don't know, another year or year and a
22 half or something like that, after the release of Windows
23 3.0.

24 Up until then, we were under the impression that the
25 Windows -- Windows was a temporary thing that was going to be

1 taken over by OS/2 PM and that they were doing some versions
2 of Windows, and products on Windows would also be able to be
3 converted over to run on OS/2 PM, whether they would run --
4 well, anyway, they could -- you wouldn't have wasted a lot of
5 effort. It kind of depended on if you were running it in,
6 like, a Windows compatibility box kind of thing or if you had
7 to convert your code over.

8 But, as far as designing your graphical user
9 interface, that was going to be identical, if not very
10 similar at least. So you weren't going to waste lot of
11 effort there. So, I believe that -- this is getting fuzzy
12 and maybe you could refresh my memory if you happen to know.
13 It seemed like that Microsoft was telling people to develop
14 for Windows first and then move over to OS/2 PM, but that was
15 the future. They were saying that OS/2 PM was the future,
16 and I think that was why WordPerfect chose to develop for
17 OS/2 PM at first.

18 Q. This was in spite of the fact that Microsoft had told
19 developers to develop for Windows first and then convert it
20 to OS/2 PM?

21 A. But the fact of the matter was, it was possible to
22 develop for OS/2 PM first, and it was our choice to do so,
23 and one of the reasons for that choice is that OS/2 PM was
24 what was going to be around in the long run. And so that
25 was -- that was the reason that we were doing that. And we

1 started a Windows development, kind of a research group prior
2 to when Windows 3.0 was released, just to kind of -- because
3 I think we were planning on doing one eventually. We thought
4 PM would be first and then Windows might follow.

5 (Whereupon the playing of the deposition was concluded.)

6 THE COURT: All right.

7 MR. TULCHIN: This is the point, Your Honor, I said.

8 THE COURT: Okay. We're going to have a little quiz
9 on Monday. How many questions prompted that? I think it's,
10 "What's your name?" but I'm not sure.

11 See you all. I assume that by stopping today we're
12 still going to stay on schedule to have you all finish by
13 mid-week?

14 MR. TULCHIN: I assume so, Your Honor. Yes. That's
15 our thought.

16 THE COURT: Have a great weekend. See you all on
17 Monday. And don't forget next -- well, it may change, but I
18 don't think we're going to sit next Friday, but we'll see how
19 we go next week. If I have to change my schedule, I will, to
20 keep this case on schedule. Have a nice weekend. I'll stay
21 here with counsel.

22 (Jury leaves the courtroom.)

23 THE COURT: Mr. Taskier, I don't want to denigrate
24 you, because you did a wonderful job reading those findings
25 of fact, but would you negotiate with Mr. Tulcin to find out

1 if there are some more findings of fact you could read
2 instead of the rest of Mr. Middleton's testimony?

3 MR. TASKIER: Your Honor, there were some findings
4 you didn't let us read, if you'd like me to read those.

5 THE COURT: I figured you'd say that.

6 All right. I thought I ruled on all of these, but
7 what's --

8 MR. TULCHIN: I think you have, Your Honor. I think
9 I was wrong.

10 THE COURT: That's fine.

11 MR. TULCHIN: I may have made a mistake. I think
12 the only thing necessary at this very next portion is the
13 instruction that this piece of trade press is not being
14 admitted for the truth.

15 THE COURT: Exactly. That's what I remember.

16 MR. TULCHIN: And everything has been ruled on. I
17 was wrong.

18 THE COURT: No problem. There are about seven
19 things I want to go over with you. Number 1, one of the
20 jurors asked in front of Theresa about whether they could ask
21 questions, and she gave the appropriate answer, basically:
22 "You can ask questions, but whether or not they are going to
23 be answered is up to the Judge."

24 I have here -- and Theresa has made five copies for
25 each side -- two sets of questions, and we can talk about

1 them next week. Theresa has told the jurors -- well, I think
2 we will let them know next week. The first one I can read to
3 you. It's from Juror No. 1. "Could we see the bill of sale,
4 WordPerfect to Novell?" Second. "Why did they wait so long
5 to sue?"

6 The second two are from Juror No. 6. I'm not going
7 to read them into the record. You all will have them.
8 That's why I had Theresa copy them. But they had to do with
9 international releases. So let me know what, if anything,
10 you want me to say to these jurors about these.

11 Secondly, I -- next week -- I assume that you all
12 have not had a chance -- and even working hard at night, I
13 assume you still have work to do with one another on the
14 exhibits; is that right?

15 MR. JOHNSON: Yes, Your Honor.

16 THE COURT: Okay. We will talk about those next
17 week. One very small thing, and I don't know if he has done
18 it yet. Somebody from Judge Benson's office may be talking
19 to somebody on each side about he has a Christmas party, and
20 he likes to use his courtroom on Sunday night, December 11.
21 So I think what he would like to do is to talk about not
22 moving everything, but moving some of the things away, so I
23 told him to have somebody from his office contact somebody on
24 each side. So if you get the question, that's what it's
25 about. It's about trying to get the boxes or something to

1 try to move them out on the evening. I think that's a Sunday
2 evening.

3 In terms of the instructions, the sooner we can talk
4 about them next week, the better, just because I can be
5 thinking about them in light of your comments, because what I
6 really don't want to have happen is have us have a delay
7 after the close of the evidence. I'd like to be able to
8 immediately, the next day, go to instructions.

9 And one addendum. And this is just a build, not a
10 new beta, so I'm not going to send it out to you. In looking
11 it all over -- and I'm not sure that Microsoft would agree to
12 this, but I'm inclined to think that, in addition to the
13 first instruction about the principle where it says it's
14 undisputed that Microsoft had a monopoly in the operating
15 system, I think, from the way I understand it, but I
16 certainly will hear from you all, it should be added there,
17 it was also -- and I'll give this to you in writing
18 eventually -- it was also found in the case instituted in the
19 District of Columbia, a finding that is binding here that
20 from -- and I think these dates are correct. If I'm wrong, I
21 frankly made these up this morning when I wrote this -- 1996
22 to 1999, Microsoft unlawfully maintained its monopoly in the
23 operating system market by conduct directed toward companies
24 other than Novell.

25 No? That's not right? Okay.

1 MR. HOLLEY: No -- well, we can obviously talk about
2 it, Your Honor, but --

3 THE COURT: That's not right.

4 MR. HOLLEY: But it all had to do with this
5 ephemeral, you know, could-be, would-be-eventually causation
6 standard. There was -- Judge Kollar-Kotelly made it very
7 clear in her decision --

8 THE COURT: Fine.

9 MR. HOLLEY: -- that it all amounted to nothing in
10 the end.

11 THE COURT: Fine.

12 MR. JOHNSON: Please.

13 Sorry, Your Honor.

14 THE COURT: It must have amounted to something, but,
15 in any event, I'll -- I'll be glad to hear from you all.
16 That was a proposed addition, and I didn't realize Mr. Holley
17 would be quite so vehement about it. And there are different
18 standards. It just seemed to me that this helped the jury to
19 understand, frankly, what else was happening, and, apparently
20 not, according to Microsoft.

21 I cannot understand my handwriting. That must be
22 exhibits.

23 In terms of the Rule 50 motion, my present
24 inclination is to deny the Rule 50 motion. I don't think --
25 but I will -- in fact, I'll deny it, but it's without

1 prejudice to it being re -- if, upon reflection, Novell
2 thinks it's important. I don't think it pertains -- what
3 else would come into evidence pertains to anything the jury
4 has to decide. I really think it has to do with the legal
5 issue I raised, which is essentially in a private antitrust
6 action, it's not -- basically the plaintiff has to prove, in
7 this case, that it would have moved to another operating
8 system which, frankly, I don't think really is one of the
9 issues before the jury. It could be, but that's why it can
10 be reopened.

11 I would be inclined to deny the Rule 50 motion. It
12 seems to me that the evidence in the record is there already
13 in terms of the proffer of what -- you know, if I didn't deny
14 the motion, what would be there. If, in fact, this becomes a
15 very material issue, maybe I would then reconsider letting it
16 in. The reason I'm inclined not to let it in is, you know,
17 you all are very good lawyers. You've thought this through.
18 I just am not inclined to say that this is a kind of gap in
19 proof that the cases that say Rule 50, you know -- I'd be --
20 excuse me.

21 I'd be the first one to say that if somebody forgot
22 something that everybody thought was in or should have been
23 in, I'd let it in. It seems to me that this was an
24 intentional decision by counsel, by experienced counsel, who
25 have been around the case for a long time, not to admit, not

1 to seek to introduce the evidence and so I'm not inclined to
2 let it in. On the other hand, I'll say this as an aside.

3 It came up today that it may be that the revenues
4 are not technically in evidence that are in that one
5 demonstrative exhibit. If, in fact, the revenues concerning
6 WordPerfect -- or at least the installed database -- I forget
7 what it was that was on that chart. That's the kind of thing
8 that, even with experienced counsel, if there's no dispute
9 about the underlying data, I'd be inclined to let that in
10 because I really think everybody from you thought that was
11 in. At least I thought it was in with the -- I thought that
12 the demonstrative chart was supported by evidence, and I
13 wouldn't even have thought of it, but Mr. Tulchin made the
14 objection, which is entirely appropriate.

15 All I'm saying is, if that's not in, that, despite
16 the fact that there is very experienced plaintiff's counsel,
17 if it's not controversial as to what the underlying evidence
18 is, I would be inclined to reopen to let that in. But you
19 all talk about that. That's a -- it may be in or it may not
20 be.

21 Jurors questions. Rule 50. Instructions. Addendum
22 to instructions. Exhibits. Schedule.

23 You all let me know -- Microsoft, I understand,
24 still hopes that it wants to close on Monday. If it can do
25 so without giving too much away, I would like Mr. Johnson to

1 be able to let us know if there's going to be rebuttal and,
2 if so, how long that will take. I assume, frankly, that
3 there will be a day of rebuttal, but I could be wrong.

4 And, if that's correct, the case would go to the
5 jury on Wednesday Subject to what you all have to say. I'd
6 like to give -- my instructions are divided into three parts.
7 The first is sort of like general instructions. The second
8 is the law specifically applicable to this case, and the
9 third is what I call a mechanics and procedures deliberation.

10 My usual practice is to give the first two parts
11 before you all make your arguments and reserving on the final
12 so that I just tell the jury how to go about their business.
13 I would like the -- if possible to have all of that done, the
14 arguments and my instructions done in a day. That may not
15 not be possible. This is a long case. And if you all want
16 more time, I just need to know. If that's true, we would
17 finish the case on Wednesday. Maybe, if there's not a lot of
18 rebuttal, I could give my instructions on Tuesday afternoon.
19 I'm really -- I'm not binding anybody. I'm just trying to
20 figure this out -- so that the case would go to the jury on
21 Thursday and that they could then consider as long as they
22 want to consider but would begin their deliberations on
23 Thursday.

24 The sooner you all have some idea of what the
25 schedule really is going to be, and you can let one another

1 know and let me know so that I can let the jury know so that
2 they can make their plans accordingly. I mean, we may
3 have -- they have got decisions they have got to make. I
4 think one of the jurors is a guitar teacher who really runs
5 into a problem the following week because she has -- her
6 students have recitals. I think she's the one who, at least
7 some days of the week, has sessions, teaching sessions at
8 3:00 o'clock, and which, if that's a problem the week of the
9 16th or the week of the 13th it's a problem -- the week of
10 the 12th it's a problem, I guess we could leave it up to the
11 jury what they want to do or whether they want --

12 Ideally this has been a wonderful jury. They have
13 all been prompt. I would like to have them all deliberate if
14 they want to. It could be that the jurors are going to make
15 the decision -- it could be that she makes the decision that
16 she's got to stop so that she can have her teaching go on
17 next weekend, in which case maybe we'd have to excuse her
18 because we have got plenty of jurors, but I really would like
19 her and her peers to make that decision.

20 It's just that we are -- everybody has done -- you
21 have tried a very efficient case and your -- even though your
22 witnesses have not always given efficient answers, that --
23 just let me know as soon as possible. I would like to
24 keep -- my preference would be to keep all the jurors, to
25 have the case go to the jury I think, realistically, next

1 Wednesday or Thursday. The sooner you can tell me what the
2 schedule is, the better.

3 And also, and this is not a big deal, it's a matter
4 of personal courtesy. Just because they have been working on
5 it with me -- I am not having a law clerk come out next week
6 because I don't want to spend the taxpayers' money, but
7 ideally I like to have my clerks come out and listen to
8 closing arguments and maybe have my secretary come out, too,
9 so the sooner you can tell me, the sooner I could -- they can
10 make plane reservations. But so that's a question of
11 personal preference.

12 MR. TULCHIN: Your Honor, just one question, if I
13 could. With respect to the instructions that you
14 distributed, your current thinking about that, would it make
15 sense to have both sides submit something to you on Monday?
16 Would that be convenient?

17 THE COURT: That would be ideal, but I don't want to
18 ruin your weekend. The better you are -- the sooner you can
19 get something back to me, the better, because I want to think
20 about it, and just, as I say, this is very much of a beta
21 version. I reserve the right to withdraw, for any reason,
22 anything that I have said, but -- and there are things
23 that -- there are things I have left out on both sides. I
24 have tried to make them simple, and I really am not trying
25 to -- I have really tried to get it down to questions which I

1 think need to be answered so this case doesn't ever have to
2 be retried.

3 But I could be misconceiving things. I could have
4 the wrong questions. If you all could get something to me on
5 Monday, that would be great, and I could then consider them
6 and we could discuss it on Tuesday, and maybe we could
7 discuss the exhibits on Monday. But the idea is what I don't
8 want to have happen, and the reason I'm giving them to you
9 now is, I don't want to have, at the last minute, us have to
10 devote a day to figuring out what the instructions are going
11 to be.

12 MR. SCHMIDTLEIN: Your Honor, one point -- or at
13 least question we've got. And we are giving thought to the
14 rebuttal question.

15 THE COURT: Sure.

16 MR. SCHMIDTLEIN: Case question. And I think I can
17 say that we are -- you know, we are very hopeful that if
18 there is any rebuttal case, it's going to be a day.

19 THE COURT: Oh, good.

20 MR. SCHMIDTLEIN: And certainly not more than
21 that.

22 THE COURT: And if it's less than that, I could get
23 the instructions on Tuesday and then we could have the
24 closing arguments on Wednesday.

25 MR. SCHMIDTLEIN: But that's obviously still under

1 consideration --

2 THE COURT: Oh. No.

3 MR. SCHMIDTLEIN: In our evaluation of that and sort
4 of working through that, one question we have and we don't
5 want to run afoul of any rules here, for rebuttal witnesses,
6 can we share with them testimony that has been given in this
7 case, given that they may be rebutting testimony?

8 THE COURT: I don't think so.

9 MR. SHCMIDTLEIN: Okay.

10 THE COURT: I don't think so. I mean, I would have
11 to take a look at my local rule, but that does not strike me
12 that you should be able to. The thing that prompted --
13 frankly, I broke the rule a long time ago, and this is
14 different. I think it is perfectly appropriate because I was
15 a U.S. Attorney, and some Judge got outraged about the fact
16 that one of the assistants had gone out and asked questions.
17 And they weren't leading questions. I mean, the testimony
18 had prompted questions which they thought appropriate to ask
19 of a potential witness, and they asked the question of a
20 potential witness without disclosing what the testimony had
21 been and really not in a way that sort of said what the
22 testimony was. And the Judge got outraged. And that did not
23 seem to me to be a violation of the sequestration order.

24 And so, it would seem -- if you wanted to ask
25 questions, without saying what the testimony was, it would

1 seem to me that you could.

2 MR. SCHMIDTLEIN: All right.

3 THE COURT: But I'll hear from the other side.

4 MR. SCHMIDTLEIN: Frankly, it might have been a way
5 to sort of streamline or make things -- but I understand, and
6 we can certainly live with it.

7 THE COURT: You all can talk about it, but as long
8 as you don't implicitly say what the testimony has been, if
9 something comes up that you want to ask a question based upon
10 what you have heard, then you have to prepare your case.

11 Okay. In terms of the instructions -- and I
12 realize -- the damages come to mind particularly. I have not
13 given -- I have left out the nominal instruction, which I am
14 open to reconsidering it because really I thought that the
15 prior instruction, if you can't prove damages, you can't
16 award anything, basically said you can't award nominal.
17 Mitigation, it seems to me, is already included. I have
18 tried to make things as simple as possible. I specifically
19 had in and then excluded -- and I realize this is not
20 probably the focus of the big problems, but in terms of
21 Novell's proposed instructions, they have instructions with
22 three elements. Number 1, injury in fact. Number 2, that
23 the damages were caused by Microsoft. And, third, antitrust
24 damages.

25 I had it in and took it out. And, again, so you all

1 know my thinking on the theory that if, in fact, the jury
2 finds 1-A, 2-A and 3-A yes, that it has found it. You know,
3 I don't think anybody would say that there hasn't been injury
4 in fact, but it seems to me that in terms of antitrust
5 injury, maybe I have to give that to the jury. It seems to
6 me that's a question of law, and, frankly, it seems to me
7 that you have proved antitrust injury if there is any injury
8 at all.

9 And, in terms of the second element, which is if it
10 was caused by Microsoft, it seems to me that becomes
11 confusing to the jury because they don't even reach damages
12 unless they have answered the first questions in a way which
13 would imply that's right, so that is why I excluded the
14 elements on -- that Novell had proposed because, one, I
15 thought it was -- the last one I thought was a question that
16 involved -- first, I thought it was obvious, and the second I
17 thought it was confusing in terms of the Microsoft, so I
18 didn't include some of the things you requested for the
19 reasons I just stated.

20 But I am -- I'm perfectly open. As I say, this is a
21 beta version, and it's not just going to be what you all tell
22 me. If I decide that I want to withdraw for arbitrary and
23 capricious reasons, I reserve the right to do so.

24 MR. JOHNSON: Thank you, Your Honor.

25 MR. TULCHIN: Have a nice weekend.