

1 (Recess)

2 MR. TASKIER: Before we bring in the jury, can we
3 be heard for a second?

4 THE COURT: Of course.

5 MR. TASKIER: Mr. Jardine was kind enough to give
6 me his slides in advance.

7 THE COURT: Good.

8 MR. TASKIER: Which is an appropriate courtesy,
9 which I shared with them, but I have a problem.

10 THE COURT: Everybody else can be seated.

11 MR. TASKIER: And the problem, Your Honor, is that
12 there are --

13 THE COURT: Do you mind if the witness is while we
14 talk about this?

15 MR. TASKIER: I don't think it is a problem. I
16 think that is fine.

17 The problem, Your Honor, is that there are four
18 slides, with quite a bit of stuff on them, that have never
19 been heard about and that are brand new and that were not in
20 his report or in his deposition, a complete surprise to us.

21 THE COURT: Was the underlying testimony or
22 opinion --

23 MR. JARDINE: I can represent what it is, Your
24 Honor. He is going to give examples of other firms that
25 missed things, and he is going to talk about the Flip video

1 for about five minutes as an illustration of another firm
2 that missed something and then analogize it to --

3 MR. TASKIER: Can I hand this up to Your Honor so
4 you can see how extensive this is?

5 THE COURT: Is there a problem with the
6 disclosure?

7 MR. TASKIER: Yes, Your Honor, this is brand new,
8 never --

9 THE COURT: I mean, the subject matter?

10 MR. JARDINE: I don't think it is because it is
11 not a substantive opinion being rendered, it is an
12 illustration and an analogy, and on that ground I think Dr.
13 Warren-Boulton probably crossed that line many times.

14 MR. TASKIER: Well, without objection. I do
15 object to this.

16 MR. JARDINE: I guess I rest my point, Your Honor,
17 that I don't think this is a substantive opinion for which
18 disclosure is required, because it is illustrative of the
19 opinion he is rendering.

20 MR. TASKIER: I think it is quite significant that
21 he is --

22 THE COURT: It does not reflect well upon me to
23 suggest this, because it shows that the middle ground is not
24 always the best ground, but is there a way to have the
25 testimony without the slides? I mean, if it is just

1 supporting --

2 MR. JARDINE: Yes, we could do that.

3 THE COURT: Let's do that.

4 MR. TASKIER: Thank you, Your Honor.

5 THE COURT: But I do recognize that the middle
6 ground is not always the best ground.

7 (WHEREUPON, the jury enters the proceedings.)

8 BY MR. JARDINE

9 Q. Professor Hubbard, have you prepared a slide that
10 summarizes the testimony that you just taken the jury
11 through?

12 A. Yes, I have.

13 MR. JARDINE: If we could have Dave put up slide
14 number 220.

15 BY MR. JARDINE

16 Q. Just by way of summary and review, would you provide an
17 explanation and summary of what your testimony has been to
18 this point.

19 A. Sure. Before the break we talked about a little bit of
20 economics and a little bit of finance. The little bit of
21 economics were these two big changes that have happened, the
22 move to Windows and the move to suites. The little bit of
23 finance was the decline in the operating performance for
24 WordPerfect in the presence of those trends, and something
25 we'll talk more about, which is the overoptimism that Novell

1 had when it acquired these assets.

2 I would note for you that it is not uncommon for these
3 kinds of things to happen in the business world, and
4 certainly in my experience firms miss industry shifts and
5 that happens. We all make mistakes. Second, management
6 sometimes don't value assets correctly in a transaction.
7 That also is not an infrequent occurrence.

8 Q. Can you think of examples of where firms have missed
9 industry shifts?

10 A. Sure. Some examples that are familiar from daily
11 life -- take Eastman Kodak. Kodak was a story American firm
12 that basically was late to miss the shift away from film,
13 with a shift in camera technologies. Think about the Sony
14 Walkman, that at least if you're my age you know what it is,
15 you younger people may not, but there was a shift from
16 listening to music on a Walkman to MP3 players, iPods and
17 now bundled into a phone.

18 Borders Books, that was once revolutionary with a big
19 superstore, has now been eclipsed and was late to online
20 means of acquiring books. And perhaps an example that
21 frames this most clearly is the Flip digital video camera.
22 So the Flip camera was a camcorder that was used to do
23 things like record family events or office parties. It came
24 out in 2007. It sold very quickly. It was called U2 for
25 socker moms. It was very popular.

1 Cisco, a very large company, acquired the company that
2 made Flip in 2009 for about \$600 million. 590 million to be
3 precise. Immediately the stock market analysts said what is
4 going on here? There is a shift happening in this industry
5 away from these standalone cameras -- does that sound
6 familiar? We talked about standalones before -- to
7 something more integrated, and why on earth would you pay
8 \$600 million for Flip, and a lot of commentary like that.

9 Three months after Cisco does this iPhone 3G comes out,
10 where I no longer have to have this separate camcorder as a
11 mom or dad or an office worker. I can do everything in the
12 phone. Ultimately Cisco wrote off the bulk of the price of
13 that asset. It no doubt went in thinking that it bought a
14 good asset. It was overoptimistic and it missed some
15 trends. These things happen. Shifts in consumer
16 preferences happen, and I would argue that that is precisely
17 what happened here.

18 Q. With that background, I would like to turn now to your
19 specific opinions that you rendered in terms of your own
20 analysis of damages.

21 Will you explain to the jury the two ways that you
22 approached that?

23 A. Sure. My task, again, as the damages witness has to do
24 with some valuation exercises, so I need to assess the value
25 of the WordPerfect and QuattroPro assets. I do this in two

1 ways. You can think of them as top down and bottoms up.

2 From the top down I'm going to look at market data.

3 Q. I'm sorry. Go ahead.

4 A. I earlier spoke about market participants' reactions,
5 so we'll use stock market information and market based
6 approaches as one way to get at this.

7 A bottoms up way will be to build up the accounting
8 data of these assets. So but-for revenues, but-for costs,
9 but-for profits, and compare them to the actual world to
10 calculate lost profits. So top down, bottoms up, but really
11 two ways of getting at the issue.

12 Q. Have you prepared slides that show each of those?

13 A. Yes, I did.

14 MR. JARDINE: Why don't we have slide 226.

15 BY MR. JARDINE

16 Q. Is this the top down approach that you were describing?

17 A. Yes. In a market based approach here we're looking at
18 the verdict of buyers and sellers of stock, the claims on
19 value on Novell. And looking at the stock market's reaction
20 with some care, and I will come back to that part, but at a
21 simple level looking at the stock market's reaction can tell
22 us about what the underlying value of the purchased assets
23 is.

24 My conclusion when I go through this is that in 1994,
25 so before any of the alleged conduct that the jury will have

1 to consider, the market participants actually viewed these
2 assets, and by these assets I mean the WordPerfect and
3 QuattroPro assets, in the hands of Novell at about the same
4 price as what Novell sold it to Corel for.

5 Meaning, no damages, is the translation.

6 Q. Did you prepare a slide that reflects or describes your
7 second approach?

8 A. I did.

9 Q. If we could put up slide 227.

10 A. So this second approach uses accounting data. Before
11 we looked at market data, real money in the stock market,
12 and now we're going to look at the accounting data. So here
13 we'll compare but-for profitability of these assets,
14 meaning, again, WordPerfect and QuattroPro in Novell's hands
15 to actual profitability. And basically what I find and will
16 show you, is that if you were to project Novell's future
17 earnings from WordPerfect and QuattroPro with or without
18 delay, with or without the conduct that you need to
19 consider, the results would be a largely the same.

20 And I would note that there is kind of a -- when you're
21 looking at a set of damages estimates, it is reassuring to
22 know that these are robust, and I am going to look at very
23 different methods and come up with the same answer, in
24 contrast to Dr. Warren-Boulton.

25 Q. And these two approaches, which we're going to have you

1 explain in greater detail, were independent of looking at
2 Dr. Warren-Boulton's methods?

3 A. Correct. I'll come to him, if you ask me to, but these
4 are my own opinions for you.

5 Q. And you have separate critiques of this approaches?

6 A. I do.

7 Q. Let's turn to your first approach which is what you
8 have described as the top down or market reaction approach.

9 How do you start your method one approach?

10 A. Before we get to what is actually done, it is worth
11 going back to the question of what a stock price is and why
12 it is useful here.

13 I prepared a slide if that is okay.

14 Q. Put up slide 228.

15 A. Usually people focus on market data, and what a stock
16 is is just a claim on the ownership of something, and so the
17 stock price represents the value of that claim. Now, when
18 you think about buying a share of stock, what you're
19 thinking about when you buy it, whether it is you yourself
20 or buying a whole company, is what do I expect to get from
21 that stock over time, the dividends that I get in the
22 future, and what is going to happen to the value of the
23 underlying assets?

24 Is it good news? Is this company going to do well? Or
25 bad news and is this company going to do poorly? Market

1 participants, all of us who buy and sell stock, all of the
2 financial institutions active in the market, constantly are
3 looking at information. So when there is information that
4 becomes available, you would expect the stock price to
5 react. That is why these market based approaches are used.
6 Both Dr. Warren-Boulton and I used market approaches.

7 Q. And would that background provide an understanding for
8 you in looking at what happened to the Novell stock on March
9 22 and 23 after the announcement of the acquisition?

10 A. It does.

11 And to do that I really need to do an events study. It
12 would probably be worth explaining what that is.

13 Q. Would do you that for the jury.

14 A. Sure. I have a graphic that might make it simpler.

15 Q. Is that the graphic that you have in mind?

16 A. Yes. Let me describe what an events study is, and then
17 I will tell you a story from the newspaper a couple weeks
18 ago. An events study is actually pretty simple. It just
19 says what is the market price reaction to some news, pulling
20 out what was going on in the marketplace generally? That is
21 an exercise I'm going to need to do here.

22 Now, just before Thanksgiving there was a story of an
23 oil spill off the coast of Brazil by Chevron, which is a
24 large oil company. So oil spills are not good news for the
25 environment to be sure, and they are also not good news for

1 Chevron. There will be associated cleanup costs and
2 liability and a whole lot of things. So it would be
3 interesting to know what happened to Chevron stock when
4 market participants understood, oh, my gosh, there has been
5 this big spill in Brazil.

6 To get to that I can't just look at what happens to
7 Chevron's stock, because it could also be news that effects
8 the value of oil companies generally, whether or not they
9 spilled oil off the cost of Brazil. So this was the story
10 from the Wall Street Journal, so I took the oil companies
11 the Wall Street Journal did, just to be illustrative for
12 you, and turned them into an index. That is the red line.
13 The blue line is Chevron's stock price expressed in index
14 terms.

15 If one were doing an events study what one would do is
16 measure the gap between the red line and the blue line over
17 an event window. So that would say that whatever is
18 happening in the oil business generally, Chevron took a hit
19 because of the spill. That is what an events study is, and
20 that is the kind of thing that I'm about to describe.

21 Q. Did you utilize the events study approach to understand
22 what happened in that period of the Novell announcement and
23 the market's reaction over the next several days?

24 A. I did. The events study would be part of the
25 calculation, but it is probably best to begin with just

1 starting with the purchase price and going through it.

2 Q. Have you prepared a slide that helps do that?

3 A. I have, yes.

4 Q. If we could put up 230.

5 A. Let's start with what we know. So Novell wanted to
6 page 1.55 billion for WordPerfect and QuattroPro. Don't
7 need an opinion. That is a fact.

8 What we have to get at is the purchase price is not
9 necessarily true value. I gave you examples. I talked
10 about Borders, I talked about Kodak and I talked about Flip.
11 We can get it wrong. Fundamental value may be very
12 different than what one market participant thinks.

13 Now, when this announcement happened, and you saw from
14 the board earlier, and I will come back to this in numbers
15 in a moment, a very sharp market price reaction. The stock
16 market verdict was harsh and it was swift. And basically
17 what the market was saying, and I will formalize this in a
18 minute, but it is pretty simple to say, is that the
19 WordPerfect and QuattroPro assets in the hands of Novell
20 were not worth \$1.55 billion.

21 Indeed, to show you the intensity of that feeling, one
22 can look at the volume of data, that is the volume of buying
23 and selling of the underlying stock, and you'll see a huge
24 spike in volume. This was a big sentiment expressed in the
25 marketplace. I have a slide to that effect.

1 Q. If we could look at 231.

2 Explain to the jury what this shows.

3 A. Sure. On the left here we have the stock price. On
4 the right is the volume and the underlying asset, which is
5 Novell common stock. This sharp decline in the red line is
6 essentially back over there. It is the big market price
7 decline. The little gray bars along the bottom are trading
8 volume on that trading day. And the red dotted line
9 represents the median daily trading volume for the month.
10 So that would be typical.

11 Now look at the gray bars surrounding the announcement
12 and the big stock price that dropped. This was not simply a
13 decline in a stock price on a day when nobody was around,
14 like a Christmas holiday or something like that. It was an
15 extremely aggressive volume response that really strengthens
16 this finding.

17 Q. Once you have looked at this price, the announced price
18 and the market's reaction, then where does that lead you in
19 applying the events study analysis to interpreting what
20 Novell paid versus the actual value as indicated by the
21 market?

22 A. Well, now we have to take this in steps, because really
23 the argument I made earlier was that if you actually looked
24 at true value, the value of the assets when they were
25 purchased, roughly the same as when they were sold, and that

1 is what it means as no damages. So I need to describe a set
2 of calculations using events studies that get to that.

3 I can begin that with the next slide.

4 Q. I think that is 232.

5 Would you explain to the jury what you have organized
6 here to explain the calculations that you did.

7 A. Sure. So we're in March of 1994, so we're at the time
8 of the initial announcement. We start out with Novell's
9 announced purchase price, and that is what know, \$1.55
10 billion.

11 What I need to do, what an economist needs to do to be
12 useful here is to calculate the last look, which is what is
13 the economist's best estimate of the value of the assets
14 when purchased. Because that is what, with some nips and
15 tucks, I am going to have to compare later to a sale price.

16 What I need to do is start at the top, which we all
17 know, and get to the bottom by subtracting overpayment. How
18 much did an overoptimistic management overpay for these
19 assets? Now, it is not quite fair to take the entire drop
20 there for two reasons. One is the Chevron example. I can't
21 just mechanically go to the board and copy down the value
22 claim and put it in the box for you, because I have to look
23 at what is happening to other similarly situated firms, just
24 like I did in the Chevron example from the newspaper before
25 Thanksgiving. That is what an events study does.

1 Holding constant what was happening in the market
2 generally, the reaction and the decline in the market
3 capitalization of Novell following the announcement was
4 \$1.78 billion. Of that, too, I can't count all of it.
5 Because, remember, in October, October 30th of 1995 to be
6 specific, Novell announces that it is going to sell the
7 assets. The stock market reacts favorably to that
8 announcement, and I believe that that favorable announcement
9 serves as an upper bound on the value of focus.

10 Now, the reason I say an upper bound is because there
11 is every reason to believe that the loss of focus that you
12 have heard about would get worse over time, so I am being
13 conservative by saying, okay, let's take the value that I
14 will measure with another event study on October 30th, 1995,
15 and I will give all of that as loss to focus.

16 Q. Professor Hubbard, let me just interrupt you there.

17 We have slide 20C that shows what happened on October
18 30th, I think.

19 A. Okay.

20 Q. We may or may not --

21 A. I'll take that as a no, since I don't see the picture
22 changing.

23 Q. Go ahead.

24 Let me remind the jury that on October 30th Novell
25 issued a press release, as I understand it, and let me hand

1 this out. Maybe this will help.

2 I didn't check to see if the Elmo was on. It may not
3 be on.

4 MR. JARDINE: I'm told that the technology problem
5 is my fault. It is slide 232.2.

6 BY MR. JARDINE

7 Q. Okay.

8 A. Okay.

9 Q. Then the jury can see it, we hope. If we can, I would
10 like the jury to see this.

11 A. On October 30th, 1995 Novell announces a planned
12 divestiture with a favorable market response. That is the
13 run up in the stock price. I do an events study and I
14 calibrate what that favorable response is in dollars. Why
15 that is relevant to me, is that good news is the market
16 saying, phew, glad you're getting rid of it.

17 I am taking that as an upper bound on the regaining of
18 focus that Novell would have. Novell, remember, has this
19 other business, the NetWare business upon which it can
20 focus. It is an upper bound because, again, I'm being
21 conservative on timing, and the market could simply be
22 saying, gosh, we thought these assets were even more money
23 losing, we could sell them for something, so that's good
24 news. Either way what I have is conservative as an upper
25 bound.

1 Q. Go back to 232.

2 Go ahead.

3 A. So now, again, we have the announced purchase price and
4 I need to get the overpayment. What is overpayment? The
5 decline in market capitalization from the first events study
6 is \$1.78 billion. That is that sharp drop there, adjusting
7 for what happened in the market. I'm going to give back,
8 though, the gain on the other end, when in October the firm
9 says they are going to sell, so I am going to take back
10 about 430-ish million, so the resulting overpayment is \$1.35
11 billion.

12 So of the initial 1.55 billion, market overpayment of
13 \$1.35 billion, meaning the value of the assets when they
14 were purchased, what I started with, 1.555, and that is what
15 I said I would pay for them, plus what the market has done,
16 too much, 1.35, and I get to \$207 million.

17 Now, I'm not done for a couple of reasons. One has to
18 do with time. We're sitting here in March of 1994. The
19 assets are not sold until 1996. And the assets that are
20 sold don't include GroupWise, but this value that I have
21 here does include GroupWise.

22 Q. Before we leave this slide, did you look at any other
23 corroborating evidence for your conclusion that the
24 overpayment was 1.35 billion?

25 A. Sure. I looked at the commentary from stock market

1 analysts, which I have a demonstrative for.

2 Q. Have you collected some of those on a slide?

3 A. Yes, I have.

4 Q. If we would look at slide 233.

5 A. Before I talk about a couple of these, it is worth
6 talking about who these people are. Analysts are
7 researchers that are paid by securities firms to talk about
8 the value of stocks. It is the job of an analyst to go
9 through the industry, go through company accounting data and
10 try to come up with a value, and you'll see in analysts'
11 reports things like, buy, hold, sell, and they are trying to
12 form opinions for securities firms. That's who these people
13 are.

14 So before when we were talking about market data, it is
15 those people buying and selling stock. It is real money and
16 these are people offering professional opinions. You can
17 read these, but I wanted to read two or three of them
18 because I think they are highly illustrative.

19 The first one codifies in the words of an analyst
20 essentially what I told you in numbers. The stock action,
21 since the deal was announced, appears to represent an
22 informal rejection of the deal. That is, the 1.55 is
23 grossly too high. My words, not the analysts.

24 I also wanted to read for you the second and the
25 fourth, because I think they are telling, again, compared to

1 the numerical story I gave you. The second one says that
2 analysts said Novell may be paying too much for WordPerfect
3 given its earnings. I already showed you that the earnings
4 were on a declining trend. This is a very rich valuation.
5 Back to the analysts, they were overpaid, Rothschild said,
6 of privately held WordPerfect.

7 Then the only other one I would read, and you can read
8 all of these yourself, is the fourth, that Wall Street
9 analysts noted that while WordPerfect still holds more than
10 half the word processing market, and that is that standalone
11 market I mentioned to you earlier, its once overwhelming
12 leadership has been sharply eroded by competing Windows
13 based packages from Microsoft.

14 So an analyst is saying, whoa, I don't get this
15 valuation. They seem to have missed the trend that I see.

16 Q. If we could go back to 232 for one moment, just to make
17 sure that we have the transition in mind, I think that you
18 said that when you arrived at the bottom number that we see
19 as 207 million, you were not done?

20 A. I am not done for two reasons. One, I am not done in
21 time, because I have got numbers for you now -- this is what
22 the market is saying in March of '94, but to be useful I
23 have to talk about '96. That is when the disposition
24 happens. I have to breakout GroupWise, because this
25 valuation includes GroupWise and the ultimate sale doesn't.

1 Q. If we could turn to slide 232.1.

2 Is that your slide that addresses both of those issues?

3 A. It is. Let's go through the pieces of this. Let's

4 start with what we knew from the first slide. The first

5 column there in calendar time, March of '94, the value of

6 assets when purchased including GroupWise \$207 million.

7 That is what I just calculated. So that started with the

8 fact, the 1.55, and took out the market verdict and gave a

9 bottom line.

10 Now, I go from March of '94 to March of '96 by

11 essentially just using the time value of money. I take \$94

12 and turn them into \$96, which means as if you put money in a

13 back or bought a bond, I need to move the numbers around,

14 and I'm going to use the treasury bill interest rate or the

15 risk free interest rate, and that is how I am going to get

16 from 207 to 228.

17 So in March of 1996 terms, what I calculated for you on

18 the earlier slide is a number of \$228 million, but I'm not

19 done. So all I have done now is move my earlier event study

20 work from the past to the present, the present being '96 for

21 this purpose, and then I estimate the value of GroupWise to

22 be \$114 million, which means that the value of WordPerfect

23 and QuattroPro, which were the other pieces in the package

24 when they were sold, would be 228, and that is the number

25 for March of 1996, minus my estimate of the GroupWise value,

1 114, gives me a value of WordPerfect and QuattroPro of 114.

2 Now, we come to again another piece of data. The sale
3 price of WordPerfect and QuattroPro to Corel all in is \$147
4 million. So that, like the 1.55, is data and the rest is my
5 work for you.

6 So the damages are the difference between the value
7 that I would estimate that those assets were actually worth,
8 based on the marketplace verdict, minus the price that Corel
9 actually paid for them, and you get a modest negative number
10 actually, \$32 million to the negative, but that would mean
11 essentially zero. Understand that the damages you want to
12 compare them to is the purchase price, so when I tell you
13 the difference is minus 32 million, but relative to 1.55
14 billion, which is where I started, it is essentially zero.

15 So this is an opinion of no damages, but what it means
16 in terms of the underlying economics is that the value from
17 the get-go was approximately the same as the value they
18 actually got at the end, so there could be no damages.

19 Q. As I understand it, what you have just described for
20 the jury is your conclusion applying your first top down
21 method?

22 A. That is correct.

23 Q. Now, the jury heard earlier in this trial Dr.
24 Warren-Boulton describe a purchase versus sale approach that
25 looked at these transactions.

1 Does your opinion and approach to the analysis differ
2 from the one he testified to?

3 A. It does, yes.

4 Q. Have you prepared a slide that highlights the
5 differences?

6 A. Yes, I have.

7 Q. If we could put up 234.

8 A. Dr. Warren-Boulton when he offered testimony also used
9 a market base method. He erroneously in my view, and I will
10 explain this in a moment, attributes most of the decline,
11 the harsh market reaction that obviously happened, to a loss
12 of focus on NetWare as opposed to overpaying for assets.

13 Dr. Warren-Boulton and I each have prepared reports. I
14 offered nine substantive criticisms of what he did. My
15 reading of the transcript suggested he already accepted five
16 of those criticisms, but four remain and they are important.
17 I want to make sure to be clear what they are. They really
18 fall into a handful of economic mistakes.

19 One I would call a misclassification kind of mistake.
20 That is sweeping in events that aren't really relevant to
21 the analysis. We all know the events and the timeline, and
22 that is the inconsistency from an economic perspective and
23 the inappropriateness of including October 27. Remember,
24 October 30th is the announcement of the divestiture. He
25 sweeps in a bonus day, October 27.

1 The second error in that regard is the inclusion of
2 January of 1996. I will explain all of these again in a
3 minute.

4 The third error is misestimating gains from focus on
5 NetWare. Remember that side by side the discussion that is
6 preceding this about the WordPerfect type assets is Novell
7 also had this NetWare business. I argue and believe that he
8 misestimated the gains from focus, and I will explain that.
9 And then finally in the context of the events study, he
10 mismeasured the returns.

11 Go back to the Chevron example, the oil spill example.
12 You're trying to measure that gap. He chose the wrong index
13 and essentially did not produce the right reaction. And
14 while I will go through these in detail with you, I can tell
15 you in advance that I can reverse engineer, I can begin with
16 his number, I can peel back these criticisms and I will get
17 to zero.

18 Q. Have you prepared a slide that shows the cumulative
19 effect of those corrections?

20 A. I have.

21 Q. And is that slide 235?

22 A. Yes.

23 Q. And if we can put that up.

24 Explain what you're showing with the arrow on the left.

25 A. Okay. So the arrow on the left is why I am going

1 through this exercise and why it is so important to do this.
2 I need to reverse engineer from Dr. Warren-Boulton to me to
3 be essentially helpful to the jury.

4 Dr. Warren-Boulton presented a damages estimate at
5 trial in this method of about \$976 million. You have
6 already heard my view that it is essentially zero. So I'm
7 going to take the four remaining errors in Dr.
8 Warren-Boulton's analysis, and strip them aside, and
9 cumulatively they would bring that 976 to, again, a modest
10 negative number, minus 67, so essentially zero in the
11 context of the purchase price.

12 On the right are the four kinds of mistakes. Here I
13 think it is important to say exactly why I think these are
14 mistakes and why they systematically inflated his damages.
15 The first is the right window for October 30th. Why are we
16 looking at October 30th? It is easy to get lost in the
17 details and forget the story. The story is I need to look
18 at October 30th. Dr. Warren-Boulton looked at October 30th,
19 because it is going to give us some information about the
20 regaining of focus in this business.

21 We know the stock price went up. I already talked to
22 you about that. The question is what is the right window?
23 I argue that it is the reaction to the October 30th
24 announcement. There is no evidence to suggest any leakage
25 of that information, so that is the right window. Dr.

1 Warren-Boulton sweeps in the previous trading day as well.

2 The second error has to do with January 1996. Remember
3 in October there is an announcement that we're going to
4 sell. What January of 1996 does is identify the actual
5 transaction, the Corel transaction. Including this has two
6 problems. One is economics and the other is statistics, and
7 they are both pretty simple. The economic problem is you
8 don't need it. You already announced you're going to sell.
9 The gains from the repricing focus are already priced
10 October 30th.

11 The statistics problem is when you do the events study
12 in January, the measured return is not statistically
13 different from zero. So even if there had not been an
14 economic mistake, which there had, statistically it is zero
15 anyway so no grounds to include it.

16 The third one there is not properly estimating gains
17 from NetWare focus, and I already told the Court and the
18 jury that in my judgment as an economist the upper bound on
19 gains from focus in dollars is what I can measure in the
20 October 30th date. That is about \$430 million in the events
21 study. What Dr. Warren-Boulton does is use percentage terms
22 and apply his now much larger numbers, remember, he is
23 sweeping in all these other windows as well, and apply those
24 in percentage terms at the beginning. That makes no sense.
25 Focus is about dollars, about cash flows, and that is what I

1 have measured.

2 And then finally the fourth of these is how you measure
3 abnormal returns. An abnormal return is this big drop after
4 the market moves, that is the difference between the blue
5 line and the red line in the Chevron picture that I showed
6 you from before Thanksgiving, and Dr. Warren-Boulton
7 filtered out the market, if you will, using the S&P 500
8 index.

9 I used the NASDAQ index. I did so deliberately. The
10 reason is the correlation of Novell's stock price movement
11 day to day is much greater with the NASDAQ than it is with
12 the S&P 500. The economic theory of these events studies
13 tells you that is what to do.

14 Again, nine problems with what he did, five he
15 testified that he already accepted, and the remaining four
16 when peeled back essentially in this market based approach
17 get you zero damages.

18 Q. And so if we look at this market based approach your
19 opinion, doing your own independent study, was what with
20 respect to the damages?

21 A. Zero. And what that means again in the story is that
22 the true underlying value of the assets when they were
23 acquired is about the same as what they were sold for. That
24 is what it means to say no damages.

25 Q. And when you make the corrections to Dr.

1 Warren-Boulton's purchase versus sale method, what
2 conclusion do you reach about damages?

3 A. His method would also yield zero.

4 Q. Now, obviously he gave different testimony. Have you
5 prepared a slide that shows the respective differences on
6 how you address overpayment between yourself and Dr.
7 Warren-Boulton?

8 A. Sure. I have a slide to that effect.

9 Q. I think the jury has seen it. If we can put up Exhibit
10 236, slide 236.

11 A. Okay. These are two bar charts, one by me and one by
12 Dr. Warren-Boulton. The market decline is not quite the
13 same in each of those. Remember, the indexes are different,
14 but the more interesting difference is the apportionment of
15 the market decline -- remember, that is the verdict. We
16 know that happened. That is the sharp drop that you saw in
17 the picture -- between overpayment and loss of focus. So
18 the calculations I presented to you, the bulk of that, about
19 three quarters, is overpayment. That is Novell was just
20 overoptimistic about these assets, some loss of focus. And,
21 again, I argue I'm being conservative.

22 The market gap decline for Dr. Warren-Boulton is he
23 assumes is principally a loss of focus. How does he get to
24 such a different answer than me? I went through it for you
25 in the preceding slide. He sweeps in some events that

1 shouldn't be there and miscalculates the focus. That is
2 really the essential difference in the two.

3 Q. Thank you.

4 I would now like to move to a different topic. Dr.
5 Warren-Boulton presented a separate damages model that was
6 based on the market's reaction to an October 6th, 1995 press
7 release by Novell.

8 Do you recall his method doing that?

9 A. Yes, I do.

10 Q. Do you recall that that press release disclosed several
11 things, including a missed earnings announcement and a delay
12 in the release of its Windows 95 products?

13 A. Yes.

14 Q. All right. Did you perform your own damages study
15 independently using the same approach that he did?

16 A. I did not. This is a wholly inappropriate approach.
17 I'm happy to offer criticism of what he did, but there is no
18 reason for me to have done that.

19 Q. Would you explain to the jury what criticisms you have
20 for the way Dr. Warren-Boulton approached this method?

21 A. Sure. Because my criticisms are going to involve plain
22 English as well as economics, can we start with some plain
23 English? I have a slide from the press release.

24 Q. If we could put up slide 237.

25 A. What Dr. Warren-Boulton talked about for October 6th,

1 and this is the announcement of the earnings miss, he
2 attributed the market price reaction, which was significant,
3 and I'll come to that in a moment, to a story about the
4 delay.

5 Starting in English, and then I will go to economics,
6 the English of the press release is different, of course,
7 and going back to the story that I said about the industry
8 and about the shifting consumer preferences, the press
9 release says this is primarily due, and I am reading from
10 the release, to a continued fall off in the Windows 3.1
11 application market. So, in other words, the bet that we had
12 there is not panning out the way that we thought. It also
13 refers to shipping in early 1996 but, as a matter of
14 economics, you first need to parse out which of those you're
15 trying to study. There is no attempt in what Dr.
16 Warren-Boulton did.

17 Using a graphic I think I can go through what the
18 economic problems are as well as the plain English problems.

19 Q. All right. If we could put up slide 238.

20 A. Now, in this slide what I have done is to try to look
21 at the consequences of earnings misses. Let me just orient
22 you to the slide, and then I will go into a little bit of
23 economics.

24 On the left is the abnormal change in market cap.
25 Those are stock market reactions to news when you put out an

1 earnings press release. The blue diamonds are departures
2 and misses in earnings. So to understand what a miss in
3 earnings means, it is important to go back to the
4 conversation about analysts. Analysts are constantly
5 looking at firms, and there is a consensus estimate of
6 analysts about how much a big company is going to earn in a
7 given quarter. So when people talk about an earnings miss,
8 it means when the company tells you what is actually going
9 to happen, did it differ from what the analysts are saying?
10 That is what it means to miss your earnings.

11 Now, you can see that the blue line or the blue
12 diamonds typically refer to negative numbers, that is
13 consistently missing your number to the negative, that is
14 you're not as good as what the analysts believed. And
15 you'll see that October 6, 1995 did have a significant
16 negative stock price reaction, over a billion dollars, but
17 that is not unique to earnings misses. As I have shown you,
18 there are other bars of similar size, so you can't simply
19 point to it, you have to do some economics.

20 Now, what Dr. Warren-Boulton did for economics was to
21 say, well, the earnings miss was I believe about 11 cents a
22 share. So he took the 11 cents per share and multiplied it
23 times the number of shares outstanding, and since that is
24 all that can be attributed to the earnings miss, I think
25 that is a number of about \$40 million, the rest of this that

1 gets you to this much bigger billion dollars must be due to
2 delay.

3 That is problematic for a myriad of reasons. It begins
4 with a plain English reading that the press release talks
5 about other things, but in order to do that you have to sort
6 out whether an earnings miss is telling you only about the
7 past or about the future, and there was simply no attempt to
8 do that in what Dr. Warren-Boulton did. So I don't even
9 consider this method legitimate.

10 The other method that he talked about is a legitimate
11 method that he executed wrong. This method is not even
12 legitimate, and I can offer a practical observation on
13 another graphic.

14 Q. Great. If we could put up slide 239.

15 A. Entirely apart from the plain English or economics
16 story, let's be the devil's advocate. If this delay is the
17 true story, then the delay means that the demand for the
18 products would have to go somewhere, and the somewhere might
19 be another successful seller like Microsoft. So surely if
20 there is this huge miss for delay, that would be good news
21 for Microsoft to happen, because they are going to go to
22 Microsoft instead of Novell.

23 So here I look at stock market reactions of both
24 Microsoft and Novell, as well as the S&P and the NASDAQ and
25 you see no such thing. There is no positive reaction of

1 Microsoft that you might expect if this were this delay that
2 somehow benefits Microsoft. The market participants
3 certainly didn't pick that up.

4 Q. And so with respect to this method that Dr.
5 Warren-Boulton utilized looking at the market reaction of
6 October 6, 1995, did you prepare any sort of adjusted or
7 corrected damage study to his?

8 A. I did not. This is not in my judgment as an economist
9 a legitimate approach for studying damages the way he has
10 executed it. In contrast to the first and in contrast to
11 another method we'll talk about, I just offer the criticism
12 that this method is not worthy of consideration.

13 Q. Why don't we turn to the next method. You talked
14 earlier about doing a top down and a bottoms up analysis.
15 Could we turn now to your bottoms up analysis, and would you
16 explain to they jury what you did.

17 A. Sure. And there is a slide that would be useful here,
18 perhaps.

19 Q. If we could put up 240.

20 A. Dr. Warren-Boulton and I had in common a couple of
21 kinds of methods. One was a market based method. I told
22 you about my approach and I told you about my view of his.
23 The other is this bottoms up lost profits analysis where one
24 would want to compare actual profits that we can see in data
25 to but-for profits.

1 Now, before going through numbers it is important to
2 start with some words and what does it really mean here that
3 we're trying to do? In the but-for world some things don't
4 change. Okay. So what does not change in the but-for world
5 is WordPerfect lagged behind Microsoft. I already showed
6 you that from history. That is in the Windows platform.

7 WordPerfect had lagged behind Microsoft in the suite
8 products. I already showed you that. That is history. And
9 WordPerfect's success as a standalone DOS product had not
10 translated into success in the Windows suite world. I
11 showed you that already. Those were the market share data.

12 Now, what does change in the but-for world? In the
13 but-for world WordPerfect for Windows 95 would be out by
14 October 1995. That is the 60 days after the release of
15 Windows that we talked about earlier this morning rather
16 than in 1996.

17 Q. And in your last point you wrote WordPerfect for
18 Windows 95, would that also include Novell's suite Perfect
19 Office that included the WordPerfect product?

20 A. Yes, it would.

21 Q. And with that understanding, what would be the first
22 step in constructing your lost profits model to accomplish
23 what you have described?

24 A. Here I will have to get somewhat granular, because
25 we're talking about multiple products here. We have word

1 processors, he have presentation software, we have suites,
2 we have individual products and suites, so I have to for
3 each of those come up with but-for revenues.

4 How am I going to do that? Well, for each one I need
5 to start with market shared data from 1995, and use the
6 overall data from the industry to project what but-for
7 revenues would be. And then I need to talk about forward
8 years, but let's keep to 1995 first and maybe turn to the
9 next graphic.

10 Q. All right. If we could look at graphic 241.

11 A. So here I take as an example the suites. I could have
12 talked about word processors, standalone spreadsheets,
13 standalone presentation, but let's just talk about suites.
14 Here Novell's share of the worldwide suite revenue in Q-1,
15 1995 is just under seven percent. That is data. That is
16 not my estimate. Q-2 of 1995 is 6.1 percent. Q-3 of 1995
17 is 1.7 percent. So this is the period of 1995 that occurs
18 before we get to this change we have to make for the but-for
19 world. This is just going through September of the year.

20 The weighted average market share, not the simple
21 average of the three numbers, 6-9, 6-1, 1-7, but the
22 weighted average for the underlying numbers is four and a
23 half percent. I am going to make a calculation like that
24 one for suites that I just showed with you, and for
25 standalone word processors and for standalone spreadsheets

1 and standalone presentation revenues.

2 Q. That would be each of the main components of a suite,
3 but as standalone products?

4 A. Correct. That will help me get a number for the fourth
5 quarter of 1995, but then I have to go forward in time.
6 There I think the next graphic would be useful.

7 Q. If we could look at slide 242, please.

8 Explain to the jury what 242 shows.

9 A. Let's start first with just the first bar and I will
10 offer an explanation.

11 I calculated the weighted average share for suites for
12 Novell for the first three quarters of 1995 to be four and a
13 half percent, so I give that four and a half percent for the
14 fourth quarter, and the market size in that quarter -- it is
15 quarterly data, so that bar would be smaller than the other
16 bars -- is 867 million. So the number that I'm going to
17 plug into a table in a minute is four and a half percent
18 times 867.

19 So 1995 is easy. If you will, the first three quarters
20 gives you the data, and you do a calculation for the fourth
21 quarter, and now the question is what am I going to do about
22 the future? Here is the approach that I take. The blue
23 bars are the worldwide suite revenues in those years. So
24 when you see 1996, 3-7-9-4, that means worldwide suite
25 revenue would be about \$3.8 billion. If you go to 2002,

1 worldwide suite revenue is about \$7.9 billion. That is the
2 market.

3 To get from that to numbers that I can plug in I have
4 to get Novell's. I have Novell's market share in 1995. So
5 what do I do? I use data on the top ten business
6 application software categories, and then look at the
7 weighted average market share of non-leading firms. Why am
8 I doing that? Novell is not the market leader. We know
9 that. I showed you those numbers. So what I do is say I'm
10 going to assign to Novell, and I'll give it the chance of
11 being the weighted average of the non-leading firms, and
12 then use that as a trend to take the market share from the
13 4.5 percent that I calculated down to other market shares.

14 So in 1996, if I did that calculation, their market
15 share for suites would be 3.8 percent. 3.7 percent in 1998
16 and so on. How am I doing that again? 4.5 percent is my
17 jumping off point. That is where I started. The rest is a
18 trend that I'm getting from looking at data on top ten
19 business application categories and looking at the weighted
20 average shares of non-leading firms. So that is what is
21 happening in slide 242.

22 Q. Just to spend a little time on this, I gather that that
23 trend line goes down, and it is not predetermined that it
24 would go down, as I understand it, it is just whatever
25 happened to the non-leading firms in this technology

1 section?

2 A. Correct. The before and after sense of jumping off
3 point, the line goes on up and then down and it depends on
4 what is happening with the market shares of the non-leading
5 firms.

6 Q. And just to be clear, does this describe what you
7 previously explained to the jury about a but-for world?

8 A. Yes. We are entirely in the but-for world now. I'm
9 sitting here constructing what the world would have been
10 like.

11 Q. As I think you explained, but so we are clear, the
12 but-for world that you have constructed assumes that Novell
13 would have had access to the namespace extension APIs and
14 would have released their products by October?

15 A. Right, by the fourth quarter, fourth calendar quarter.

16 Q. And that is what a but-for world is?

17 A. Yes.

18 Q. Now, just so we are clear, the blue bars represent
19 what?

20 A. The blue bars, again, are the total market, in this
21 case for suites. I can do this for each of the four
22 categories that I mentioned. I promise you I won't, but
23 this is representative of the kind of calculation that you
24 do. So the blue bars are the total. The red line is the
25 market share.

1 So when I get to dollars that I can put as but-for
2 revenue, I can multiply the market share times the total and
3 that is how I get my dollars.

4 Q. Did you do such a calculation?

5 A. I did.

6 Q. If we could turn to slide 243.

7 Would you explain how you took the information from the
8 last slide we looked at and put it into this chart.

9 A. The easiest way is to take from the last chart -- if
10 you start with but-for suite revenues, and that is what we
11 were just talking about, that first row going from 1995
12 quarter four all the way up to the year 2002, those numbers
13 are the product of the market share you saw in the previous
14 slide times the estimate. So the 39.2 was four and a half
15 percent times the 867. That is where all this is coming.

16 These other numbers, if I looked at standalone word
17 processors the same way, standalone spreadsheets the same
18 way, or standalone presentation the same way, I would get
19 the numbers themselves. So in each of these cases, in each
20 of the four rows I am building up in exactly the same way,
21 estimate market share, and I have got data on what the total
22 worldwide sales are, and then I can calculate the but-for
23 revenue.

24 So those first four rows are by product, the suite and
25 the three constituent standalone products but-for revenue,

1 and the fifth row there just adds them up. So the but-for
2 revenues of these assets, not all of Novell, these assets,
3 the productivity application assets, is that row that begins
4 at 94.2 and goes to 199. So with a series of calculations,
5 again, using the actual market data, I have come up with the
6 but-for revenues.

7 Now, I still have work to do, because but-for revenues
8 are not getting you where I need to be in a damages
9 calculation. That is about but-for profits. So I have to
10 go from revenues to profits and the missing link obviously
11 being costs.

12 So what I do is estimate but-for costs essentially
13 using the same approach, as I read the transcript, that Dr.
14 Warren-Boulton presented, which was to assume fixed costs in
15 the business of \$177 million, and variable costs of 55 cents
16 of a dollar of revenue. So the line that I have there for
17 but-for costs essentially reflects that observation. That
18 is the one piece of this that he and I would share.

19 The last line, but-for profits, says this would be the
20 profit of these assets, not all of Novell, but productivity
21 application assets in the but-for world. So if I look at
22 '95, quarter four, just to give a fixed idea, the but-for
23 revenue I calculated across all of the four parts was 94.2
24 million. The estimated but-for costs was 96.3 million, so
25 the but-for profit is a negative number, it is a loss of 2.1

1 million.

2 In 1996 I would have estimated that the but-for
3 revenues were 233.6 million. The but-for costs, using the
4 formula, again, that Dr. Warren-Boulton also presented, were
5 \$306.1 million, and but-for profits of a minus 72.6 million.
6 Again, a loss would have occurred in the but-for world and
7 so on.

8 Q. Just one other question about this chart. Why did you
9 stop in 2002?

10 A. Well, I stopped in 2002 because I'm going to eventually
11 do a terminal value of this, that is a valuation of cash
12 flows after 2002, but to be comparable to Dr. Warren-Boulton
13 as well, he also presented to 2002 and I didn't want there
14 to be any confusion about the time period.

15 Q. When you get to your bottom line of but-for profits, is
16 work done on this model?

17 A. It is not. All I have done so far is tell you half of
18 the story. I have estimated what the but-for profits are,
19 so this is what would have happened, again, my analysis as
20 an economist looking at what would have happened in the
21 but-for world.

22 To get an estimate of lost profits to inform damages, I
23 have to look at the actual world too.

24 I need an additional slide.

25 MR. JARDINE: If we could go to the next slide,

1 David.

2 BY MR. JARDINE

3 Q. Would you explain what you're showing on this slide --

4 A. Sure.

5 Q. -- Professor Hubbard?

6 A. The first three rows here you just saw. They are the
7 build up to but-for profits, and I just wanted for
8 completeness to present them here. The top row is estimated
9 but-for revenues, minus estimated but-for costs, equals
10 but-for profits. That is the minus 2.1 minus 76 and so on.

11 The actual profits I can get from accounting data for
12 Novell. Minus 23.6 in the fourth quarter of 1995 and minus
13 33.5 for calendar year 1996. Now, you'll note before I go
14 any further that you see some zeroes after that. Well,
15 remember, in the actual world these assets were sold. So
16 after March they are not on the books anymore. So
17 essentially the minus 33.5 would have been the actual
18 profits for that first quarter where Novell held them. In
19 the actual world those are zeroes because they don't own the
20 assets.

21 So the estimated lost profits are the difference
22 between the but-for profits, and that is what I am
23 estimating, and the actual profits. That is in the data.
24 So for Q-4 '95 I suggested the but-for profits were minus
25 2.1 million, a loss of 2.1 million. The actual loss was

1 23.6 million, so there would have been an estimate of lost
2 profits in that quarter of 21 and a half million dollars.

3 In the but-for world in that quarter Novell's assets
4 did better than they did in the actual world. Going forward
5 in 1996 the but-for profits were a minus 72.6 million, and
6 they would have lost almost \$73 million, but they actually
7 lost 33 and a half million dollars, so the estimated lost
8 profits there are about \$39 million and so on.

9 Now, there are a couple of ways to look at this in
10 terms of looking at the lost profits as a measure to inform
11 damages. In either case we have to look at the present
12 value. This simply means that these numbers are at
13 different points in time, and from an economists way of
14 thinking it is like comparing apples and oranges, because a
15 dollar that I give you in 1995 is not the same thing as a
16 dollar that I give you in 2002. The dollar you got in '95
17 you could have put in the bank and earned interest up to
18 2002.

19 So what the last row there does is take the present
20 value of the lost profits as of March of 1996. Why March of
21 1996? That is the date they were selling the assets. So
22 that is the same kind of present value I used in the market
23 method.

24 There are two kinds of answers that you could do here.
25 You could, and I shaded this in yellow, stop after 1996

1 because you could say, gosh, in the but-for world with
2 negative numbers that big they probably would have called
3 the question in the but-for world too, in the sense do we
4 really want to carry on a money losing business year in and
5 year out? So a conservative estimate would be no damages
6 because you get, again, a slight negative number combining
7 Q-4 '95 and '96.

8 If you did what to cumulate going forward, you would go
9 all the way out to 2002, and then construct what would be
10 called a terminal value, that is to assume something about
11 all of the cash flows after 2002. So to be conservative I
12 assumed the losses don't get any worse than they were in
13 2002 and discount it back to the present.

14 Your eye would tell you, and you don't need to be an
15 economist, that that is going to be a much bigger negative
16 number. So either way you look at it there would be no
17 damages from lost profits of these productivity application
18 assets.

19 Q. And that is the conclusion that you reached and the
20 opinion that you reached applying your bottoms up or lost
21 profits model?

22 A. That is correct. So like the top down, and what the
23 market participants do with dollars, either way you look,
24 building up the accounting data or look at market
25 participants the answer is the same. It is zero.

1 Q. Now, I think you mentioned earlier, did Dr.
2 Warren-Boulton utilize a lost profits model as well?

3 A. He did.

4 Q. And you testified earlier that you had some criticisms
5 of it. Would you describe for the jury in what ways your
6 approach is different or what criticisms you have?

7 A. Sure, and I am going to give, in fact, an example to
8 set this up. When I was building up market shares I took
9 the individual profits, so I have got word processing, et
10 cetera, et cetera, and suites. What Dr. Warren-Boulton
11 does, and it superficially looks similar, it is about market
12 shares and about revenue but he says, no, this is all one
13 market called the productivity applications market.

14 So he took the four things that I mentioned, the three
15 standalones and the one suite and called them all the same
16 market. I want to illustrate it, if I could, with a couple
17 of slides of why this would not be a good thing to do.

18 Q. Could we have 245?

19 A. Let me first start with numbers and then I will use
20 some examples. Let's start with the numbers first. So this
21 is revenue on the left. So \$8 billion is the top number
22 down to zero, and plotted down at the bottom is the time
23 from 1993 to 2002. So what you see there is the growth
24 overall in what Dr. Warren-Boulton would call a productivity
25 applications market, mechanically summing what I did.

1 But what do the pieces of the sum look like? Well, the
2 red part of that is the productive suites. Remember when I
3 began this morning I said one of the C changes is the shift
4 to productivity suites. This is just telling you what you
5 saw earlier all over again. The story is increasingly
6 becoming completely a story about productivity suites, the
7 red bar.

8 The blue and green bars, the standalone pieces of this
9 were okay at the beginning, but become negligible at the
10 end. So putting this all together would be like taking at
11 the turn of the twentieth century the market for buggies and
12 the market for cars and putting them all together and
13 talking about the market for transportation, even though it
14 was clear which way we were headed.

15 I wanted to show in a simple economic example why this
16 is flawed.

17 Q. If we could turn to slide 246.

18 A. Now, I wanted to pick some simple numbers and not get
19 tripped up in all the accounting data, and so I want you to
20 consider with me an example where in 1995 let's say that the
21 standalone application market is \$10 million and Novell has
22 50 percent of it. So mechanically that is the word
23 processor presentation, the spreadsheet, and that is what
24 I'm talking about.

25 The suite market in 1995, let's call that \$20 million,

1 and Novell has five percent of that. So if we were to
2 calculate Novell's revenue that year it is 50 percent of
3 ten, and that is five, and it would be five percent of 20,
4 and that is one, so five plus one is 6 million, and 6
5 million happens to 20 percent of the combined market which
6 is 10 plus 20.

7 Now, let me look at 1996 and illustrate the difference
8 between the way I am describing it and the way Dr.
9 Warren-Boulton is describing it. In 1996 let's map the C
10 changes in an example. So the C changes are we're going to
11 shrink the size of the standalone market. We showed you
12 that is what happened with the data, just giving you a
13 numerical example, and I am going to increase the size of
14 the suite market. So to be concrete, I'm going to take the
15 standalone market from ten down to five, and I am going to
16 take the suite market from 20 up to 40. So just to keep it
17 simple, one fell in half and the other doubled.

18 We'll assume that Novell still had 50 percent of the
19 standalones and still had five percent of suites. The way I
20 am describing it to build up to revenue what would Novell
21 get? If we get 50 percent of standalones, that is five, so
22 50 percent of five is two and a half, and of suites it would
23 get five percent of 40, that is two, so two and a half plus
24 two is four and a half million dollars, and that would be
25 ten percent of the total market. That wouldn't surprise you

1 because Novell had a fixed proportion in a market that was
2 growing out from under it. As the area that had the tiny
3 share, that was the growing part, so it wouldn't surprise
4 you. Indeed, as I calculated, it did less well than it had
5 before.

6 Now, what would Dr. Warren-Boulton suggest? He would
7 say, well, it is okay to mosh all of these together and just
8 call it a productivity applications market. But in his way
9 of thinking, I lined up with 20 percent, which was my
10 initial share of the total market, and that is what I found
11 in '95, but I say, well, I get 20 percent of the total
12 market still, because that is the productivity share, all of
13 that is moshed together. So he would say rather than four
14 and a half million, I am going to give you 9 million. So
15 basically even though the suite market in which Novell had a
16 small share was the part that is growing, he is predicting
17 that they have more success in the productivity applications
18 market, and I think that fails just as a matter of simple
19 logic.

20 Q. So that is one criticism that you have of the way he
21 constructed his lost profits model. Do you have other
22 criticisms?

23 A. I do. I have several, but I have another that would be
24 probably worthy of discussion here. I have a graphic on it.

25 Q. If we could go to 246.1.

1 A. Now, remember when I was building up but-for revenues I
2 started off with a jumping point for market share and
3 multiplied it by total revenue and that is how I get the
4 Novell numbers. Dr. Warren-Boulton superficially is doing
5 something similar, but rather than looking at these four
6 components he moshes all this together. So he starts out
7 and says '95 Q-1 and '95 Q-2 and '95 Q-3, he uses numbers
8 like 13.1, 10.2, 3.8.

9 Your didn't see that from me. Why? I built up each
10 one separately and he has chosen to aggregate them. That
11 was the first criticism that I made. The second criticism
12 he is doing is throwing out the third quarter of 1995. That
13 does not make any sense, because in the but-for world we are
14 going to October, we are going through the third quarter,
15 and so what that does is give a different jumping off point.

16 So if he were allowed to throw away the third quarter,
17 that is rearrange the definition of the but-for world, his
18 jumping off point for market shares, and a flawed approach
19 in my view, for whatever that is worth, is 11.7 percent.
20 Whereas, if he included the third quarter he would only have
21 8.7 percent.

22 Both of these errors, the moshing together of the
23 markets and the forgetting the third quarter, systematically
24 inflate but-for revenues, meaning that it systematically
25 inflates damages.

1 Q. Now, I know you have had some other criticisms in your
2 report of his lost profits model, but if you just correct
3 for those two errors that you have described, what does it
4 do to his estimate of damages? Did you prepare a slide that
5 shows that?

6 A. I did.

7 Q. Could we turn to 246.2.

8 A. Remember in the market method I took his number and I
9 reverse engineered it back to me. I want to do the same
10 exercise to be helpful here.

11 So he opined here that the lost profits method was \$440
12 million in loss --

13 MR. TASKIER: Objection, Your Honor. That
14 misstates the testimony.

15 THE COURT: Your recollection is better than mine.

16 MR. JARDINE: I can tell you. He testified, as
17 you'll recall on his chart, that he put 2011 value for this
18 method, but agreed that his report said 440 million, and
19 that that correctly states the March 1996 value.

20 MR. TASKIER: That is not what his testimony says,
21 Your Honor.

22 THE COURT: This testimony is subject to what your
23 recollection of the testimony of Dr. Warren-Boulton was.

24 Overruled.

25 MR. JARDINE: Thank you.

1 BY MR. JARDINE

2 Q. Dr. Warren-Boulton, do you recall what number as of
3 March of 1996, Dr. Warren-Boulton used in his expert report
4 that you prepared your report from?

5 A. My only request is that you not call me Dr.
6 Warren-Boulton.

7 Q. I'm sorry.

8 MR. JARDINE: On that point could I ask the court
9 reporter to strike that and let me start again?

10 BY MR. JARDINE

11 Q. Professor Hubbard --

12 THE COURT: It will just be reported as his
13 objection.

14 BY MR. JARDINE

15 Q. Yes.

16 A. Let me make two points. The lost profits method from
17 Dr. Warren-Boulton's report, and the fact that he corrects
18 in my mind this egregious and absolutely astonishing error
19 that he made in this room, is 440 million.

20 Let me clarify that for Your Honor.

21 THE COURT: I think the jury will recall the data.

22 THE WITNESS: The 440 million, if you correct
23 either the problem in the baseline, that is he just forget
24 the third quarter, or you do a more appropriate product
25 categories, you can do either of those, my construction did

1 both, but if you do either you'll go from his 440 million to
2 essentially zero, to negative numbers.

3 BY MR. JARDINE

4 Q. So as we finish this lost profits analysis, both your's
5 and his, have you prepared a slide to summarize your
6 conclusions with respect to them?

7 A. I have.

8 Q. If we could have slide 251, please.

9 A. Basically to go back to where I began this morning, the
10 economics of what happened were all about what was going on
11 in the industry and what was happening to consumer
12 preferences. WordPerfect missed the boat twice. It was in
13 decline going into this. Its management was overoptimistic
14 about -- Novell's management was overoptimistic about the
15 value of those assets. The market's reaction both in
16 dollars and the analysts commentary was harsh and swift.
17 Using sensible assumptions that I can do as an economist, I
18 find basically no market reaction and no lost profits as a
19 result of any alleged bad acts.

20 Dr. Warren-Boulton in these two methods makes a number
21 of mistakes. First of all, the inconsistency across numbers
22 with damages estimates varying by several fold, and many of
23 the assumptions that he makes just have no merit whatsoever.

24 As I say, one of his methods I would rule out entirely.

25 Once you correct his assumptions, I can reverse engineer

1 either of the acceptable methods that he does and I will get
2 to zero.

3 Q. Are you aware that at trial Dr. Warren-Boulton also
4 offered a fourth method which he labeled the Lotus
5 conditional bid method?

6 A. I am, yes.

7 Q. Was that methodology included in his report?

8 A. No, it was not.

9 Q. Have you subsequently looked at the testimony he gave
10 on that subject?

11 A. I did.

12 Q. Do you have an opinion about the validity of his
13 approach that he labeled the Lotus conditional bid approach?

14 A. Well, there are a number of problems with the so-called
15 Lotus conditional bid. First of all, there is nothing I
16 have seen in the record that suggests that it was an actual
17 offer that was made.

18 Second, no matter how one characterizes it, it is about
19 the value of those assets in Lotus's hands, not Novell. Why
20 am I making that distinction? Lotus has One, Two, Three,
21 which is a spreadsheet doing well. We saw testimony from
22 last week about QuattroPro by contrast, so you have a
23 situation where you don't really have what I call a bona
24 fide bid, and, second, you don't have anything like the same
25 valuation. Third, and perhaps most telling, is the market

1 never had a chance to react.

2 You see, we could observe market participants' reaction
3 to Novell because there was an announcement and we saw a
4 reaction. Because the Lotus bid was never an actual
5 consummated transaction, we never saw the market reaction.
6 The notion that Dr. Warren-Boulton presented in Court that
7 the Lotus bid by construction had no overpayment in it is an
8 econ 101 level mistake.

9 Q. With that have you prepared a chart that compares your
10 opinions with Dr. Warren-Boulton's opinions on each of the
11 methods?

12 A. Yes.

13 Q. If we could look at 252.

14 Would you explain to the jury what you're portraying by
15 this overview of damages estimates you view, and contrast it
16 with Dr. Warren-Boulton?

17 A. Sure. The testimony that I am offering this morning
18 tells you that my belief as an economist, based on the work
19 that I did, is that if you use market based methods, if you
20 use lost profits methods, the conclusion is zero damages.
21 Those are the first two.

22 Dr. Warren-Boulton presented four methods, as I
23 understand it, from the transcript at trial. The Lotus bid
24 I would rule out for the reasons that I have mentioned. I
25 don't really think there is any information content there.

1 The lost profits method, my reading of the transcript was
2 that the 1-1-1-9 number was obtained from -- to my mind,
3 again, is just a breathtaking error of taking the 440 and
4 carrying it forward into the indefinite future, until today.
5 So that is nonsensical. The only number to even think about
6 was the 378 to 440 from his methods.

7 The October 6th announcement I told you was in my
8 judgment a method not worth considering. And then for the
9 market based method and for the lost profits, the 976 and
10 the 440, I can reverse engineer them to zero. By my way of
11 thinking, all six of these bars are zero.

12 Q. Earlier you testified that to you you look and see if
13 your top down and bottoms up methods would arrive at roughly
14 the same place?

15 A. Yes.

16 Q. If you look at the three red bars that Dr.
17 Warren-Boulton -- that represent his damages estimate as of
18 March of 1996, do you see what would for you constitute any
19 contrasting concern?

20 A. Well, certainly the lost profits method, which is a
21 legitimate method, I disagree on how he carried it out, but
22 that is a legitimate method, certainly gives a very
23 different answer than the market base method. As I have
24 told you, I would throw out the other two on just economic
25 grounds.

1 Q. Have you prepared a slide that essentially represents
2 with the adjustments how you view both yours and his?

3 A. Yes.

4 Q. If we could look at 253.1.

5 A. Basically, as I said to you, I would take out the Lotus
6 bid and October 6th. They are not correct to even look at
7 as a matter of economics. And I can reverse engineer his
8 mistakes in the market base and the lost profits, so there
9 are six methods being presented, four of which are
10 legitimate methods and all four are zero.

11 Q. Now, I just have several more questions. You remember
12 at the beginning of your examination you talked about the
13 assumptions that you made with respect to liability and
14 starting time, and I would like to ask you your
15 understanding of some assumptions Dr. Warren-Boulton made.

16 Could we look at slide 252.

17 As you have indicated, absent your corrections, Dr.
18 Warren-Boulton gave testimony about actual damages using the
19 methods we have talked about today. As you understand his
20 methods, does Dr. Warren-Boulton assume that a 100 percent
21 of the damages numbers that are represented on that chart is
22 attributable to the delay in Novell releasing its Windows 95
23 product?

24 A. That is my understanding, yes.

25 Q. If his assumption is wrong, if the jury were to

1 conclude that all or part of those losses were due to other
2 factors, such as mismanagement, overpayment, the effects of
3 being slow to market, what is the effect of that kind of a
4 finding on Dr. Warren-Boulton's damages opinions?

5 A. I'm not an attorney, but speaking as an economist, what
6 it would mean is that those approaches would not have any
7 bearing on the question.

8 Q. Let me change the question a little. As you understand
9 it in all of Dr. Warren-Boulton's approaches where he finds
10 damages, does he assume that 100 percent of the delay in
11 releasing the Windows 95 product by Novell is attributable
12 to Microsoft's withdrawal of support for the namespace
13 extension APIs?

14 A. That is my understanding, yes.

15 Q. And if his assumption is wrong, that is if the jury
16 should find that, in fact, some or all of the delay was due
17 to other factors, for example, delays in the development of
18 the QuattroPro product as part of the suite, what would be
19 the effect of that finding on the damages opinions offered
20 by Dr. Warren-Boulton?

21 A. These approaches that he did as constructed, again,
22 just wouldn't be useful in assessing the question.

23 MR. JARDINE: I pass the witness, Your Honor.

24 THE COURT: I hate to do this to you, Mr. Taskier,
25 but I don't believe their lunch is here yet, so if you could

1 begin the cross.

2 MR. TASKIER: That is what I imagined, Judge.

3 THE COURT: Okay.

4 CROSS-EXAMINATION

5 BY MR. TASKIER

6 Q. Dr. Hubbard, I am just going to give you, so I don't
7 keep walking back and forth and back and forth with
8 exhibits, I am going to give you a binder, if that is okay.

9 A. Sure.

10 Q. I am going to give you a copy of your expert report.

11 A. Okay.

12 MR. TASKIER: I'm going to give one to the Court
13 and one to opposing counsel.

14 THE COURT: Thank you.

15 MR. TASKIER: That may shave five of six minutes
16 off.

17 BY MR. TASKIER

18 Q. We met in the hallway before court this morning, right?

19 A. Yes.

20 Q. We had not met before then?

21 A. Not to my recollection, no, sir.

22 Q. Or to mine.

23 Now, you have been retained by Microsoft, but do you
24 consider yourself an independent expert?

25 A. Yes.

1 Q. And, sir, an independent expert calls strikes and balls
2 right down the middle?

3 A. An independent expert should give whatever he or she
4 believes to be the case as an expert, absolutely.

5 Q. Right. What the evidence directs you and not a desire
6 to reach a desired result?

7 A. That is what it means to be an expert.

8 Q. So we have a little bit of experience in the courtroom
9 with economics experts so far, so I imagine we'll have a
10 lengthy conversation today, if past is prelude, but let me
11 ask you if I ask you a question that really requires a yes
12 or no answer, do you think that you could give me a yes or
13 no answer without a mini lecture on economics?

14 THE COURT: He is an economist.

15 MR. TASKIER: I am hoping against hope, Your
16 Honor.

17 THE COURT: We can all quote Harry Truman.

18 MR. TASKIER: That is right.

19 THE WITNESS: The answer is I will do my very
20 best.

21 BY MR. TASKIER

22 Q. Thank you. I appreciate that.

23 Now, I heard Mr. Jardine ask you about your
24 compensation. \$1,200 an hour?

25 A. Yes, sir.

1 Q. Do you by any chance know how much you have received
2 from Microsoft or billed to Microsoft for your time in this
3 case so far?

4 A. My estimate, and I have not checked all my bills
5 thoroughly, but I would guess it is around 200 hours.

6 Q. So that is \$240,000?

7 A. Yeah. That would be about right, yes.

8 Q. Now, you don't do all this by yourself, correct?

9 A. No, sir.

10 Q. You have a staff that supports you?

11 A. Yes, sir.

12 Q. And that staff is from a company called Analysis Group?

13 A. That is right.

14 Q. And you have a couple of economists sitting here today
15 from Analysis Group?

16 A. Yes.

17 Q. And do I understand from your deposition testimony that
18 in addition to the 1,200 for your time, you receive as
19 compensation some percentage of what they charge as well?

20 A. Yes.

21 Q. And what percentage is that?

22 A. It would be seven and a half percent of whatever the
23 billings of the firm are to the client.

24 Q. Do you have any idea what the billings of the firm are
25 to the client?

1 A. There, I am sorry, I really don't.

2 Q. Do you have any idea how much you have received based
3 on that seven percent in addition to your time?

4 A. I really don't. I am sorry, because I don't break it
5 out to where I would get an attribution to a number of
6 matters. I am sorry. Sitting here today I don't know.

7 Q. Now, you have worked for Microsoft on other cases, too,
8 right?

9 A. I have worked as an expert for Microsoft on another
10 case, yes.

11 Q. That was the case in Iowa, correct?

12 A. Yes.

13 Q. Do you recall how much you were paid by Microsoft for
14 that case?

15 A. It is the same hourly rate, but I really don't recall
16 the number of hours. Sorry.

17 Q. Similar hours?

18 A. I doubt it would be as many, no.

19 Q. So a fair amount of money in between these two cases?

20 A. I would say it is a substantial amount of money, yes.

21 Q. I want to go, if I can, to one of your first slides. I
22 think it is number 212. You have that in front of you.

23 You said there if Novell's Windows 95 products would
24 not have been released until after November of 1995 in the
25 but-for world, Dr. Warren-Boulton offers no opinion on

1 damages.

2 That is the opinion that you gave, right?

3 A. Yes, sir.

4 Q. Now, Dr. Warren-Boulton didn't say that he had no
5 opinion on damages after October of 1995, did he?

6 A. No, sir. That is not what that says.

7 Q. You say that it is your opinion that he offers no
8 opinion on damages if the Windows 95 product would not have
9 been released until after October of 1995.

10 A. That is correct. It is my judgment as an economist, if
11 that is the state of the world, that Dr. Warren-Boulton's
12 testimony does not apply. That was my answer to Mr.
13 Jardine's question. I'm not suggesting that Dr.
14 Warren-Boulton said that by himself.

15 Q. Right.

16 MR. TASKIER: The next slide, and let's bring that
17 up if you don't mind, that is 212.1. Let's bring up 212.1.

18 BY MR. TASKIER

19 Q. You put this slide up, and that is the basis for your
20 conclusion about October 1995; isn't that correct?

21 A. As far as what Dr. Warren-Boulton said about October --
22 yes, of course.

23 Q. So you're basically saying -- you're extrapolating the
24 60 days after August of 1995 when Windows 95 was released,
25 and you're saying that is October and that is what he is

1 saying?

2 A. That is what he is saying, yes.

3 Q. All right. It is not really what he is saying, is it?

4 Let's read it together.

5 It depends on the assumption that Novell would have had
6 its product in the market within a sufficiently short time
7 period, so there would not have been a significant effect on
8 its sales. It is my understanding from the testimony, of
9 which I totally rely on the programmers, that we're talking
10 about something on the order of the time frame August,
11 September, October.

12 It is my understanding also from that testimony that
13 the expectation was that that was their goal, was to get it
14 out within 30 or 60 days, and that is my but-for world.
15 But, you know, on this, you know, I defer to the prior
16 testimony that has been heard.

17 Did you look at the prior testimony, Dr. Hubbard?

18 A. I have seen some but not all of the testimony in this
19 proceeding.

20 Q. Did you look at any testimony of the programmers with
21 respect to what their expectation was as to when it was
22 going to be released?

23 A. My reading of that was that there was testimony of a
24 whole variety of days, depending on what we're talking
25 about, which piece of this, but I think Dr. Warren-Boulton

1 is pretty clear in what he says.

2 Q. It is pretty clear what he says, sir. He says I rely
3 totally on the testimony of the programmers. He refers to
4 that and he defers to that.

5 MR. TASKIER: Can we bring up, Mr. Goldberg, Mr.
6 Gibb's testimony in court, page 805.

7 MR. JARDINE: I object to the question on the
8 grounds that it improperly states the slide. The slide says
9 two things. He relies on the programmers, but it also gives
10 what he relied on and what he concludes.

11 MR. TASKIER: I move to strike Mr. Jardine's
12 interpretation.

13 THE COURT: I think we better give you all a rest
14 before we have lunch. I'm a little confused.

15 So I don't think your lunch is there yet, but let
16 me hear from counsel on this. You all go on out and we will
17 take a 25 minute lunch for you all. 25 minutes.

18 (WHEREUPON, the jury leaves the proceedings.)

19 THE COURT: Professor, I guess it is best that you
20 step out of the room.

21 THE WITNESS: Yes, sir.

22 THE COURT: To start with, let me see what it is
23 from Mr. Gibbs that you want to put up.

24 MR. TASKIER: Do you have Mr. Gibb's testimony? I
25 have the cites, Your Honor. 805, 23 to 806, 7.

1 THE COURT: I am just baffled. I don't see how
2 this -- I thought your basic theory of the case was that the
3 product was going to get to market within a substantially
4 close period of time, whether 60 days or whatever, to the
5 time of the release, and that this testimony related to
6 delays that occurred because shared code took so long. That
7 is why I had the jury leave. I am just puzzled.

8 MR. TASKIER: Your Honor, I think the point is
9 that it is not delayed for purposes of damages to us if it
10 is within the 90 day period that was expected from the
11 outset by being part of the First Wave program, which said
12 that it would release within 90 days, that the testimony of
13 Mr. Gibb and the testimony of Mr. Harral, all of whom said
14 60 to 90 days. Dr. Warren-Boulton constricted it a little
15 bit, but made it very clear that he defers to the
16 programmers and that there is 90 day window.

17 THE COURT: But, again, I thought, and I could be
18 wrong, I thought that he reduced the 90 days to 60 days
19 elsewhere in this testimony. Maybe I am wrong.

20 MR. TASKIER: Your Honor, I think his testimony
21 that they cited --

22 THE COURT: Well, let me find out from Mr. Jardine
23 what the doctor said.

24 MR. JARDINE: I'm glad to, Your Honor. To give
25 the progression, in his original report Dr. Warren-Boulton

1 assumes September would be the day it would be released,
2 based on what Mr. Alepin had said in his report. But, as
3 you recall, Mr. Alpein didn't ever give us a date in his
4 testimony, and so Dr. Warren-Boulton then said he was
5 relying on the estimated release date as an assumption for
6 his model, correctly on what these people said.

7 But then he made clear that the conclusion that he
8 drew was 30 to 60 days. He said August, September and
9 October. When I specifically asked didn't you assume
10 September in your report? He said, yes, but I'm now relying
11 on them, and so it is a relatively short period 30, 60 days,
12 and then he said August, September, October.

13 By any calculation Professor Hubbard had to have
14 some date to rely on and he picked October, the latest date
15 Dr. Warren-Boulton utilized. We have multiple citations to
16 the transcript where Dr. Warren-Boulton adopts some
17 formulation of 30 to 60 days, August, September, October or
18 a relatively short period of time.

19 So it is not for Professor Hubbard to figure out
20 what they say, he just has to look and see what Dr.
21 Warren-Boulton relied on, and they're trying to head off the
22 factual testimony, and we specifically told Professor
23 Hubbard don't get in the business of evaluating evidence,
24 just adopt what Dr. Warren-Boulton adopted. That is where
25 we are having this fight. I think it is what Dr.

1 Warren-Boulton said that is critical.

2 MR. TASKIER: And my point is that that is exactly
3 what Dr. Warren-Boulton said. Dr. Warren-Boulton said
4 repeatedly I deferred to the prior testimony that is --

5 THE COURT: But he translated that into 60.

6 MR. JARDINE: That is what he did.

7 THE COURT: He may defer, but he translated it
8 himself.

9 MR. TASKIER: Your Honor, he constricted it as he
10 heard 60 --

11 THE COURT: Okay. The objection is sustained.
12 Let's all go to lunch.

13 I mean, that is not fair to do to somebody. I
14 mean, the fact is the witness, whom he is criticizing,
15 translated whatever that prior testimony was, he made a form
16 statement that he is relying upon the testimony, as is
17 proper, and that is what he should do, but he translated
18 what he had read into 60 days.

19 MR. TASKIER: Your Honor, he also said November
20 several pages later.

21 THE COURT: Let's see where he said November.

22 MR. TASKIER: I mean, there is testimony --

23 THE COURT: Well, let's see what he said. Maybe
24 my recollection is wrong.

25 MR. TASKIER: These are connected and --

1 THE COURT: Let me see where he said November.

2 MR. JARDINE: He did say a later date, and we had
3 that discussion, and we had Professor Hubbard pick, because
4 he had to pick a date for his models, October, because that
5 was -- we can give you the pages if you want, and it went
6 over five or six pages, but October was the most, 30 to 60
7 days, and August, September and October was the clearest and
8 most consistent answer that he gave on that subject.

9 THE COURT: What did he say about November?

10 MR. TASKIER: We are getting that right now. He
11 has made it very clear here that he conditions the 60 to 90
12 days on whatever --

13 THE COURT: But he translated from 60 to 90 to 60
14 in his own testimony.

15 MR. TASKIER: So he misspoke.

16 THE COURT: He misspoke under oath? I am not
17 going to put up with that.

18 MR. TASKIER: He made it very clear that I totally
19 rely on the programmers. I defer to the prior testimony.
20 He is explicitly that that is what I recall, but this is
21 what I'm relying on. He is referring back to --

22 THE COURT: What did he say about November? Maybe
23 I am wrong. My recollection was that it was pretty clear
24 that he was talking about 60 days from the release.

25 MR. TASKIER: The point here is that Dr. Hubbard

1 is now coming to the jury and saying after November -- after
2 October, not November 23rd, which is 90 days, after October
3 it is a dead stop and there are no damages and you can find
4 no damages. That is what he argues. That is not what the
5 record says and it is not what any of the programmers say.

6 MR. JARDINE: Well, I will give you the pages to
7 look at, but the Court has the point exactly. We told
8 Professor Hubbard we did not want him to go back and figure
9 out what all that conflicting evidence meant, the testimony,
10 we said just rely on what Dr. Warren-Boulton said, what he
11 concluded.

12 He did conclude and he said 30 to 60 days more
13 than any other number, and we put the clearest quote where
14 he says August, September, October. We are glad to provide
15 the Court those pages, but the Court has it exactly right.

16 THE COURT: Well, in any event, if you all want to
17 argue, I may allow you to argue something different. I
18 think in terms of fair cross-examination of the expert he
19 properly relied upon what the other expert said, so I don't
20 think -- I am not precluding you from arguing yet, and I'll
21 hear from you, and maybe you can go as long as November, but
22 you certainly can't go into January where the evidence takes
23 you, but --

24 MR. TASKIER: Your Honor, here is the other cite I
25 am referring to. The question was I guess I want to be

1 clear on -- do these damages models that you provide us in
2 your report were constructed on the assumption that the
3 product would have been out at least by September of 1995?
4 Answer, no. It was constructed on the assumption that they
5 would have been out within a sufficiently short time period
6 so that there would be no significant harm, whether that is
7 September or October or November.

8 The point is that they have instructed their
9 expert to look at a mischaracterization, a tiny slice of
10 what Dr. Warren-Boulton said --

11 THE COURT: It is not a tiny slice. It is the
12 thrust of what he said.

13 How do you respond to that, Mr. Jardine?

14 MR. JARDINE: I am sorry. I didn't hear you, Your
15 Honor.

16 THE COURT: Maybe I will have to read the whole
17 testimony.

18 MR. JARDINE: Well --

19 THE COURT: I definitely had the impression that
20 he was within a period of 60 days.

21 MR. JARDINE: Your Honor, that is when he was -- I
22 can give you a copy of the pages in a minute -- I asked him
23 what he was relying on because he said he no longer could
24 rely on Professor Alepin, and his answer was a fairly short
25 period of time. This question is doesn't your report say

1 September? And he said, yes, but I'm now looking at the --
2 that was on Alepin and I am now saying a relatively short
3 period of time, and he tied it down to August, September,
4 October, 30 to 60 days. Whenever he was specific, that is
5 what he was specific about, and --

6 THE COURT: So Alepin was November?

7 MR. JARDINE: Alepin had said September in his
8 report, but didn't testify about it when he was here.

9 MR. TASKIER: My point, Your Honor, with all
10 respect, is that that is taking four words out of this quote
11 from Dr. Warren-Boulton, and those four words completely
12 write out -- if they focus on those -- my understanding from
13 the testimony, on which I totally rely on the programmers.
14 I am not allowed to show the jury what the programmers said?

15 THE COURT: I didn't say you couldn't. What I
16 have ruled so far is that you can't cross-examine, but let
17 me hear from Mr. Jardine.

18 MR. JARDINE: Here is a good example, Your Honor.
19 On page 2,422, and after this I said to him, and you may
20 recall this was a lengthy examination with Dr.
21 Warren-Boulton, and I say if I understand what you have told
22 me, if in fact they had access to the namespace extensions,
23 but Novell would not have had its Windows 95 product out
24 until December of 1995, then that is beyond the point that
25 you assume for your damages model, and they would have to be

1 modified; is that true? He said I can't pick December. All
2 my understanding of my recollection is that they were
3 talking about 30 to 60 days, the end of August. What are we
4 talking about? The end of September, the end of October,
5 somewhere around the beginning of November. I would say
6 that for each. I really don't want to get into this because
7 this is not my -- then he goes on and on. That is another
8 example where he picks --

9 THE COURT: I think that is the final thing that I
10 remember.

11 MR. TASKIER: Except, Your Honor, he says based on
12 my recollection --

13 THE COURT: Okay. I am not now saying that you
14 can't argue that based upon the evidence there is some
15 theory of damages into November. I am saying it is not fair
16 cross-examination of one expert to another, that this was a
17 perfectly fair thing for him to do, to read that, and every
18 expert says I'm relying upon the testimony as he did.

19 He is not expressing an opinion, but he made it
20 clear to me, and I hear this that there may have been the
21 mention of November here or there, but at that one point he
22 is talking about 60 days from release. He is talking about
23 a sufficiently short period of time. I just don't think it
24 is fair cross-examination.

25 I am not saying that you can't argue or that

1 Mr. Johnson can't argue, look, the expert said -- what is
2 his name? Professor Hubbard said, you know, there are no
3 damages under Warren-Boulton because Warren-Boulton was
4 relying on the testimony which extended as far as into
5 November. If you want to argue that, fine.

6 MR. TASKIER: Your Honor, I just elicited from
7 this witness that he did look at prior testimony.

8 THE COURT: I'm telling you that I think in terms
9 of the cross-examination, that I think a fair reading of
10 what Dr. Warren-Boulton said was a sufficiently short period
11 of time after release, which he translated in the final
12 analysis, whatever the other testimony was, to 60 days. I
13 mean, in terms of an expert's -- I don't think an expert has
14 to rely upon all of this other stuff, you know, when your
15 own expert has translated it into 60.

16 MR. JARDINE: Your Honor, my expert also said to
17 the best of my recollection that is 30 or 60, but I rely
18 entirely on what the programmers said. So everything ties
19 back to what -- excuse me -- everything ties back to what
20 the programmers said. I would imagine that we're entitled
21 to show that to the jury.

22 THE COURT: I didn't say that you couldn't.

23 MR. TASKIER: Well, now I'm being foreclosed from
24 exploring with Dr. Hubbard --

25 THE COURT: Well, I will think about this. I

1 think it is a separate question. What you're trying to do
2 is impeach Dr. Hubbard on the grounds that he took Dr.
3 Warren-Boulton at this word.

4 MR. TASKIER: No, Your Honor.

5 With all due respect, he has put up what Dr.
6 Warren-Boulton said, which includes two of the most explicit
7 references to the prior testimony of the developers on which
8 he relies. And now you're saying I can't explore with this
9 witness, who has now said there are no damages after
10 October, based on these four words. The programmers were
11 very clear that it was a longer period of time.

12 MR. JARDINE: Your Honor, I think we're talking
13 past each other, because Dr. Hubbard didn't try to calculate
14 what all of the evidence in the trial was. He just looked
15 at what Dr. Warren-Boulton said and assumed the same thing.
16 We have got the pages we'll hand to the Court if you're
17 interested that go right to the testimony where he said I am
18 basing -- Dr. Warren-Boulton had to pick some time to base
19 his expert opinions on. He said it was 30 to 60 days, a
20 relatively short period of time, not September of 1995 that
21 he relied upon from Mr. Alepin in his report.

22 He said he looked -- it is clear he said he relied
23 on them, but he reached a conclusion and said it was 30 to
24 60 days, August, September, October. That is what Professor
25 Hubbard adopted for developing his models and for the

1 criticism. It is really exactly what Dr. Warren-Boulton
2 laid out.

3 MR. TASKIER: I think we really are talking past
4 each other, because they acknowledge that it was based on
5 what the programmers said, and that it was not a bright line
6 number that Dr. Warren-Boulton said that is it and I don't
7 care what anybody else says. They are taking this snippet
8 of testimony, Your Honor --

9 THE COURT: It is not a snippet of testimony.
10 You're ignoring the January testimony, but that is a whole
11 different question.

12 MR. JARDINE: That was a different question for
13 him.

14 THE COURT: I know. I expect I will hear a lot
15 from them.

16 MR. JARDINE: We have six pages that go right to
17 it, and he couldn't have been clearer.

18 MR. TASKIER: He is clear.

19 THE COURT: I have expressed my views that I
20 have -- that is basing his prediction without even a member
21 of the QuattroPro team on it, but that is a whole different
22 question.

23 MR. JARDINE: I will say, Your Honor --

24 MR. TULCHIN: At page 2,426 you summed this up,
25 Your Honor, in response to some cross-examination. You

1 said, Mr. Jardine, haven't you gone on as far as you can
2 with the witness on this point? The jury has heard the
3 evidence. There is a dispute about when it could have come
4 out, et cetera, and you have established that these figures
5 are based upon it coming out in or about 60 days. It seems
6 to me that you can argue that.

7 You stop Mr. Jardine on cross and you summed up
8 the 60 day point. The witness saw the same thing in these
9 six or eight pages of testimony.

10 MR. TASKIER: With all respect to Mr. Tulchin,
11 Your Honor's presentation of what was said, the 60 days, and
12 there is no argument that it was said, but my point, Your
13 Honor, is that it was explicitly -- it couldn't be more
14 clearly referred to as whatever they say is what I rely on.
15 If Your Honor allows us to argue that to the jury, I guess
16 that is what we will argue to the jury.

17 MR. JARDINE: That is certainly not what Professor
18 Hubbard relied on. He relied on what Dr. Warren-Boulton
19 testified had been his --

20 THE COURT: As I said, I think if you want to
21 argue to the jury that in fact there are damages afterwards
22 because the programmers said, and in terms of what the
23 professor said, I think that it is perfectly appropriate, as
24 did Dr. Warren-Boulton to say, look, I relied here, and I
25 can no longer rely on Mr. Alepin, and I relied on the

1 testimony. I really think that in balance he translated
2 that into 60 days so, therefore, it is appropriate for
3 Professor Hubbard to say what he said and it is simply not
4 impeachment.

5 If you want to argue, when it comes to closing
6 argument, look, the professor said there are no damages
7 after, but if you look at the testimony of Mr. Gibb --
8 excuse me, I guess it is Mr. -- I keep forgetting his last
9 name.

10 MR. TASKIER: Harral.

11 THE COURT: Harral. That it could have been 90
12 days, that is a whole different question. If you want to
13 argue that, that is great. Okay.

14 MR. TASKIER: Thank you, Your Honor.

15 MR. SCHMIDTLEIN: Your Honor, do you anticipate
16 wanting to hear argument on any of the motions at the end of
17 the day?

18 THE COURT: Well, at the end of the day --

19 MR. SCHMIDTLEIN: I don't think there is anything
20 that is imminent that needs --

21 THE COURT: My plan is to -- I don't think -- I
22 have reviewed the instructions. I have yesterday and very
23 early this morning I wrote new instructions. I have
24 e-mailed them back to my Office. They look for typos. I
25 have been playing with this thing up here hoping I will get

1 it back. That has been fixed. There is one substantive
2 issue raised by my office that I want to take a look at. I
3 don't think I'll have it ready for you by the close of the
4 testimony.

5 My plan is to get you something today. We may
6 have to call you all up and have you come pick it up so we
7 can talk about the instructions tomorrow. I would like to
8 finalize what we tell the jury about their questions. I
9 don't have anything before me about the exhibits yet so I
10 can't do that. I don't know whether or not Microsoft is
11 prepared to address -- I think the motions in limine were to
12 limit the testimony of Mr. Blount, Pete Peterson and the
13 other expert.

14 MR. TULCHIN: Dr. Bennett as well, Your Honor.
15 Yes, we would like to submit something on that, Your Honor.
16 I think we just got this morning the brief about --

17 THE COURT: Dr. Bennett you want to talk about
18 tomorrow too?

19 MR. TULCHIN: That would be great, Your Honor.

20 Tomorrow we have Mr. Peterson first in the
21 morning, so we need to resolve that part of it. But one of
22 the things that I intended to say, Your Honor, that we
23 intended to say, the motion makes assertions about
24 Peterson's testimony that I don't think are going to be
25 true. I think if Novell is concerned about Mr. Peterson

1 testifying about things that are outside his personal
2 knowledge, it is not our intention to elicit that testimony.
3 So this is really better suited --

4 THE COURT: It seems to me that what I ought to do
5 is just wait and hear the objections at trial.

6 MR. TULCHIN: Yes, sir.

7 MR. JOHNSON: Your Honor, if I may, if that is not
8 their intent, then Mr. Tulchin spent half of the deposition
9 trying to do just that. Mr. Peterson, appropriately so,
10 and, I mean, we have quoted some of his testimony from that
11 deposition, in which he said, look, after March of 1992 I
12 have got no personal information.

13 THE COURT: I guess the simple question is do you
14 intend to get any facts after March of '92?

15 MR. TULCHIN: I don't think so, Your Honor. I
16 would like to go back and consider that. I will say that a
17 deposition is not trial testimony.

18 THE COURT: Of course it is not.

19 MR. TULCHIN: Of course, we were in discovery.
20 They have also known that Mr. Peterson was coming here for
21 months, Your Honor, and we got this brief this morning.

22 THE COURT: Well, if you think that there is a
23 good chance that you're not going to elicit any testimony
24 after March of '92, that is the end of the question.

25 MR. TULCHIN: I think there is, Your Honor.

1 MR. JOHNSON: Well, if that is, in fact, what he
2 is going to do, then that is the same as granting our motion
3 and we would be satisfied.

4 THE COURT: I am not granting your motion. The
5 question is not asked.

6 MR. JOHNSON: No, but it would be the same thing.
7 The result would be the same.

8 THE COURT: Okay. I think with Peterson I think I
9 will just have to wait and see if there is a specific
10 question. It sounds to me like there is a general -- if
11 there is something asked it is not going to be generally
12 what you objected to, and if there is a specific question
13 that is what bench conferences are for.

14 I take it in terms of the other two we'll just
15 have to wait.

16 MR. JOHNSON: Mr. Blount is the same way. He
17 also --

18 THE COURT: Well, maybe you can meet and confer,
19 somebody can meet and confer and find out -- I mean, I
20 gather, and I just don't know, because I was not there at
21 the deposition, but as I understand it from the e-mail the
22 testimony from Blount says, look, at one time I was
23 associated with I think Novell and we looked at WordPerfect
24 and decided not to buy it because it was not the right fit.

25 MS. NELLES: That is correct, Your Honor.

1 MR. SCHMIDTLEIN: If that is all they are going to
2 testify to --

3 THE COURT: If that is all he is going to testify
4 to --

5 MR. JOHNSON: If that is it --

6 THE COURT: Why don't you all talk about that. It
7 seems to me that is probably all he has to say, but I don't
8 know. Okay. But why don't you all talk about it.

9 In terms of this you can argue that to the jury.
10 I honestly don't think -- what I'm talking about is
11 cross-examination of this witness. I really think it is
12 fair for him to have read, look, I relied on the testimony
13 of the other witnesses but he translated that into 60 days.
14 Now, maybe I missed it, but it seemed to me that everybody
15 walked away with the inference that it was 60 days.

16 If you want to argue to the contrary, fine. I
17 mean, if the jury thinks that they can award it on a
18 non-speculative basis things into November, and the product
19 would have been delivered but for that, we'll see what the
20 jury does.

21 MR. TASKIER: May I ask him, Your Honor, if it was
22 90 days and if that would change his opinion?

23 THE COURT: I don't think that is fair. Maybe
24 what I ought to do is just to say I'm not going to allow the
25 question, but there is testimony from the programmers that

1 it could have been 90 days. How about that? So the jury
2 does not have a misapprehension there. I mean, instead I'm
3 not allowing it on cross-examination, but saying there is
4 testimony from one of the programmers that it could have
5 been 60 to 90 days --

6 MR. TASKIER: In fact two, Mr. Harral said 90
7 days.

8 THE COURT: Okay. Two.

9 I will do that and then they won't have a
10 misapprehension and then you can argue. As I say,
11 professionally I just don't think he did anything wrong, so
12 I don't see any basis for cross-examination.

13 MR. TASKIER: Thank you, Your Honor.

14 (Recess)
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